IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

GENERAL LAND OFFICE
OF THE STATE OF TEXAS,

Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al*

Defendants.

No. A-17-CA-00538-SS

PLAINTIFF'S OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

ORAL HEARING REQUESTED

ROBERT HENNEKE
Texas Bar No. 24046058
rhenneke@texaspolicy.com
THEODORE HADZI-ANTICH
California Bar No. 264663
tha@texaspolicy.com
RYAN D. WALTERS
Texas Bar No. 24105085
rwalters@texaspolicy.com
TEXAS PUBLIC POLICY FOUNDATION
Center for the American Future
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

Attorneys for Plaintiff
General Land Office of the State of Texas

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INTRODUCTION AND SUMMARY

The facts in the administrative record are undisputed. Based on the cross-motions for summary judgment, there are only two legal issues before this Court: (1) whether Defendant United States Fish and Wildlife Service (the "Service") impermissibly denied the Petition at the 90-day stage because it used an incorrect legal standard, thereby acting "not in accordance with law," and (2) whether the Service's denial of the Petition was irrational and, therefore, "arbitrary and capricious." With regard to both issues, the Service argues that its decision to deny the Petition should be sustained in deference to the Service's scientific and technical expertise. The Service's position on both issues is without merit.

The text of the ESA, the Service's regulations, applicable case law, the actual language denying the Petition, and the Service's own legal brief show that the Service used an impermissible evidentiary standard. A petition should be granted at the 90-day stage if a reasonable person would conclude that the petition provides substantial scientific or commercial information indicating that the petitioned action "may be warranted." The decisionmaking criteria is simply whether the petition provides the requisite "substantial information" leading to a more thorough 12-month review. *If* a petition survives the 90-day stage, then a different, more stringent set of criteria is applied during the 12-month review to determine whether the substantive relief sought is actually merited. Throughout its legal brief, the Service conflates the two legal criteria, thereby showing and implicitly acknowledging that, in the instant case, it applied criteria applicable to a 12-month review at the 90-day stage. By impermissibly applying the 12-month review criteria here, the Service acted "not in accordance with law." Consequently, the Service is not entitled to deference on this issue.

Moreover, the Service's denial of the Petition was irrational in light of the Service's refusal to designate critical habitat for the Warbler. As the Service's brief explicitly acknowledges, a chief reason for denying the Petition was the perceived threat to the Warbler's critical habitat, which the Service claims is undeterminable after years of peer-reviewed studies were conducted describing the areas inhabited by the Warbler. Based on the voluminous studies in the administrative record, the Service has more than enough information to designate critical habitat if it were serious about protecting the Warbler from extinction. Under these circumstances, it was irrational, and therefore arbitrary and capricious, to deny the Petition based on risk to critical habitat while at the same time asserting that critical habitat is undeterminable and therefore cannot be designated. The Service's position is particularly untenable in light of Congress's instructions to the Service that designating critical habitat is the premier tool for protecting endangered species under the ESA. Accordingly, the Service is not entitled to deference on this issue, either.

The *Amici* raise issues regarding climate change and wildfires. Those matters are not dispositive on the issue of whether, at the 90-day stage, the Petition provided the requisite "substantial information" indicating that the relief sought "may" be warranted. During a 12-month review, climate change and wildfire issues would be considered with regard to whether delisting is appropriate, based on the totality of circumstances, and *Amici* would have ample opportunity to participate in the decisionmaking process as interested members of the public in connection with those issues at that time.

Here, Plaintiff General Land Office of Texas ("GLO") provided overwhelming evidence in its Motion for Summary Judgment that the Petition should have been granted because delisting "may" be warranted. Consequently, the Service was required by law to proceed to a 12-month review.

ARGUMENT

I. The Service Applied an Impermissible Evidentiary Standard in Denying the Petition

When it denied the Petition, the Service impermissibly discounted peer-reviewed studies published in reputable scientific journals showing that Warbler population and habitat have increased substantially over the past several decades. At the same time, the Service cherry picked information set forth in other studies that were either not designed to evaluate overall Warbler population or habitat, or were unpublished and not peer reviewed. In addition, relying on snippets from studies taken out of context, the Service summarily dismissed the substantial information provided in the Petition without offering a rationale other than *ipse dixit.* By failing to credit the "substantial scientific or commercial information" set forth in the Petition, and by using an impermissible evidentiary standard to deny it, the Service made several legal errors.

A. The Service Acted "Not In Accordance with Law" When It Applied the 12-Month Review Standard at the 90-day Stage.

The Service impermissibly applied the 12-month review standard to the Petition, in violation of the ESA and its implementing regulations. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). At the 90-day stage, the Service may not require that a petition contain conclusive evidence that listing is warranted, but is instead limited to determining whether a reasonable person would find that the petition presents substantial scientific or commercial information that the petitioned action "may" be warranted. *Id.*; 71 Fed. Reg. 66298 (Nov. 14, 2006); 79 Fed. Reg. 4877, 4878 (Jan. 30, 2014). In multiple instances, the Service used the 90-day finding as an opportunity to refute claims within the Petition by citing other, often older, scientific studies, rather than evaluate the Petition under the 90-day standard to determine if it provided the requisite substantial information. In so doing, the Service acted arbitrarily, capriciously, and not in accordance with law, thereby abusing its discretion, by demanding a conclusiveness of evidence

more appropriate to a 12-month review rather than a 90-day finding. *See Humane Soc'y of the United States v. Pritzker*, 75 F.Supp.3d 1, 10 (D.D.C. 2014) ("[T]he application of the 12-month determination's evidentiary standard at the 90-day review stage [is] arbitrary and capricious."); *Ctr. for Biological Diversity v. Kempthorne*, 2007 WL 163244, at *4 (N.D. Cal. 2007) ("At [the 90-day finding] stage, unless the Service has *demonstrated* the unreliability of information that supports the petition, that information cannot be dismissed out of hand."). (Emphasis added.) Thus, the burden is on the Service to "demonstrate" that information supporting a 90-day petition is unreliable, and the Service's *ipse dixit* conclusions of unreliability, offered summarily and without justification, are not entitled to deference. As set forth in more detail in Section I.C., *infra*, the Service has not made a defensible demonstration that the studies supporting the Petition are unreliable.

Accordingly, the Service is not entitled to unfettered deference in denying the Petition because the Service's 90-day finding (1) does not follow the statutory requirements of the ESA, (2) is flawed in that it misconstrues, and is often contrary to, the evidence before the agency, (3) fails to use or credit the peer-reviewed science presented in the Petition, and (4) is not supported by a defensible explanation of the agency's underlying analysis or rationale in summarily discounting overwhelming evidence supporting the Petition. *See* 5 U.S.C. § 706(2)(A); 50 C.F.R. § 424.11(b); 16 U.S.C. § 1533(b)(1)(A). Thus, the Service's 90-day finding must be set aside under the APA as arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law. 5 U.S.C. § 706.[1]

[1] The term "otherwise not in accordance with law" should be read to serve some independent purpose that is different from the terms "arbitrary, capricious, an abuse of discretion." *See Gustafson v. Alloyd Co., Inc.* 513 U.S. 561, 591 (1995) (cautioning courts to avoid reading a statute so as to make some terms superfluous). Although some decisions have applied the several criteria set forth in 5 U.S.C. § 706(2)(A) as an undifferentiated generic standard, the Supreme Court has

1. The Plain Language of the ESA and Its Implementing Regulations Provide an Intentionally Low Threshold for the Service to Grant Petitions at the 90-day Stage.

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 . . . to add a species to, *or to remove* a species from, either [the threatened or endangered species list], 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) (emphases added). The Service, by regulation, has stated that a petition is deemed to contain 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). 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 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).

If the Service issues a "positive" 90-day finding, because the petitioned action (listing or delisting) *may* be warranted, then the agency must publish the finding in the Federal Register and commence a "status review" of the species to be completed within one year, sometimes referred

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recognized that "the Administrative Procedure Act . . . directs courts to set aside agency action 'not in accordance with law,'" as a stand-alone legal standard by which agency action should be rejected. *See SAS Inst., Inc. v. Iancu*, 138 S.Ct. 1348, 1359 (2018). It has also recognized that an administrative agency "by definition abuses its discretion when it makes an error of law." *See Koon v. U.S.*, 518 U.S. 81, 100 (1996). Here, because the Service's use of the 12-month review standard rather than the 90-day review standard was "not in accordance with law" it is also an "abuse of discretion."

to as the 12-month review. 16 U.S.C. §§ 1533(b)(3)(A)–(B). The Service must "solicit information from the public for use in [its 12-month] status reviews," and is required to "consult as appropriate with affected States, interested persons and organizations, [and] other affected Federal agencies" as part of this status review. 50 C.F.R. § 424.13. After the completion of the 12-month review, the agency is required to determine whether the petitioned action is in fact warranted, based on the best scientific and commercial evidence available. 16 U.S.C. § 1533(b)(3)(B). Thus, there is a sharp distinction between the criteria for granting a petition at the 90-day stage (i.e., that the petitioned action *may* be warranted) versus the criteria applicable during a subsequent 12-month review (i.e., that the petitioned action *is* warranted).

Thus, by its plain terms, the ESA does not require at the 90-day stage that a petition present *conclusive* evidence to trigger a positive 90-day finding and subsequent status review. Rather, at the 90-day stage, the ESA directs the Service to evaluate a petition only to determine whether it contains "substantial scientific or commercial information indicating that the petitioned action *may* be warranted." 16 U.S.C. § 1533(b)(3)(A) (emphasis added). Similarly, the ESA implementing regulations define "substantial" information in relaxed terms, stating that it is "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). If a petition satisfies that low bar, the Service must undertake a comprehensive 12-month species status review before making a conclusive determination as to whether a proposed listing or delisting is in fact warranted.

2. Case Law Overwhelmingly Recognizes the Distinction Between the 90-day and 12-month Review Standards

It is well established that "the application of the 12-month determination's evidentiary standard at the 90-day review stage [is] arbitrary and capricious." *Humane Soc'y of the United States v. Pritzker*, 75 F.Supp.3d 1, 10 (D.D.C. 2014); *see Ctr. for Biological Diversity v.*

Morgenweck, 351 F.Supp.2d 1137, 1141 (D. Colo. 2004). ("[I]t is clear that the ESA does not contemplate that a 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."); *see also Colo. River Cutthroat Trout v. Kempthorne*, 448 F.Supp.2d 170, 176 (D.D.C. 2006) ("This Court finds the reasoning of *Morgenweck* persuasive . . . 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 *9 (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) (Addressing a petition to delist at the 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 finding standard in favor of the petitioner and 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). The Northern District of California set aside a negative 90-day finding on the ground that the Service had denied a petition because the evidence presented was "equivocal." *Id.* at *3. The court rejected this finding because "equivocal" evidence admits of more than one interpretation, and a reasonable person could find that an action "may be warranted" even in the face of evidence cutting multiple ways. *Id.* at *4. 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 *7 (emphasis added). *See Pritzker*, 75 F.Supp.3d at 11 (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" and a need for "more thorough analysis," which suggested to the court that "a reasonable person might conclude that a [12-month status review] was warranted").

Accordingly, courts have found that it is arbitrary and capricious for the Service to reject a petition "because much of the evidence was not conclusive." *Ctr. for Biological Diversity v. Kempthorne*, 2007 WL 163244, at *4 (N.D. Cal. Jan. 19, 2007) ("The 'may be warranted' standard . . . seems to require that in cases of such contradictory evidence, the Service *must defer to information that supports [the] petition's position* . . . At this stage, unless the Service has demonstrated the unreliability of information that supports the petition, that information cannot be dismissed out of hand.") (emphasis added). The Service stands deference on its head with regard to the Petition at issue here. Under the ESA, a reviewing court does not defer to the Service's judgment regarding a 90-day finding, the *Service* defers to a petitioner providing substantial information that delisting may be warranted. In the instant case, by misapplying the criteria for granting or denying the Petition, the Service did not act "in accordance with law."[2]

"At the 90-day stage, the question is not whether the designation *is* warranted, only whether it *may* be," and, as set forth in Section I.A.3., *infra*, the Service's analysis here involved a higher

[2] *See* footnote 1.

standard of proof and more conclusive evidence than that authorized by the "substantial information" standard. *See Ctr. for Biological Diversity v. Kempthorne*, 2007 WL 163244, at *7 (N.D. Cal. Jan. 19, 2007) (emphasis in original).

3. The Record Shows that the Service Applied the Wrong Standard in Denying the Petition.

The record shows that the Service applied a heightened evidentiary standard in its review of the Petition, pitting evidence in the Petition against other studies it preferred. *See, e.g.*, M000442-M000443 (explicitly using Reidy, et al. (2016) in an effort to refute the Petition's modeling studies of Warbler habitat and population size; M000444 (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; M000447 ("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).

In its cross-motion for summary judgment the Service continues with its mistaken understanding of the standard of review of a petition at the 90-day stage, conflating it with the subsequent 12-month review that requires the agency to evaluate the studies with other evidence, and to make a definitive conclusion as to the merits of the delisting petition. *See, e.g.*, Def's MSJ at 19 ("The other information regarding habitat fragmentation in the Petition to Delist was *inconclusive*, at best, and *did not refute* the wide-spread consensus that habitat fragmentation harms the Warbler's recovery and remains a significant threat.") (emphases added); 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."); 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); Def's MSJ at 36 (refuting 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.)'" Def's MSJ at 36 (citing 90-day Finding, R000447).

In light of these impermissible efforts to play one set of studies against another at the 90-day stage, and the Service's admitted uncertainty, the Service was required to move forward to a full consideration of the merits of the Petition in a 12-month review, rather than rejecting it at the 90-day stage by improperly requiring the Petition to provide conclusive evidence. *See* Def's MSJ at 27-28. Among other things, admitted uncertainty at the 90-day stage means that a 12-month review was needed. *See Pritzker*, 75 F.Supp.3d at 11 (finding that the National Marine Fisheries Service 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" and a need for "more thorough analysis," which suggested to the court that "a reasonable person might conclude that a [12-month status review] was warranted"); *Ctr. for Biological Diversity v. Kempthorne*, 2008 WL 659822, at *9 (D. Ariz. Mar. 5, 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*, 281 F.Supp.2d at 1203-04 ("[T]he standard for evaluating whether substantial information has been presented [in a petition] is not overly-burdensome, [and] does not require conclusive information . . .").

In effect, the Service made a 12-month status review finding rather than a 90-day finding, thereby impermissibly cutting off any opportunity for public comment required in connection with

12-month findings. 16 U.S.C. § 1533(b); *Ctr. for Biological Diversity v. Kempthorne*, 2007 WL 163244, at *4–7 (N.D. Cal. Jan. 19, 2007) (finding that in cases of contradictory evidence, "the Service should make the [90-day] finding and then proceed to the more-searching next step in the ESA process"); *Colo. River Cutthroat Trout v. Kempthorne*, 448 F.Supp.2d 170, 175-76 (D.D.C. 2006) ("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."). Because the Service applied the wrong evidentiary standard in denying the 90-day Petition, the denial was "not in accordance with law," and therefore should be vacated and remanded to the Service with instructions to evaluate the Petition under the proper standard, as required by law. *See Buffalo Field Campaign v. Zinke*, 289 F.Supp.3d 103, 112 (D.D.C. 2018).

The Service cites *Palouse Prairie Found. v. Salazar*, No CV-08-032, 2009 WL 415596 (E.D. Wash. Feb. 12, 2009), *aff'd*, 383 Fed.Appx. 669 (9th Cir. 2010), for the proposition that, when reviewing a negative 90-day finding, "the issue before the Court is not whether a reasonable person could accept [the petitioner's] interpretation of the data, but whether the [agency] had a rational basis for concluding that a reasonable person would not do so." *Id*. at *2. The Ninth Circuit, in affirming the district court's judgment, relied on the fact that "[t]he petition failed to identify a single well-designed study determining the current or historical population and range of the earthworm." *Palouse Prairie Found. v. Salazar*, 383 Fed.Appx. 669, 670 (9th Cir. 2010). Unlike *Palouse Prairie Foundation*, the Petition at issue here was supported by a large volume of independently peer-reviewed studies published in established scientific journals and, as set forth in detail in Section I.B., *infra*, the Service did not present credible evidence that the studies should be discounted. Rather, the Service claims in its cross motion that some of the studies cannot be relied upon, using the expedient of *ipse dixit* to support its conclusions. Deference to the service

at the 90-day review stage is inappropriate where, as here, the Service has not demonstrated that the studies cited in the Petition and summarized in the Plaintiff's motion for summary judgment should be discounted. The studies in the administrative record upon which Petitioner relies are more than adequate to support the Petition at the 90-day stage.

B. The Service Failed to Credit the Substantial Evidence in the Petition.

"[T]he 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*, 289 F.Supp.3d at 110 (internal citations omitted) (emphasis added).

The Service's motion for summary judgment summarily discounts positive research findings on the health of the Warbler population while championing negative findings. There is little if any discussion of *why* certain studies are lauded while others are derided. Rather, *ipse dixit* is used to support one set of studies over another. *See* the Def's MSJ at 31-39; *see also Ctr. for Biological Diversity* 2007 WL 163244, at *4 ("At [the 90-day petition stage], unless the Service has *demonstrated* the unreliability of information that supports the petition, that information cannot be dismissed out of hand.") (emphasis added).

1. Warbler Population and Habitat

While acknowledging that the Warbler population and distribution is larger than previously recognized, *see* Def's MSJ at 8, the Service's brief summarily dismisses as insubstantial reams of new information published in peer-reviewed journals, cited in the 90-day Petition, and described in the Plaintiff's legal brief. *Id.* at 23. Four examples will illustrate the point. First, the Service summarily discounts the higher population size estimates (Mathewson et al., Morrison et al.) by using one source (City of Austin). R3860-3870 [O'Donnell et al. 2015]). *See* Def's MSJ at 25.

But using the City of Austin study, which was done on a local, small spatial scale, to discount studies conducted on a much larger spatial scale, such as Mathewson et al., and Morrison et al., is a classic apples-and-oranges comparison unworthy of the Service.

Second, the Service discounts the Mathewson et al. population estimate as flawed. Def's MSJ at 25. But the study showed the male Warbler population size with a mean (average), and lower and upper bounds with a very high 95% level of confidence. (263,339 males; 95% CI: 223,927–302,620. *See* R3580. Hence the total population would be approximately twice as large if females were estimated, which the service conveniently neglects to mention with regard to this peer-reviewed study. *See* R1927-1984 [GCWA Review Comments 2011].

Third, The Service argues that, even if the Warbler population is much greater than previously thought, sufficient threats exist to warrant continued listing. Def's MSJ at 25-27. But the fact that the Warbler population is many times larger than previously understood has a substantially wider distribution, and occupies and breeds in habitat once thought to be unsuitable belies the Service's effort to elevate potential threats to individuals over palpable evidence that the Warbler population overall is substantially increasing in number.

Fourth, the Service acknowledges that the original recovery goals for each region were based on an "educated guess," while arguing that the Warbler was not delisted in 2008 because of habitat loss and fragmentation. *See* Def's MSJ at 27. But in 2008 the Service was still operating under the "educated guess" of a small and isolated population. The studies cited in the 90-day Petition and by the Plaintiff in its motion for summary judgement show either that the Warbler population has either experienced truly extraordinary growth *or* that the original estimates of Warbler population were woefully incorrect. Furthermore, the Service uses the outdated recovery plan to discount new information developed after the recovery plan that shows (1) Warblers

successfully occupy and breed on habitat patches much smaller than previously thought, (Butcher et al. 2010), (R1143-1149), Robinson (2013), (R5467-5520), and (2) the distribution of the Warbler (and thus amount of habitat) is much larger than understood in 1990. (Collier et al. (2012), (R1591-1600), Duarte et al. (2016), (R326-335). *See* Def's MSJ at 27-28. As indicated, the assessments in the recovery plan were, as the Service acknowledges, "educated guesses." Yet it uses decades-old, often unpublished, information to discount more recent and more comprehensive information. For example, at the time of listing the "educated guess" was a small, highly fragmented population of Warblers. Subsequent work on distribution and abundance, habitat use, and genetics have shown this guess is likely incorrect (Morrison et al. (2012), Wildlife Society Bulletin 36:408-414, attached to GLO MSJ as Appendix 1). Yet the Service refused to evaluate the original listing criteria and recovery plan in light of the more recent data set forth in the Petition.

In any event, at the 90-day stage, weighing and comparing studies is impermissible unless the Service demonstrates that the studies in the petition are unreliable. *Ctr. for Biological Diversity*, 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). No such unreliability has been demonstrated with regard to any study proffered in the Petition on the issue of Warbler population and habitat. The Service's denial of the Petition on other grounds fares no better.

2. Predation

The Service argues that because "the Petition acknowledged that predation occurs" on the Warbler, and that because it "put forth no evidence that predation as a whole does not have a significant negative effect on Warbler survival and breeding success," the Petition failed to provide substantial evidence on this factor. *See* Def's MSJ at 30. In support, the Service cites one study,

Stake et al. (2004), conducted on Fort Hood, R5826-5833, but neglects to mention that the study concluded predation by fire ants and mammals is small, and that predation will vary across the range of any bird species, including the Warbler. *See* R5829-5830. The Service also ignores or summarily discounts other studies showing that predation is not a significant threat to the Warbler, while failing to recognize that the Warbler population on Fort Hood is of high overall abundance. *See* Peak and Thompson (2014), R3918-3932. In short, the Service impermissibly discounts or ignores studies showing that naturally occurring predation is not negatively impacting the Warbler population. *See, e.g.*, Stake et al. (2004), R5826-5833.

The Service also summarily discounts the published papers summarized in the Groce et al. (2010) status review, R2463-2464, that show cowbird parasitism to be of no substantial negative impact to the Warbler rangewide. *See* Def's Br. at 29. It does this by citing one unpublished paper written 18 years ago that did not undergo independent peer review, Anders 2000, and which simply suggested that Warblers outside of Fort Hood were "susceptible" to parasitism. (R640-654).

3. Adequacy of Existing Regulatory Mechanisms

Although the Service claims that it is "not clear that the existence of protected land or availability of information are 'regulatory mechanisms' under the Act," Def's MSJ at 33, an "existing regulatory mechanism" need not be legally binding for the Service to reasonably find it to be an adequate source of protection. *Defenders of Wildlife v. Zinke*, 849 F.3d 1077, 1082-85 (D.C. Cir. 2017). Additionally, the Service acknowledges in the 90-day finding that it did not consider existing long-term land protections like wildlife preserves and habitat conservation plans in its consideration of Factor D in the 5-year review, though it summarily dismisses such issues under Factor A without detailed analysis or explanation. *See* M000446; R006784.

4. Other Natural or Manmade Factors Affecting the Warbler

The Service argues that "the Petition failed to provide substantial information that other natural or manmade factors may warrant delisting the species, in light of the other threats faced by the Warbler," while admitting that it chose one study over another regarding the effects of fire on the Warbler. *See* Def's MSJ at 35-36 (rebutting study cited in Petition on positive effects of fire with another study finding negative effects). *See Pritzker*, 75 F.Supp.3d at 11 (Service not permitted to compare studies against each other at the 90-day review stage).

Amici assert that the Petition presented no information regarding climate change and similarly failed to address the effects of catastrophic wildfire on the Warbler and its habitat. *See* Amici Br. at 3. However, *Amici* do not provide facts regarding how potential future climate change might negatively impact the Warbler, and they ignore research results showing that wildfires in that region do not pose particularized major threats to the Warbler. *See* White et al. (2009), R7394; *see also* Baccus, et al., (2007), R914-951.

5. The Service Failed to Justify Summarily Discounting Substantial Information Supporting the 90-day Petition

Because the Petition presents substantial scientific or commercial information indicating that the Warbler population is substantially larger than previously understood, leading a reasonable person to believe that delisting *may* be warranted, the Petition should not have been denied. *See* 16 U.S.C. § 1533(b)(3)(A)-(B). The number, breadth, and depth of the studies, as set forth in detail in the Petition and as summarized in Plaintiff's legal brief supporting its motion for summary judgement are more than adequate to meet the applicable regulatory standard at the 90-day stage. *See* 50 C.F.R. § 424.14(b)(1). The Service discounted the studies cited in the Petition by referring to competing studies whose interpretation the Service preferred. *See* M000442-M000443. This is unacceptable at the 90-day stage, where "if two pieces of scientific evidence conflict, the Service

must credit the supporting evidence unless that evidence is unreliable, irrelevant, or otherwise unreasonable to credit." *Buffalo Field Campaign*, 289 F.Supp.3d at 110; *see also id.* at 110-111 (noting that "the Service appears to have taken it upon itself to resolve a disagreement among reasonable scientists . . . The Service thereby applied an inappropriately heightened standard to the evaluation of Buffalo Field's petition," and discussing how the Service in that case "simply picked a side in an ongoing debate in the scientific community, which is improper at the 90-day finding stage. The Court need not defer to an agency's application of the improper legal standard."). Here, the Service simply picked a side without providing adequate justification that the numerous studies cited in the Petition were "unreliable, irrelevant, or otherwise unreasonable to credit." *Id.* Accordingly, because the Service applied the wrong standard in denying the Petition, the denial must be vacated.

II. The Service's Denial of the Petition Was Irrational, and Therefore Arbitrary and Capricious, In Light of Its Failure to Designate Critical Habitat

The Service's cross motion for summary judgment asserts that its failure to designate critical habitat is irrelevant to its denial of the Petition. The assertion is without merit. In the final rule listing the Warbler, the Service did not designate critical habitat. The Service stated that "[c]ritical habitat for this species remains undeterminable at this time." 55 Fed. Reg. 53152, 53156 (Dec. 27, 1990). The Service noted that although satellite mapping was used to identify Warbler habitat, "all the specific elements of the habitat that are critical to the survival of the golden-cheeked Warbler are not known." *Id*. The Service stated that biological studies were being conducted to address the issue, and gave a deadline of May 4, 1992, to determine and designate critical habitat. *Id*. More than 25 years from the date the final listing rule was published, critical habitat for the Warbler remains undesignated by the Service.

An agency action can be sustained only if it "considered the relevant factors and articulated a *rational connection* between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) (citation omitted; emphasis added). Agency action is arbitrary and capricious when "the agency has . . . entirely failed to consider an important aspect of the problem . . . or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added). A reviewing court must undertake a "thorough, probing, in-depth review" of the agency's decision and then decide whether it was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971).

The Service's repeated reliance on arguments relating to Warbler critical habitat to support its denial of the 90-day Petition, combined with its conspicuous failure to designate critical habitat for over two decades, is problematic. Although the Service asserts that other provisions of the ESA function to protect habitat even without a critical habitat designation, Def's MSJ at 30-32, the Service is not free to ignore Congress's instructions to designate critical habitat for endangered species, nor can it use its violation of the ESA as a rationale for denying the Petition.[3]

The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved." 16 U.S.C. §1531(b). To achieve that purpose, under Section 4 of the ESA when listing a species as threatened or endangered the government has a concurrent duty to designate critical habitat for that species "to the maximum

[3] Additionally, the failure to designate critical habitat leaves a Sword of Damocles hanging over property owners in Central Texas, who may not be able to clearly determine which of their lands are subject to the ESA's prohibitions. As a large Texas government agency, GLO was able to identify that some of its properties are used by Warblers, but it defies credulity to argue that a typical Texas land owner is in the same position.

extent prudent and determinable." 16 U.S.C. §1533(a)(3)(A)(i); *see also id.* § 1533(b)(6)(C) (permitting the Secretary to extend the deadline for designating critical habitat up to two years after the publication of the proposed rule to list the species if critical habitat is not "determinable" at the time of listing). Designating critical habitat is the most effective way of protecting species and was at the forefront of legislators' minds during the initial debates on the ESA: "Often, protection of habitat is the only means of protecting endangered animals which occur on nonpublic lands." S. Rep. No. 307, 93 Cong., 1st Sess. 4 (1973). In 1978, Congress amended the ESA to expressly link the *timing* of the critical habitat designation to the decision to list a species. 16 U.S.C. §1533(a)(3). The duty to designate critical habitat is a "non-discretionary duty" and a "congressional mandate." *Schoeffler v. Kempthorne*, 493 F.Supp.2d 805, 809 (W.D. La. 2007).

In the years since the enactment of the 1978 Amendments, courts have regularly emphasized the central importance of designating critical habitat in a timely fashion. *See, e.g.*, *Catron Cty. Bd. of Com'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996) ("ESA's core purpose is to prevent the extinction of species by preserving and protecting the habitat upon which they depend from the intrusive activities of humans."); *Palila v. Hawaii Dep't of Land & Nat. Res.*, 649 F.Supp. 1070, 1076 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988) ("[O]ne of the main purposes of [the ESA] was conservation and preservation of the ecosystems upon which endangered species depend.").

The Service argues that its decades-long failure to designate Warbler critical habitat is irrelevant to its denial of the Petition. Def's MSJ at 14-16. But that argument is belied by the Service's drumbeat of assertions that it was *required* to deny the Petition *because* of the threats to Warbler critical habitat, which the Service continues to assert is undeterminable. *Id.* at 17-28, 31-37. If Warbler critical habitat is geographically undeterminable so too are the threats to that area,

wherever it may be, because one cannot protect an area from threats unless one knows its geographic location. The Service's argument cannot pass the red-face test. Under these circumstances, the denial was irrational, evincing a clear error of judgment and, accordingly, was arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the 90-day finding should be vacated, and this matter should be remanded to the Service for reconsideration.

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Respectfully submitted,

ROBERT HENNEKE
Texas Bar No. 24046058
rhenneke@texaspolicy.com
THEODORE HADZI-ANTICH
California Bar No. 264663
tha@texaspolicy.com
RYAN D. WALTERS
Texas Bar No. 24105085
rwalters@texaspolicy.com

By: */s/ Theodore Hadzi-Antich*
THEODORE HADZI-ANTICH
TEXAS PUBLIC POLICY FOUNDATION
Center for the American Future
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

Attorneys for Plaintiff
General Land Office of the State of Texas

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Texas by using the CM/ECF system, which will serve a copy of same on the counsel of record.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH