IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY *et al.*, LLC, Plaintiffs, vs. JIM KURTH, *et al.*, Federal Defendants, and AMERICAN FOREST & PAPER ASSOCIATION, *et al.*, Defendant-Intervenors.	No. 1:15-cv-00477-EGS
DEFENDERS OF WILDLIFE, Plaintiff, vs. JIM KURTH, *et al.*, Federal Defendants, and AMERICAN FOREST & PAPER ASSOCIATION, *et al.*, Defendant-Intervenors.	No. 1:16-cv-00910-EGS (Consolidated Case)

DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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GLOSSARY OF ABBREVIATIONS

ESA	Endangered Species Act
Final Rule	Final rule listing the Northern Long-Eared Bat as threatened, found at 80 Fed. Reg. 17974 (Apr. 2, 2015)
LAR	Administrative Record for the NLEB Listing Determination
NLEB	Administrative Record for the NLEB Interim 4(d) Rule
Pd	*Pseduogymnoacus destructans*
Polar Bear Memorandum	Supplemental Explanation for the Legal Basis of the Department's May 15, 2008, Determination of Threatened Status for Polar Bears, dated December 22, 2010
Proposed Rule	Proposed rule to list the Northern Long-Eared Bat as endangered, found at 78 Fed. Reg. 61046 (Oct. 2, 2013)
Service	U.S. Fish and Wildlife Service
SuppAR	Supplemental Administrative Record
WNS	White-nose syndrome

INTRODUCTION

Plaintiffs have tried—and failed—to support their claim that the United States Fish and Wildlife Service ("Service") erred when it listed the northern long-eared bat (*Myotis septentrionalis*) as a threatened species, rather than an endangered species, under the Endangered Species Act ("ESA" or "Act"). 16 U.S.C. § 1531 *et seq.* The record and briefing demonstrate that the Service thoroughly evaluated the status of the species and, in particular, the threat posed to the species by the fungus *Pseduogymnoacus destructans* ("Pd"), which is believed to be responsible for white-nose syndrome ("WNS"). After identifying and evaluating the best available information on the species' status and the impact of this disease on the species, the Service carefully applied the ESA's standards to determine whether the northern long-eared bat warranted listing, and if so, as a threatened or endangered species, ultimately deciding to list the species as threatened. 80 Fed. Reg. 17974 (Apr. 2, 2015) ("Final Rule").

The Service's decision has important legal and practical ramifications. An endangered listing would have been inconsistent with the best available information and imposed unwarranted costs and restrictions on the public, including the members of the Defendant-Intervenors ("Associations"), which represent a variety of land use, industrial, and commercial sectors that would otherwise bear the significant burdens associated with the protections for endangered wildlife imposed under the ESA. Meanwhile, the threatened listing affords the Service the appropriate flexibility and tools to tailor protective measures to protect bats and address WNS where it occurs. Plaintiffs have failed to demonstrate that listing the northern long-eared bat as an endangered species, with the associated costs to the public resulting from increased procedural and substantive protections, was appropriate under the ESA. Therefore, the Court should deny Plaintiffs' Motion for Summary Judgment and grant the Federal Defendants'

and the Associations' Cross-Motions for Summary Judgment on Claims I, I, and III of the Complaint filed in matter No. 1:15-cv-00477 and Claims I and II of the Complaint filed in matter No. 1:16-cv-00910.

ARGUMENT

I. The Interpretations of Statutory Standards Used in the Northern Long-Eared Bat Listing Are Consistent with the ESA, and Those Proffered by the Plaintiffs Are Not.

In Reply in Support of Their Motion for Partial Summary Judgment on Their Listing Claims and in Opposition to Defendants' and Intervenors' Cross Motions for Summary Judgment ("Plaintiffs' Reply") (Dkt. 59), Plaintiffs continue their attempt to muddle the statutory line between "threatened" and "endangered" species. Their disregard for the language of the ESA undermines both their arguments on the listing of the northern long-eared bat (Pl. Reply at 2-11) and the interpretation of the statutory phrase "significant portion of the range." Pl. Reply at 34-45.

A. The Service's Interpretation of "Threatened" and "Endangered" Species Are Reasonable and Consistent with the Act.

A prime example of the Plaintiffs' tendency to overlook the distinction between threatened and endangered species is their insistence that the Service unlawfully "paired" its interpretations of "in danger of extinction" or "likely to become endangered within the foreseeable future." Pl. Reply at 4. However, the record shows that the Service properly applied each definition in its respective analyses of whether the northern long-eared bat qualified as either an endangered or a threatened species.

As explained in Defendant-Intervenors' Brief in Opposition to Plaintiffs' Partial Motion for Summary Judgment and Defendant-Intervenors' Cross-Motion for Summary Judgment ("Intervenors' Opening Brief") (Dkt. 56), a plain reading of the statutory definitions of "threatened species" and "endangered species" shows that the key difference between the two is

the timing of the threat of extinction. Intervenors' Op. Br. at 13-14; *see also* Federal Defendants' Opposition and Partial Motion for Summary Judgment on The Listing Claims ("Federal Defendants' Opening Brief") (Dkt. 53) at 15-16. An endangered species "*is* in danger of extinction," while a threatened species "is *likely to become* an endangered species *within the foreseeable future*." *Compare* 16 U.S.C. § 1532(6) *with* 16 U.S.C. § 1532(20) (emphasis added).

In a footnote, Plaintiffs attempt to deny this plain reading of the statute by characterizing it as an "echo" of a theory the Service advanced in the polar bear litigation and that this Court rejected. Pl. Reply at 5 n.3. To the contrary, this Court's decision acknowledged the temporal distinction between threatened and endangered species established by the language of the Act. *In re Polar Bear Endangered Species Act Listing*, 748 F. Supp. 2d 19, 26-27 and n.13 (D.D.C. 2010) ("As defendant-intervenor AOGA correctly noted, an endangered species 'is' in danger of extinction, in the present tense, whereas a threatened species is 'likely to become' so endangered."). Thus, the Service properly does *not* include a species' "foreseeable future" in its evaluation of whether the species *currently* qualifies as an endangered species.

The Service must, as it did here, focus its analysis of whether a species qualifies as an endangered species on the species' current status. In the Determination section of the Final Rule, the Service first addressed whether the northern long-eared bat was eligible for the lower level of protection as a threatened species, finding that "[t]he spread of WNS and its expected impact on the northern long-eared bat are reasonably foreseeable, and thus the species is likely to become an endangered species within the foreseeable future." 80 Fed. Reg. at 18021. The Service then addressed whether the species' status was such that it would qualify for designation as an endangered species at the time of listing, concluding that "it is not *at the present tim*e in danger of extinction." *Id.* (emphasis added). The temporal distinction the Service applied when

evaluating the level of protection appropriate for the northern long-eared bat is consistent with the statute. The Court should reject the Plaintiffs' attempts to graft the "foreseeable future" into the definition of "endangered species."

B. The Service Reasonably Applied the Term "In Danger of Extinction."

Plaintiffs believe the northern long-eared bat should have been listed as an endangered species and that the threshold the Service used to determine if the species is "in danger of extinction" is incorrect. However, because Plaintiffs built up and argued against a strawman definition instead of addressing the interpretation of "in danger of extinction" that the Service actually applied, their arguments provide the Court no basis upon which to find that the Service's reasonable interpretation and application of the phrase are in error.

The Service has interpreted the phrase "in danger of extinction" as "currently on the brink of extinction" to give effect to the temporal distinction between threatened and endangered species established in their respective definitions in the ESA. *See* Fed. Def. Op. Br. at 15-16. As explained in the Federal Defendants' Reply In Support of Their Motion for Partial Summary Judgment on the Listing Claims ("Federal Defendants' Reply") (Dkt. 63), this interpretation reflects the Service's historical practice. *See* Fed. Def. Reply at 5. It is informed by the agency's understanding of the Act developed over years of applying these concepts to hundreds of species. The Supplemental Explanation for the Legal Basis of the Department's May 15, 2008, Determination of Threatened Status for Polar Bears, dated December 22, 2010 ("Polar Bear Memorandum"), summarizes the agency's past practice and decision-making for the process. The Service is charged with applying statutory terms consistently across species in a wide variety of circumstances. Accordingly, the Service was prudent and reasonable to compare its conclusions on the status of the northern long-eared bat against its past practice as summarized in the Polar Bear Memorandum.

The Plaintiffs argue that "currently on the brink of extinction" is the equivalent of "functionally extinct in the wild," and, from there, argue that the Service's interpretation is contrary to the ESA because "Congress directed FWS to list a species like the Bat as endangered where it is 'in danger of extinction,' not to wait until the extinction event itself is imminent and certain." Pl. Reply at 4. A brief glance at 50 C.F.R. § 17.11 is sufficient to put to rest the specter of the vanishing "endangered" category in which species reside only briefly before continuing on an "irreversible" "extinction trajectory." Pl. Reply at 4-5. Currently 1,839 species are listed as endangered, and many have been so listed for years without becoming "functionally extinct in the wild." 50 C.F.R. § 17.11; U.S. Fish and Wildlife Service, Environmental Conservation Online System, https://ecos.fws.gov/ecp/ (last visited Sep. 26, 2017). Indeed, some have improved and even recovered. *See, e.g.*, 72 Fed. Reg. 37346 (July 9, 2007) (delisting the bald eagle); 81 Fed. Reg. 13124 (March 11, 2016) (delisting the Louisiana black bear). Plaintiffs' actual dispute is not with the Service's interpretation of "in danger of extinction" but with the Service's determination that, at the time of listing, the northern long-eared bat was not "currently" in danger of extinction. As discussed in Section II below, the Plaintiffs have not demonstrated error in the Service's decision regarding the imminence of the threat of extinction for this species.

C. The Service's Determination of "Foreseeability" is Appropriate for the Northern Long-Eared Bat.

Contrary to that law in this Circuit that the question of what is "foreseeable" must be determined on a species-by-species basis, *see In re Polar Bear Endangered Species Act Listing*, 709 F.3d 1, 15-16 (D.C. Cir. 2013), Plaintiffs maintain that the Service's analysis of the northern long-eared bat's "foreseeable future" is flawed because it allegedly lacks a "correlation of each threat with the life history of the species, including different life history stages and multiple

generations." Pl. Reply at 10-11. The procedural requirement Plaintiffs are attempting to create has no support in law, but more importantly, the alleged flaw in the Service's analysis has no relevance to the question before the Court: whether the Service erred in determining that the northern long-eared bat did not meet the statutory definition of "endangered species."

As discussed in Section I.A. above and in Intervenors' Opening Brief at 16, a species' "foreseeable future" is applicable only to the question of whether a species should be listed as a threatened species. By law, the Service may list a species as an endangered species only if the species' *current* status warrants the designation. Put another way, the only reason a species' foreseeable future is used in a listing analysis is to determine if the threats to the species are imminent enough to merit listing as a *threatened* species. *See In re Polar Bear Endangered Species Act Listing*, 709 F.3d at 15-16 (upholding the Service's decision to list the polar bear as a threatened species against a challenge that the Service failed to justify the 45-year time period used as the "foreseeable future" for the species); *Or. Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1151-53 (D. Or. 1998) (holding that NMFS did not provide a reasonable definition of "foreseeable future" for the Oregon coho salmon in declining to list it as a threatened species). Here, the Service found, and no party disputes, that the threat WNS poses to the northern long-eared bat is sufficiently imminent that the species is likely to become endangered in the foreseeable future. *See* Intervenors' Op. Br. at 17-19. However, the Service's determination at the time of listing that the bat is likely to become an endangered species within the foreseeable future, by definition, means it was not then an endangered species.

Regardless of the relevance of the issue to the merits of their Complaints, the Plaintiffs argue that agency guidance requires a rigid evaluation of a species' "foreseeable future" that they deem more favorable to their position. *See* Pl. Reply at 10-11 (citing "The Meaning of

'Foreseeable Future' in Section 3(20) of the Endangered Species Act," M-37021 (Jan. 16, 2009) (Dkt. 52, Ex. 2) ("M-Opinion 37021")). The guidance upon which they rely, however, is not so prescriptive. M-Opinion 37021 explains that "some aspects of any analysis will vary depending on the species and the facts at issue, " and that the "five-factor analysis [described by the guidance] *usuall*y begins by identifying the life history of the species." *See, e.g.*, M-Opinion 37021 at 5 (emphasis added). Most significantly, the section of the M-Opinion that Plaintiffs cite as a binding procedural requirement explicitly explains that its "discussion describes a framework *often* used to make determinations under Section 4(a)(1). It provides a background for the analysis of 'foreseeable future' in this memorandum. *Other formats have been used, and the use of a particular framework as an example is not meant to suggest that others are not valid*." *Id.* at 5 n.5 (emphasis added).

When evaluating whether the northern long-eared bat merited protection as a *threatened* species, the Service properly evaluated the threats to the species, and focused on the rate of advance of WNS, the primary threat, without which "the species would likely not be imperiled." 80 Fed. Reg. at 18006. Although the Final Rule demonstrates that the Service engaged in a detailed analysis of the northern long-eared bat's foreseeable future, *see* 80 Fed. Reg. at 17996-98, 18010-11, the decisive analysis for this species is straightforward because of the nature of the threat posed by WNS to all members of the species, regardless of life stage. In the Determination section of the Final Rule, the Service summarized its analysis as follows. First, it noted that WNS is estimated to spread throughout the species' range in 2-40 years, with the most probable estimate being 8-13 years. Then the Service analyzed the impact of WNS on the northern long-eared bat population as it spreads, explaining that within a few years of WNS reaching a colony, the Service expects "substantial losses of bats" in the colony. *Id.* at 18021.

Thus, the key factor for the Service in determining the foreseeable future of the northern long-eared bat is not *how* WNS interacts with bats, but *when* it reaches bats currently unaffected by the disease. Requiring more discussion, or that the analysis be repackaged into a format acceptable to the Plaintiffs, would do nothing to change the conclusion with which all parties to this litigation agree: that the northern long-eared bat is in danger of extinction in the foreseeable future.

D. The Service Properly Applied the Statutory Standards Related to "Significant Portion of the Range."

Plaintiffs devote over 20 pages to their concept of how the Service should evaluate whether a species in danger of extinction in a "significant portion of its range." Pl. Reply at 28-49. Their lengthy argument cannot be reconciled with the ESA's clear distinction that a species is either threatened or endangered, but not both. The Service aptly explains why the Plaintiffs' attempts to call into question the legality of the "Significant Portion of the Range" policy falls short. Fed. Def. Reply at 20-32. It is worth reiterating that the Service cannot apply an analytical framework, such as the one the Plaintiffs prefer, that evaluates the status of a species in the "significant portion of the range" in a way that could result in the species simultaneously qualifying for both designations.

In an apparent attempt to rebut the Service's position that Section 4(a)(1) instructs to the Service to "determine whether any species is an endangered *or* a threatened species," 16 U.S.C. § 1533(a)(1) (emphasis added), the Plaintiffs assert that "there is no canon of statutory interpretation establishing that the use of 'or' signifies mutually exclusive terms." Pl. Reply at 37. No special canon of construction is necessary. As the Supreme Court has repeatedly noted, ordinary English usage dictates "or" in a list of items has a disjunctive meaning—unless some special contrary context of the statute dictates otherwise. *See, e.g., RadLAX Gateway Hotel v.*

Amalgamated Bank, 132 S. Ct. 2065, 2072 (2012) (holding that where the disjunctive "or" is used to separate three clauses "the question . . . is not whether debtors must comply with more than one clause, but rather *which one of the three* they must satisfy.") (emphasis added); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless context dictates otherwise . . ."); *FCC v. Pacifica Found.*, 438 U.S. 729, 739-740 (1978) ("The words 'obscene, indecent, or profane' are written in the disjunctive, implying that each has a separate meaning."). There is no contrary textual or structural context in the ESA that suggests "or" should be given a different meaning here.

Indeed, the structure of the ESA and its statutory definitions of "endangered" and "threatened" species require that the categories be distinct. Congress defined a "threatened species" as one that is *likely to become* an endangered species. Pursuant to the canon of construction *expressio unius est exclusio alterius*, one must conclude that a threatened species cannot simultaneously be an endangered species and a threatened species *See NLRB v. SW General, Inc.*, 137 S. Ct. 929, 940 (2017) ("expressing one item of an associated group or series excludes another left unmentioned") This is because Congress included in the category of "threatened species" only those species "likely to become endangered species in the foreseeable future," leaving currently endangered species unmentioned and therefore excluded.

Plaintiffs offer no rebuttal to the Federal Defendants' persuasive argument that the plain language of the definitions of "threatened" and "endangered" species, as well as the disjunctive "or" used in Section 4(a)(1), require that an individual species may not simultaneously qualify for both designations. The court should uphold the Service's analytical methods that precluded such a result for the northern long-eared bat.

II. The Service's Scientific Conclusions Supporting Its Listing Determination Are Supported With Record Evidence.

In their Reply, the Plaintiffs heighten their attacks on the record evidence and the scientific conclusions the Service drew from that evidence in support of its determination that the northern long-eared bat is a threatened, but not endangered, species. The Federal Defendants have already defended their well-reasoned and well-documented conclusions in the Federal Defendants' Reply at 5-19. Intervenors offer the following supplement to further support the arguments made by the Federal Defendants.

First, Plaintiffs' complaint that the proposed and final rule drew different conclusions from the data on WNS (Pl. Reply at 15) does not account for the Service's refinement of its evaluation of that data between the October 2, 2013 proposed rule, 78 Fed. Reg. 61046 (Oct. 2, 2013) ("Proposed Rule") and the Final Rule. The Plaintiffs claim that "the point" of the criticism is that "FWS did not base its threatened determination on any new data of the observed rate of spread." Pl. Reply at 15. However, as explained in Intervenor's Opening Brief, the Service's conclusion in the Final Rule was not driven by new data, but by a closer and more rigorous examination of the existing data and models on the spread of WNS. *See* Intervenors' Op. Br. at 22-23. The increased rigor produced a more reliable estimate of the rate of spread. *Id*. In the Proposed Rule, the Service merely noted the existence of models. 78 Fed. Reg. at 61064-65 ("A few models have attempted to project the spread of *Geomyces destructans*[1] and WNS, and although they have differed in the timing of the disease spreading throughout the continental United States, all were in agreement that WNS will indeed spread throughout the United States."). The Final Rule's analysis of the models identified specific limitations in the models

[1] In the final rule, the Service identifies the causative fungus as *Pseudogymnoascus destructans*, reflecting updated scientific understanding of the fungus.

and reflects the benefit of additional observation time to compare the rate of spread detected in the field against the models' predictions to better assess their usefulness. The Service explained the "significant limitations" of the models ("*e.g.*, failure to account for: Transmission through non-cave hibernacula, spread through Canada, and various biological aspects of disease transmission") and noted that "in many instances" the models have "either overestimated (predicted WNS would impact later) or underestimated the time at which WNS would arrive in counties that have become infected since the model was published." 80 Fed. Reg. at 17997. For that reason, the Service chose to rely on the "observed rate of spread" in the Final Rule "to develop a calculation of projected rate of spread through the remaining portion of the northern long-eared bat's range." *Id.* at 17997-98. This improved analysis of the rate of spread of WNS was highly relevant to the Service's determination of whether the northern long-eared bat was either "currently" in danger of extinction or "likely to become"—but not yet—in danger of extinction.

Second, Plaintiffs wholly misunderstand the Service's position on survey data. The Plaintiffs claim that the Service's use of summer mist net survey data is improper because the Service "had already found that the best available scientific data to determine the Bat's status comes from population trend data from winter hibernacula counts." Pl. Reply at 22. Plaintiffs' assertion is inconsistent with the Service's explanation of the relative merits of survey data in the Final Rule. As noted in Intervenors' Opening Brief at 5, in the Final Rule the Service refined its discussion of survey types and data in response to public comments. The Service acknowledged that northern long-eared bats "may favor small cracks or crevices in cave ceilings, making locating them more challenging during hibernacula surveys than other species." 80 Fed. Reg. at 17996. It nevertheless maintained that it believed winter hibernacula surveys "represent the best

available data for assessing population *trends*." *Id.* (emphasis added). In response to comments the Service further explained that it does not use hibernacula counts to estimate population *size*:

> Despite the difficulties in observing or counting northern long-eared bats, winter hibernacula counts are the recommended method, and the only method with enough history to assess trends over time, for monitoring northern long-eared bats. Hibernacula surveys are considered the best available data for cave-dwelling bats in general. *However, in recognition of the limitations of these data, we generally do not use the available hibernacula counts to estimate northern long-eared bat population size.* Instead, we use the hibernacula data to understand and estimate population trends for the species. The relative difficulty of observing northern long-eared bats during hibernacula studies should be consistent from year to year, and these data can be used to estimate relative change in numbers and indicate if the species is increasing or decreasing in number in those hibernacula. Thus, the total data available for known northern long-eared bat hibernacula can yield an individual site and cumulative indication of species population trend; the declines estimated at hibernacula are also corroborated by declines in acoustic records and mist-net captures in summer.

80 Fed. Reg. at 18008 (emphasis added); *see also id*. at 18010-11 (same). Plaintiffs err when they assert that the Service's use of population trend data to assess the species' status indicates that other data have no place in the Service's analysis. To the extent the number of individual northern long-eared bats remaining in the wild is relevant to the Service's listing decision—and Plaintiffs do not suggest that the species' population size is irrelevant—the Service properly used data from survey methods better suited to estimate population *size* rather than population *trends*.

III. The Procedures the Service Used to Evaluate the Northern Long-Eared Bat Are Reasonable and Lawful.

A. The Final Rule is a Logical Outgrowth of the Proposed Rule.

Despite acknowledging that "a threatened determination is one of three potential outcomes (endangered, threatened, or not warranted) of any final ESA listing decision"—the Plaintiffs claim that "the final threatened listing rule for the Bat was by no conceivable metric a logical outgrowth of the proposed endangered listing rule." Pl. Reply at 26. Plaintiffs' position defies reason. The Proposed Rule specifically stated that the Service would consider public

comments and may change its determination based upon information received. 78 Fed. Reg. at 61046. Indeed, Plaintiffs were sufficiently on notice of the potential for a designation other than "endangered" that they commented on the possibility. *See* Intervenors' Op. Br. at 8 (quoting SuppAR 68191, SuppAR 40661). This is a textbook example of a change in position that passes the logical outgrowth test: interested parties understood that the change was possible and filed comments on the subject. *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009).

Plaintiffs' argument that the Final Rule is not a logical outgrowth of the Proposed Rule because they were allegedly unaware that the Service may consider the Polar Bear Memorandum and the "four rationales" identified in support of the Final Rule, relies on a misreading of case law. Plaintiffs cite *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001), in which the court examined whether the Service should have provided an additional public comment period on a study cited in the final rule, but not made available during public comment. The court noted that the Administrative Procedure Act "generally obliges an agency to publish for comment the technical studies and data upon which it relies." *Id.* at 1246 (citing *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (per curiam)). But the court noted that "a final rule that is a logical outgrowth of the proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period." *Id.* Thus, the threshold question is whether the final rule itself is a logical outgrowth of the proposed rule, not whether all data and studies cited in the rule could have been anticipated by the public. Indeed, *Building Industries* held that the final rule was a logical outgrowth of the proposed rule and the additional study did not trigger an additional public comment period.

In this case, the decision to list the northern long-eared bat as a threatened rather than endangered species was an obvious possibility at the time the Proposed Rule was issued. The record indicates that Plaintiffs did, in fact, anticipate that the Service may consider the legal analysis in the Polar Bear Memorandum and the facts underlying the four rationales. Comments filed by Plaintiff Center for Biological Diversity, a party to the litigation in which the Polar Bear Memorandum was developed, used wording that closely mirrors the language the Polar Bear Memorandum used to describe a fact pattern for species found to be in danger of extinction (*i.e.*, endangered). *Compare* CBD Jan. 2, 2014 Comments (SuppAR 3542, 3543) ("In fact, for bat populations drastically reduced by the fungal disease, other threats may now be more influential and proportionately more harmful than these same threats were pre-WNS. This is because these other threats are now acting on small, extremely vulnerable populations, highly susceptible to sudden stochastic events as well as slow, small, but chronic losses.") *with* Polar Bear Memorandum at 5 (third category is defined as "those species that were formerly more widespread that have been reduced to such critically low numbers or restricted ranges that they were at a high risk of extinction due to threats that would not otherwise imperil the species."). Similarly, Plaintiff Center for Biological Diversity's August 22, 2014 comments indicate that it was monitoring comments submitted by other parties and was aware of the facts and arguments related to the status of the species at the time of listing that the Service would eventually articulate as the "four rationales." *See* CBD Aug. 22, 2014 Comments (SuppAR 40661, 40663) ("Some opponents of endangered species listing have asserted that recent summer bat surveys, unlike hibernacula surveys, indicate that the northern long-eared bat is still abundant.").

B. Plaintiffs Have Not Rebutted the Presumption of Regularity.

Agencies are entitled to a presumption of regularity and good faith. *F.T.C. v. Bisaro*, 757 F. Supp. 2d 1, 10 (D.D.C. 2010) (quoting *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966,

975 (D.C. Cir.1980)). Plaintiffs claim that "ample record evidence" rebuts the presumption of regularity, Pl. Reply at 1 n.1, citing their unsupported claims in their Opening Brief that the procedures used to develop and write the Final Rule were "highly irregular" and their merits arguments challenging the listing decision. Neither of these is sufficient to rebut the presumption.

First, to the extent the procedures are different than the Plaintiffs or even the Court would have chosen, the agency has the latitude to make such decisions. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543-45 (1978). Moreover, the procedures garnered wide support from within the agency across several regions, indicating that those most likely to know if a procedure is adopted in bad faith by agency management had no such concerns. *See* Intervenor's Op. Br. at 6-7. Indeed, the procedures used by the Service are facially superior than those now advocated by the Plaintiffs. In their Reply, Plaintiffs argue that the Service should have been restricted from evaluating any information not included in the white paper summarizing the best available science for the regional directors when they made their interim decision on the listing determination. Pl. Reply at 17; *see also id.* at 21 n.16. Locking both the record and the agency's decision as of that meeting would have precluded the Service from considering public comments received during the final public comment period, as Plaintiffs, themselves, complained in their Opening Brief. *See* Plaintiffs Partial Motion for Summary Judgment on Their Listing Claims (Dkt. 52) at 41-44. However, the Service did no such thing. The decision reached in December 2014 was understood by all within the agency to be an interim decision and subject to change if appropriate based on any and all information before the agency. *See* Intervenors' Op. Br. at 6-7, 11-12.

Second, agencies often make decisions that are opposed by some members of the public. The mere fact that the Plaintiffs can muster arguments against the decision the Service made to list the northern long-eared bat as a threatened species cannot be sufficient to demonstrate that the agency acted in bad faith. If disagreement with the agency's decision were enough to rebut the presumption of regularity, very few agency actions would ever be entitled to the presumption. Plaintiffs have presented no actual evidence to support their claim that the Service is not entitled to the presumption of regularity. Therefore, the Court should disregard Plaintiffs' unsupported complaints about the Service's decision-making process.

CONCLUSION

The Associations respectfully request that the Court deny Plaintiffs' motions for summary judgment and grant summary judgment in favor of the Federal Defendants and Defendant-Intervenors.

Dated this 29th day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2017, I caused to be electronically filed the foregoing document, Defendant-Intervenors' Reply in Support of Their Cross-Motion for Partial Summary Judgment, with the clerk of the court for the United States District Court for the District of Columbia using the CM/ECF system.

/s/ John C. Martin
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