No. 19-50178

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GENERAL LAND OFFICE OF THE STATE OF TEXAS,
Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, in his official capacity as Secretary for the United States of the Interior; UNITED STATES FISH AND WILDLIFE SERVICE; GREG SHEEHAN, in his official capacity as Acting Director of the U.S. Fish and Wildlife Service; AMY LUEDERS, in her official capacity as Southwest Regional Director U.S. Fish and Wildlife Service,
Defendants - Appellees.

On Appeal from the United States District Court for the Western District of Texas, Austin Division, No. 1:17-CV-538 – Hon. Sam Sparks

REPLY BRIEF OF APPELLANT GENERAL LAND OFFICE OF THE STATE OF TEXAS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

Taken together, the Opening Brief of the Texas General Land Office ("GLO") and the Answering Brief of the Federal Appellees demonstrate precisely how the United States Fish and Wildlife Service (the "Service") used an impermissible standard to deny the 90-day petition (sometimes hereinafter referred to as the "Petition"). The record shows, and the briefing reflects, that the Service required a level of proof corresponding to a 12-month review rather than a 90-day review. By using the 12-month standard to deny the Petition, the Service violated the Endangered Species Act ("ESA").

While the Service asserts that it used the 90-day standard, the administrative record belies that assertion. Merely stating that one has done or is doing something, and actually doing it, are two different things.

Deferring to the Service's methodology, the district court itself applied the 12-month criteria, thereby echoing and compounding the Service's error. In light of the weighty record evidence to the contrary, the district court erred in providing such an extraordinary level of deference to the Service on the purely legal issue of whether the Service used an impermissible standard in evaluating the Petition.

In their Answering Brief, the Federal Defendants skirt this central issue by mischaracterizing the nature of this appeal. Contrary to the Service's statements, GLO is not asking for a ruling determining whose interpretation of the scientific

studies is better, or which of the studies are more persuasive. Rather, GLO asks a straight-up legal question: Did the Service violate the ESA by failing to comply with its nondiscretionary duty to use the 90-day criteria?

Both sides agree that the three-pronged 90-day criteria require the Service to evaluate whether the Petition provided "substantial scientific or commercial information" that would lead a "reasonable person" to believe that it "may" be appropriate to grant the Petition's request. The disagreement among the parties is whether the Service actually applied that standard, a disagreement that this Court resolves as a question of law. Because the Service in fact applied the impermissible 12-month criteria, the denial of the Petition should be vacated and remanded with instructions to apply the required criteria.

By contrast to the lower court's decision here, a few months ago a judge sitting in the same district court, in a case where the facts were strikingly similar to those in the instant case, vacated and remanded the Service's denial of a 90-day petition on the ground that the Service impermissibly used the 12-month review standard. *See Am. Stewards of Liberty v. Dep't of Interior,* 370 F.Supp.3d 711 (W.D. Tex. 2019). The *Stewards* court looked beyond the Service's assertion that it complied with the 90-day standard and delved into the record to find that, as a matter of law, the Service did not use the 90-day standard but, instead, used the more stringent 12-month standard. In a letter dated July 8, 2019, the United States Department of

Justice informed this Court that the Service would no longer pursue its appeal of the vacatur and remand ruling.[1] *Stewards's* well-reasoned application of the law and facts provides a thoughtful and helpful approach for this Court to consider in connection with the 90-day standard.

The Service's denial of the 90-day petition in the instant case also violated the standard of administrative decisionmaking under the Administrative Procedure Act ("APA") that requires a rational connection between the facts found and the action taken. Here, the Service denied the Petition by heavily relying on threats to habitat while at the same time refusing to designate critical habitat to stem those threats, even as it approached three decades from the initial listing. If the Service were truly concerned with loss of habitat as an existential threat to the Warbler, it would have complied long ago with its duty to designate critical habitat. The Service's key justification for the denial, i.e., Warbler habitat threats, is irrational in light of its continuing failure to designate critical habitat. Accordingly, the Service's argument that its failure to designate critical habitat should not be considered by this Court falls of its own weight.

The Service's untenable position regarding critical habitat also is fatal to its argument that GLO's stand-alone critical habitat claim is barred by the statute of limitations. As set forth in detail in GLO's Opening Brief, the failure to designate

[1] *See* Exhibit 1.

critical habitat in conjunction with the original listing is a continuing violation that is not subject to the six-year limitations period. *See* Opening Br. at 44-48. For similar reasons, the Service's claim under the National Environmental Policy Act ("NEPA") constitutes a continuing violation. *Id.* In an effort to deflect attention from GLO's core arguments, the Service's Answering Brief responds by presenting a laundry list of citations to inapposite cases, each of which is addressed and distinguished in this Reply.

The district court's dismissal of the NEPA claim included an alternative ruling that NEPA did not apply to ESA listing or delisting decisions. But the cases cited by the Service in support of that ruling are off-point because the listing decision here changed the physical environment, unlike those cases that placed restrictions on land that was already required to be in its natural state before the listing decision was made. *See* Opening Br. at 48-51. This Reply addresses and distinguishes those cases, as well.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING GLO'S MOTION FOR SUMMARY JUDGMENT BY DEFERRING TO THE SERVICE'S APPLICATION OF AN INCORRECT LEGAL STANDARD

In its denial of the Petition, the Service failed to apply the proper legal standard for evaluating 90-day petitions. The ESA provides that any person may petition the Service to list or delist a species as threatened or endangered, and:

> [t]o the maximum extent practicable, within 90 days after receiving the petition of an interested person . . . the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action *may* be warranted.

16 U.S.C. § 1533(b)(3)(A) (emphasis added).[2] The Service's regulations provide that a petition presents substantial scientific or commercial information if it contains "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)(1);[3] *See also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954) (standing for proposition that agencies must comply with their regulations); *Erie Boulevard Hydropower, LP v. Fed. Energy Regulatory Comm 'n*, 878 F.3d 258, 269 (D.C. Cir. 2017) ("It is axiomatic . . . that an agency is bound by its own regulations."). Moreover, at the 90-day finding stage the Service does not "subject the petition to critical review." 71 Fed. Reg. 66298 (Nov. 14, 2006). Thus, a 90-day petition "need *not* establish a 'strong likelihood' or a 'high probability'" that a

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[2] The Service has not claimed deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in either its filings in the district court or in its brief on appeal, forfeiting any claim to such deference. *See, e.g., Albanil v. Coast 2 Coast, Inc.*, 444 Fed.Appx. 788, 796 (5th Cir. 2011) ("Plaintiffs did not raise their *Chevron* argument in the district court . . . . Thus, they have waived this argument."); *Faris v. Williams WPC-I, Inc*., 332 F.3d 316, 319 n.2 (5th Cir. 2003) ("Defendants also argue that [the regulation] is invalid under [*Chevron*]. This argument was not presented to nor passed on by the district court, and therefore may not be considered on appeal.") (citation omitted)).

[3] The Supreme Court recently clarified that so-called *Auer* deference to agency interpretations of its own regulations is only contingent on a provision being unclear after exhausting all "traditional tools" of interpretation. *Kisor v. Wilkie,* 204 L.Ed.2d 841, 858-59 (2019). Because all parties agree on what the relevant regulations mean, but differ only in whether they were applied faithfully, such deference does not come into play here.

90-day petition will succeed at the 12-month review stage "to support a positive 90-day finding." 79 Fed. Reg. 4877, 4878 (Jan. 30, 2014) (emphasis added).

As a stand-alone legal criterion by which agency action should be rejected, "the Administrative Procedure Act . . . directs courts to set aside agency action 'not in accordance with law.'" *SAS Inst., Inc. v. Iancu*, 138 S.Ct. 1348, 1359 (2018) (courts empowered to vacate agency action "in excess of statutory jurisdiction, authority or limitations"). But in deference to the Service's methodology, the district court acceded to the Service's assertions that it applied the correct legal standard. In so doing, the district court sanctioned the Service's application of the impermissible 12-month standard at the 90-day stage.

In its Answering Brief, the Service unwittingly evidences that it applied an impermissible standard in denying the Petition. The Service acknowledges that "the modeling studies described in the 2015 Texas A&M Survey (Petition, Exhibit 1) do represent the most recent and comprehensive efforts to estimate range-wide warbler habitat and population size to date," and that "the known potential range is geographically more extensive than when the golden-cheeked warbler was originally listed." Service Br. at 32. The Service's brief goes on to summarily dismiss those same "most recent and comprehensive efforts," without showing that they are unreliable. Service Br. at 36-47. In so doing, the Service ignored that:

> the 90-day standard does not allow the Service to simply discount scientific studies that support the petition or to

> resolve reasonable extant scientific disputes against the petition. Unless *the Service explains why* the scientific studies that the petition cites are unreliable, irrelevant, or otherwise unreasonable to credit, the Service must credit the evidence presented.

Buffalo Field Campaign v. Zinke, 289 F.Supp.3d 103, 110 (D.D.C. 2018) (internal citations omitted) (emphasis added); *see also Ctr. for Biological Diversity v. Kempthorne*, 2007 WL 163244, at *4 (N.D. Cal. Jan. 19, 2007) ("In cases of such contradictory evidence, the Service must defer to information that supports [the] petition's position. . . . [U]nless *the Service has demonstrated* the unreliability of information that supports the petition, that information cannot be dismissed out of hand.") (emphasis added).

Of course, it is not the role of this Court to determine which studies are trustworthy or persuasive. But the question here is whether the Service applied the correct legal standard. "It is hard to imagine a more violent breach of that requirement ["of reasoned decisionmaking"] than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced." *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *id*. at 375 ("The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel . . . and effective review of the law by the courts.").

The Service here conflated the two different stages in evaluating petitions: (1) the criteria for granting a petition at the 90-day stage (*i.e.*, that the petitioned action *may* be warranted) versus (2) the criteria applicable during a subsequent 12-month review (*i.e.*, that the petitioned action *is* warranted). Thus, the 90-day stage presents a substantially lower bar for a petitioner.

"[I]t is clear that the ESA does not contemplate that a [90-day] petition contain conclusive evidence . . . [i]nstead, it sets forth a lesser standard by which a petitioner must simply show that the substantial information in the Petition demonstrates that [the relief sought] may be warranted. FWS's failure to apply this appropriate standard renders its findings and ultimate conclusion flawed." *Ctr. for Biological Diversity v. Morgenweck*, 351 F.Supp.2d 1137, 1141 (D. Colo. 2004); *see also Colo. River Cutthroat Trout v. Dirk Kempthorne*, 448 F.Supp.2d 170, 176 (D.D.C. 2006) ("The FWS simply cannot bypass the initial 90-day review and proceed to what is effectively a 12-month status review, but without the required notice and the opportunity for public comment."); *Ctr. for Biological Diversity v. Kempthorne*, 2008 WL 659822, at *25 (D. Ariz. Mar. 6, 2008) (finding that "the application of an evidentiary standard requiring conclusive data in the context of a 90-day review is arbitrary and capricious"); *Moden v. United States Fish & Wildlife Serv.*, 281 F.Supp.2d 1193, 1204 (D. Or. 2003) (at 90-day stage, "the standard for evaluating

whether substantial information has been presented . . . is not overly-burdensome, [and] does not require conclusive information . . .").

If there is conflicting scientific information on the threats presented in a petition, courts have construed the 90-day standard in favor of the petitioner and have held that the Service "must defer to information that *supports* [the] petition's position" at the 90-day stage. *See Ctr. for Biological Diversity v. Kempthorne*, 2007 WL 163244, at *4 (N.D. Cal. Jan. 19, 2007) (emphasis added). In that case, the court opined that

> the standard requiring consideration of whether a "reasonable person" would conclude that action "may be warranted" contemplates that where there is disagreement among reasonable scientists, then the Service should make the "may be warranted" finding and then proceed to the more-searching next step in the ESA process.

Id. at *19-20; *see also Humane Society of the United States v. Pritzker*, 75 F.Supp.3d 1, 11 (D.D.C. 2014) (finding that agency acted arbitrarily and capriciously "in applying an inappropriately-stringent evidentiary requirement at the 90-day stage" because the agency had recognized that there was "conflicting scientific evidence," which suggested to the court that "a reasonable person might conclude that a [12-month status review] was warranted").

As explained in GLO's Opening Brief, the record shows that the Service, in both its denial of the Petition and in its briefing in the district court, improperly pitted studies it preferred against those cited in the Petition, a process reserved for a

subsequent 12-month review. Opening Br. at 21-22, 24, 27-28. The district court approvingly cited such improper actions by the Service. Opening Br. at 23. *See, e.g.*, ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000442-443 (Petition Review Form) (explicitly using Reidy, et al. (2016) in an effort to refute the Petition's modeling studies of Warbler habitat and population size; ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000444 (Petition Review Form) (stating that the "[i]nformation provided in the petition is refuted by the 2014 5-year review . . ."), and requiring the Petition to provide conclusive evidence; ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000447 (Petition Review Form) ("the research cited in the petition does not allow us to *conclude* that oak wilt, wildfire, vegetation management, and patch size *are not threats* to the species.") (emphases added).

Even in its cross-motion for summary judgment in the district court, the Service's arguments show that it conflated the standard of review of a petition at the 90-day stage with the subsequent 12-month review that would require the agency to evaluate the studies with other evidence, and to make a definitive conclusion as to whether the Warbler should be delisted. *See, e.g.*, ROA.1394, Def's MSJ at 19 ("The other information regarding habitat fragmentation in the Petition to Delist was *inconclusive*, at best, and *did not refute* [other evidence]") (emphases added); ROA.1400, Def's MSJ at 25 ("The Service noted that other studies 'cautioned that

this analysis [in Mathewson, et al. (2012), cited in the Petition to Delist], may have over-predicted density estimates, resulting in inflated population estimates."); ROA.1402, Def's MSJ at 27 ("The Petition to Delist did not provide evidence that this criterion *has been achieved*, i.e., that sufficient habitat has been protected to ensure the continued existence of viable, self-sustaining populations of Warblers throughout the breeding range.") (emphasis added); ROA.1411, Def's MSJ at 36 (challenging Yao, et al. (2012), cited in the Petition to Delist, regarding the effects of wildfires on Warbler habitat, with another study by Reemts, et al. (2008)). Yet the Service agreed "with the petitioners that 'there is some uncertainty regarding the magnitude of threats these activities present to warbler habitat quality (and thus, warbler reproductive success and survival.)'" ROA.1411, Def's MSJ at 36 (citing ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000447(Petition Review Form).

Citing a need to defer to the Service, ROA.1563, Slip Op. at 18, the district court itself applied evidence in the record through the filter of a 12-month review. For example, the district court observes that "studies demonstrate the Petition . . . *may* have overstated Warbler population . . . despite promising population predictions and a greater known potential range." ROA.1560, Slip Op. at 15 (emphasis added). But the issue of whether the Petition "*may* have overstated Warbler population" is not relevant at the 90-day stage unless a showing is made

that the studies upon which the Petition is based are unreliable. *See Buffalo Field Campaign* 289 F.Supp.3d at 110.

The district court essentially echoed the Service's position, observing that "there is no evidence in the administrative record that Service scientists believed the Petition . . . presented substantial evidence." *Id.* In its Answering Brief, the Service lauds this approach. Service Br. at 35-36. But the issue here is not whether the Service's scientists subjectively believed there was "substantial evidence" but whether the Service, in denying the Petition, applied an evidentiary standard not permitted by the ESA. That issue is a matter of law, which the district court should have tackled directly without deferring to the Service. And that is an issue that this Court addresses de novo. *See NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 236 (5th Cir. 2010) (district court interpretation of federal statute is reviewed de novo).

The district court further discounts the Petition by stating it merely offered a "differing interpretation of the information" analyzed by the Service in the 2014 five-year review. ROA.1562, Slip Op. at 17. But new interpretations of existing information are explicitly endorsed by the Service's own regulations as being legitimate grounds to delist a species. One of the reasons "[a] species may be delisted," 50 C.F.R. § 424.11(d), is that "data for classification [is] in error," and "[s]ubsequent investigations may show that the best scientific or commercial data

available when the species was listed, or *the interpretation of such data, were in error*." 50 C.F.R. § 424.11(d)(3) (emphasis added).

Furthermore, as Amicus Curiae State of Texas points out, the use of the 2014 five-year review as a benchmark that the Petition needed to overcome was itself arbitrary and capricious. Texas Br. at 9-12. That is because a petition to delist is not "determined or foreclosed by the five-year status review." *See Am. Forest Res. Council v. Hall*, 533 F.Supp.2d 84, 92 (D.D.C. 2008). And the Service here concedes that five-year reviews "have no legal consequences." Service Br. at 27. By using the 2014 five-year review as a benchmark by which to judge the 90-day Petition, the Service and the district court gave that review a "legal consequence" that it did not rightly have.

Recently, another judge from the same district court overturned the Service's denial of a 90-day petition to delist a species found in Central Texas known as the Bone Cave Harvestman. *Am. Stewards of Liberty v. Dep't of Interior*, 370 F.Supp.3d 711 (W.D. Tex. 2019). The court found that the Service violated the ESA by requiring that the petition "essentially present conclusive evidence about the harvestman's population trends." *Id.* at 725. Reaching beyond the mere assertion made by the Service that it applied the correct standard to review the petition at the 90-day stage, the court held that, based on the administrative record, the petition met the threshold for a finding that delisting may be warranted, and the court vacated and

remanded the matter to the Service for further consideration, noting that the Service had "required a higher quantum of evidence than is permissible under the Endangered Species Act and implementing regulations governing" review of petitions at the 90-day stage. *Id*. at 725-26.[4] Although the Service initially filed an appeal, it recently declined to litigate the appeal and will be revisiting the denial of the 90-day petition on remand.[5]

Just as in *Stewards*, in the instant case the Service went beyond the bounds of a 90-day review by requiring a higher quantum of evidence than is permissible under the ESA and its implementing regulations. The factual and legal similarities between *Stewards* and the instant case, coupled with the fact that the *Stewards* decision regarding the relationship between 90-day and 12-month standards is well reasoned, and in light of the Service's decision not to pursue an appeal in that case,

[4] The facts upon which the court in *Stewards* based its vacatur and remand are remarkably similar to those in the instant case. The *Stewards* court observed: "The petition presents extensive evidence that the gravest threat to the harvestman identified in the 1988 listing—loss of habitat due to development—might not be as grave as was predicted in 1988, and that reconsideration of the listing determination may be warranted. To support this contention, the petition includes evidence that the population of the harvestman has steadily increased since the time of the listing—from five in 1988 to 172 as of 2014—despite an explosion in the human population."). *See Stewards*, 370 F.Supp.3d at 726. Similar evidence was presented in the 90-day petition regarding the population of the Warbler, a species in the same area of central Texas experiencing the same type of development as the harvestman, with comparable habitat concerns expressed by the Service. *See* ROA.1260, Doc. No. 6, Texas AM IRNR 2015_Conservation status of the federally endangered golden-cheeked warbler.pdf, at Bates000089, 000093 (the Petition's 2015 Texas A&M Study noted that there are approximately five times more Warbler breeding habitats in Texas than had been estimated at the time of the emergency listing in 1990 and approximately 19 times more Warblers than assumed at that time).

[5] *See* Exhibit 1.

makes *Stewards* an opinion that this Court should carefully consider for its persuasiveness. *See Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987).

The denial of the Petition was also arbitrary and capricious because of the logical disconnect between the failure to designate critical habitat and the reliance on threats to habitat to deny the Petition.[6] Agencies must demonstrate that their decisions are not logically inconsistent or irrational. For example, in *Gen. Chem. Corp. v. United States*, 817 F.2d 844 (D.C. Cir. 1987), the court observed that "internal inconsistency" in an agency's written opinion made the action taken by the agency improper because administrative agencies must act "in a rational and consistent manner." *Id*. at 854. *See also Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1440-42 (D.C. Cir. 1983) (decisions among various aspects of regulatory program must be rationally consistent with each other). The fact the Service relied heavily on threats to Warbler habitat to deny the Petition while refusing for three decades to designate critical habitat in order to deal with those threats demonstrates a significant logical disconnect.[7] That disconnect makes the

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[6] The Service relies heavily on *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007), for the proposition that ESA procedures were changed in 1982 to decouple the critical habitat designation from the listing process. Service Br. at 23, 49-50. The Service misreads the case. The changes were made to decouple critical habitat designations from *proposed* listings, not final listings, and the court confirms that the two requirements remain intertwined: "The requirement [is that] that the Secretary designate habitat concurrently with the final listing decision, which is the current version of the law." *Alabama-Tombigbee Rivers Coalition*, 477 F.3d at 1266.

[7] The Service argues that GLO may not raise failure to designate critical habitat in the instant case because the argument is outside the 'four corners of the [] petition.'" Service Br. at 48

denial irrational.[8] Courts must determine whether an agency examined "the relevant data" and articulated "a satisfactory explanation" for its decision, "including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

II. THE DISTRICT COURT ERRED IN DISMISSING GLO'S CLAIMS 1 AND 3 ON THE GROUND THAT THEY ARE BARRED BY THE STATUTE OF LIMITATIONS

A. Failure to Designate Critical Habitat is a Continuing Violation

As set forth in GLO's opening brief, the duty to designate critical habitat is inextricably tied to the listing decision. Accordingly, the failure to designate is part and parcel of the listing process. As such, that failure to act constitutes a continuing

(quoting *Wildearth Guardians v. U.S. Secretary of the Interior*, No. 4:08-CV-00508, 2011 WL 1225547, at *4 (D. Idaho Mar. 28, 2011)). But *Wildearth*, an unreported district court decision outside this Circuit, is unpersuasive in the context of the instant case, where GLO argues that it was irrational for the Service to refuse to designate critical habitat for decades while denying the Petition on the ground that habitat is threatened. The irrationality of that particular decision could not have been made manifest to GLO until the Petition was actually denied on habitat protection grounds. Accordingly, GLO is entitled to make the argument here. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1108 (D.C. Cir. 2014) (hospitals not required to anticipate application of "new standard in an unexpected manner.").

[8] The Service cites *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S.Ct. 361, 368 (2018), in an effort to bolster the argument that its reliance on threats to Warbler habitat to deny the Petition do not conflict with its failure to designate critical habitat for the species. *See* Service Br. at 47-48. But the cited language in *Weyerhaeuser* merely makes the point that critical habitat must logically be a subset of the species' overall habitat. *See Weyerhaeuser*, 139 S.Ct. at 368 ("It follows that 'critical habitat' is the subset of 'habitat' that is 'critical' to the conservation of an endangered species."). *Weyerhaeuser* is utterly silent regarding the relationship between the Service's failure to designate critical habitat and its denial of a delisting petition based on threats to habitat.

violation with regard to which the statute of limitations has not expired. In response, the Service offers a dictionary definition of the term "concurrently" as meaning "at the same time." Service Br. at 22. Other dictionaries provide additional definitions. Thus, among other things, the term means "operating in conjunction." *See* Webster's II New College Dictionary at 234; *see also* Black's Law Dictionary (4th ed. 1968) at 363 (defining "concurrent" as "[r]unning together; . . . acting in conjunction; . . . contributing to the same event"). Of course, no dictionary definition is dispositive here. What matters is the text and structure of the ESA and how its various parts work together to define the relationship between listing decisions and critical habitat designations. The Service has not directly addressed GLO's arguments in that regard. *See* Opening Br. at 44-48.

The Service does cite six cases for the general proposition that courts are wary of using the continuing violation doctrine, and that the doctrine in any event does not apply to a "discrete action." Service Br. at 20. All six cases are distinguishable on their facts and law. First, *Pegram v. Honeywell, Inc.*, 361 F.3d 272 (5th Cir. 2004), was an employment discrimination case in which there were three distinct discriminatory *acts* occurring at specific times described by the Court as "denial on account of race of (1) training opportunities; (2) the approval to participate in [the employer's] MBA program; and (3) interaction with clients." *Id*. at 279. Each of the alleged discriminatory acts ceased at specific points in time. By contrast, here,

there was no affirmative *act* but, rather, a failure to act to designate critical habitat under the ESA, which failure continues to this day.

Second, *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 866-67 (5th Cir. 1993), was another non-ESA case involving several due process claims where notice of the availability of administrative appeals was not provided within the time in which appeals could be taken. Here, by contrast, there is a single, continuing failure to comply for three decades with a nondiscretionary statutory duty to designate critical habitat under the ESA. Thirteen years after *McGregor*, a district court within this Circuit held that such a failure constitutes a continuing violation. *See Schoeffler v. Kempthorne*, 493 F.Supp.2d 805, 809 (W.D. La. 2007). Though not precedential, *Schoeffler* persuasively analyzes why it is appropriate to view the failure to designate critical habitat as a continuing violation. *See* Opening Br. at 45-48.

Third, *Doe v. United States*, 853 F.3d 792 (5th Cir. 2017), was a criminal case in which the statute of limitations started to run when Doe was named as a criminal defendant, which is when he had notice of his possible Fifth Amendment claim. *Id*. at 801-02. Naming Doe as a defendant was a "discrete *action*," *id*. at 802 (emphasis added). By contrast, here the failure to designate critical habitat is a failure to act.

Fourth, *Smith v. Regional Transit Auth*., 827 F.3d 412, 421-22 (5th Cir. 2016), was a case in which a "single violation" consisting of a one-time *act* denying

benefits did not constitute a continuing violation. Of course, here, there was no act in connection with critical habitat designation, only inaction.

Fifth, *Texas v. United States*, 891 F.3d 553, 563 (5th Cir. 2018), involved the Texas Waste Act, which provided that civil lawsuits 'alleging the failure of the [government] to make any decision, or take any action, required under this part" are explicitly subject to the 180-day statute of limitations. The Service conveniently ignores the fact that the Texas Waste Act *itself* set a specific limitations period for the particular failure to act at issue in the case. The ESA does not contain any such comparable limitation.

Sixth, *Alabama-Tombigbee Rivers Coalition v. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007), is a case outside this Circuit that does not deal with a statute of limitations issue but with a variety of other ESA issues, including the relationship between the public comment period for listing decisions and the public comment period for critical habitat decisions, as well as the extent to which the Commerce Clause permits ESA regulation of solely intrastate species. In reviewing those issues, the Court stated, "We are troubled by the Service's apparent practice of routinely delaying critical habitat designation until forced to act by court order." *Id*. at 1268. It is true that the court went on to deny the relief requested by the plaintiffs to negate the original listing of the Alabama Sturgeon, but in its frustration with critical habitat designation failures the court stated that "[i]t may be that in an

appropriate case a court should use its contempt powers or fashion some creative remedy to spur the Fish and Wildlife Service on with habitat designation." *Id*. at 1270. If there ever were such an "appropriate case" it is this one, where Warbler critical habitat designation has been delayed by approximately three decades (compared to the mere six and a half years in *Alabama-Tombigbee, id*. at 1262) and, in the meantime, a petition to delist the Warbler was denied on the ground that habitat continues to be threatened. Borrowing a term used in *Alabama-Tombigbee*, a "creative remedy" to deal with the Service's continued intransigence in designating critical habitat in this case and in others would be to require the Service to reevaluate its denial of the Petition.

Thus, the cases cited by the Service do not contradict GLO's position that failure to designate Warbler critical habitat is a continuing violation under the ESA. Given the circumstances of this case, in which the 90-day petition was denied *because* of threats to habitat, it is appropriate to send a message to the Service that its failure to designate critical habitat will not be countenanced. Vacating and remanding the 90-day petition will, at long last, make that message loud and clear.

Finally, the Service argues that GLO may not rely on cases decided on grounds of failure to act because GLO did not bring a failure to act claim. Service Br. at 24. That is palpably false. More than adequate notice of the critical habitat claim was provided by GLO. *See* Second Amended Complaint at 77-80. This Court

has never required "magic words" to sustain allegations in a complaint. *See e.g.*, *Russell v. Harrison*, 736 F.2d 283, 288 (5th Cir. 1984) (use of the word "arbitrary" not required because complaint need only provide fair notice of claim and underlying facts).

B. Failure to Comply with NEPA is a Continuing Violation under the Circumstances of this Case

The Service cites a decision from this Circuit, *Davis Mountains Trans-Pecos Heritage Ass'n v. FAA*, 116 Fed.Appx.3, 16-17 (5th Cir. 2004), as standing for the proposition that a NEPA violation is a "failure to act at a discrete point in time," not a "continuous delay." But *Davis Mountains* itself dealt with an unrelated requirement in NEPA that agencies should supplement an Environmental Impact Statement ("EIS") when ongoing federal actions (such as, *e.g.*, construction projects) create new circumstances leading to environmental impacts that are significant enough to warrant a supplemental EIS; these breaches therefore arise irregularly, with no structured timelines after the initial determination. *See id*. at 16. But the structure of the law here, the ESA, makes *Davis Mountains* inapposite. The ESA specifically requires *five-year* reviews of listing decisions and not reviews "from time to time." GLO argues that the original decision listing the Warbler was subject to NEPA, and the Service had the opportunity to comply with NEPA in connection with each of the required five-year reviews. The Service failed to conduct the five-year reviews until it completed its belated five-year review in 2014, without

following the required NEPA procedures. These circumstances do not constitute one of the "rare occasions" where there is no law to apply." The "law" here is the nondiscretionary requirement to conduct listing reviews every five years, *see Bennett v. Spear*, 520 U.S. 154, 172 (1997), which afforded the Service the opportunity to comply with NEPA at each five-year interval.

III. THE DISTRICT COURT ERRED IN FINDING THAT NEPA DOES NOT APPLY TO LISTING DECISIONS (AND DECISIONS DENYING 90-DAY PETITIONS) UNDER THE ENDANGERED SPECIES ACT

The Service also defends, Service Br. at 25-29, the district court's dismissal of the NEPA claim on the alternative ground that NEPA does not apply to the initial listing of the Warbler or to the denial of the Petition because NEPA only applies when there is a change affecting the environment, and the two decisions by the Service merely maintained the status quo. ROA.962-65.

The Service cites an appellate court decision–*Pacific Legal Found. v. Andrus*, 657 F.2d 829, 835-41 (6th Cir. 1981)–holding that listing decisions under the ESA are not subject to the requirements of NEPA. Service Br. at 25-26. That decision, however, is part of a wider circuit split on the applicability of NEPA to actions under the ESA. *See, e.g., Catron County Bd. of Commissioners, New Mexico v. U.S. Fish & Wildlife Service*, 75 F.3d 1429, 1435-36 (10th Cir. 1996) (NEPA applies to ESA critical habitat designations because the former does not conflict with the latter); *Douglas County v. Babbitt*, 48 F.3d 1495, 1504 (9th Cir. 1995) (for critical habitat

designations, ESA was intended to displace NEPA requirements). Whether NEPA applies to listing decisions under the ESA is an open question in this Circuit.

The Service points to two cases from this Circuit in support of the proposition that the initial Warbler listing decision and the denial of the Petition were not required to comply with NEPA because such decisions did not effect a change in the physical environment. Service Br. at 26. GLO has already explained why one of those cases, *Sabine River Authority v. US Dept. of Interior*, 951 F.2d 669, 679-80 (5th Cir. 1992), is inapposite. *See* Opening Br. at 50 (explaining that the situation in *Sabine*, where a private nature preserve was essentially transformed into a public nature preserve via a negative easement, was unlike that here where the land at issue was free to use for any purpose prior to the Service's actions). The other case from this Circuit cited by the Service, *City of Dallas v. Hall*, 562 F.3d 712, 721-23 (5th Cir. 2009), found the circumstances there to be "strikingly similar" to that in *Sabine*. *Id*. at 721. The analysis of *Sabine* therefore applies equally to *Hall*. The *Hall* court noted that "the action at issue here is the establishment of an acquisition boundary for the refuge. The establishment of that boundary does not affect any change in the physical environment, but merely authorizes the purchase of property from willing buyers or the acceptance of conservation easements." *Id*. at 723.

Thus, the action at issue in *Hall* did not alter the natural environment, obviating any need to issue an Environmental Impact Statement ("EIS") under

NEPA. This is markedly different from the situation affecting GLO, where it was previously able to alter the natural environment on its lands inhabited by the Warbler, but became subject to the "take" prohibitions pertaining to listed species, which includes actions that harm the species by causing "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

Thus, the cases cited by the Service on the NEPA issues are distinguishable on the facts.

CONCLUSION

For the foregoing reasons, the judgment of the district court on all claims in the Second Amended Complaint should be reversed.

DATED: July 18, 2019

Respectfully submitted,

s/Theodore Hadzi-Antich

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on July 18, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

Attorney of Record for Appellant
General Land Office of the State of Texas

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Rule 32(f), it contains 6,283 words.

2. This document likewise complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

Dated: July 18, 2019

s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

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APPENDIX

TABLE OF CONTENTS

U.S. Department of Justice
Environment and Natural Resources Division

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July 8, 2019

By CM/ECF

Lyle W. Cayce, Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
Suite 115
New Orleans, LA 70130

Re: *American Stewards of Liberty et al. v. U.S. Department of the Interior, et al.*, No. 19-50321

Dear Mr. Cayce:

I represent the federal Defendants-Appellees-Cross Appellants (Federal Defendants) in the above-captioned case. On May 28, 2019, the Federal Defendants filed their Notice of Appeal as to all plaintiffs. *See* Federal Defendants' Notice of Appeal, Fifth Cir. Doc. 00514978923.

I am writing to notify the Court that the Federal Defendants are not pursuing their appeal as to the Plaintiffs–Cross Appellees (i.e., the American Stewards of Liberty; Charles Shell; Cheryl Shell; Walter Sidney Shell Management Trust; Kathryn Heidemann, and Robert V. Harrison, Sr.).

The Federal Defendants continue to pursue their cross-appeal as to the Intervenors Plaintiffs–Appellants–Cross Appellees (i.e., John Yearwood and Williamson County, Texas).

I have conferred with Paul Weiland, counsel for Plaintiffs-Cross Appellees (the American Stewards of Liberty, et al.), and confirmed that we agree it would now be appropriate to terminate the Plaintiffs-Cross Appellees as appellees in this case.

Respectfully submitted,

s/ Varu Chilakamarri
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EXHIBIT 1