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' BRIEF IN OPPOSITION TO PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT AND DEFENDANT-INTERVENORS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Local Civil Rule 7(h), and the Court's February 22, 2017 Minute Order, Defendant-Intervenors American Exploration & Production Council, American Farm Bureau Federation, American Forest & Paper Association, American Petroleum Institute, Black Hills Forest Resource Association, Chamber of Commerce of the United States of America, Forest Landowners Association, Forest Resources Association, Great Lakes Timber Professionals Association, Hardwood Federation, Independent Petroleum Association of America, Marcellus Shale Coalition, National Alliance of Forest Owners, National Association of Home Builders, New Hampshire Timberland Owners Association, Ohio Oil and Gas Association, Pennsylvania Independent Oil and Gas Association, Southeastern Lumber Manufacturer's Association, Inc. and West Virginia Oil and Natural Gas Association ("the Associations"), hereby move 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. The Associations respectfully submit the accompanying memorandum of points and authorities in support of the Associations' cross-motion for summary judgment and in response to Plaintiffs' Partial Motion for Summary Judgment on their listing claims.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
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
Service	U.S. Fish and Wildlife Service
SuppAR	Supplemental Administrative Record
WNS	White-nose syndrome

INTRODUCTION

Each species evaluated for protection under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, presents a distinct fact pattern, but even within this diverse group, the northern long-eared bat (*Myotis septentrionalis*) is an outlier. As recently as 2005, the species was stable and thriving across a significant portion of North America, including the highly developed northeastern region of the United States. However, the northern long-eared bat has proven unusually susceptible to an exotic pathogen, the fungus *Pseduogymnoacus destructans* ("Pd"), whose effects were first observed in North America in 2006. Pd is believed to be the cause of white-nose syndrome ("WNS"). In areas known to be affected by WNS, the observed populations of northern long-eared bats have declined substantially. Although the progress is not linear, the disease appears to be progressing from the original point of infection across the range of the northern long-eared bat. At the time of listing, the United States Fish and Wildlife Service ("Service") estimated that WNS had reached approximately 60% of the species' range, while in the remaining 40%, the species was stable. If current trends continue, at some point in the future, regardless of what legal protection may be afforded to the species under the ESA, the northern long-eared bat may become extinct.

The question before the Service when determining whether to list the species was one of timing: at the time of listing, had WNS progressed so far that the species was, in April 2015, "on the brink of extinction" or was the risk of extinction foreseeable but not yet present? There is no bright line in the progression of the disease at which the risk of extinction becomes "current" as opposed to "foreseeable." Therefore, to fulfill its obligations under the ESA, the Service evaluated the best available information on the species and ultimately identified four key factors indicating that, at the time of listing, the risk of extinction was foreseeable, but not yet present.

The Service therefore listed the northern long-eared bat as a threatened species. 80 Fed. Reg. 17974 (Apr. 2, 2015).

This decision had important implications for the Associations and the public because, by declining pressure to "overlist" the northern long-eared bat—*i.e.*, list it as an endangered species when it did not meet the statutory standard for the status—the Service maintained the discretion Congress intended it to have to adopt targeted rules for the conservation of the species. The Service used that discretion in this case to develop tailored protective measures designed to minimize the impact of WNS where it occurs. These provisions have the additional benefit of avoiding the onerous procedural and substantive restrictions on the public that would accompany listing an endangered species and, in the case of the northern long-eared bat, would do little good to protect the species.

The Plaintiffs challenge the Service's interpretation of three statutory terms, "in danger of extinction," "foreseeable future," and "throughout all or a significant portion of its range," and in each case the Plaintiffs' argument fails. First, the Service's interpretation of "in danger of extinction" gives meaning to the temporal distinction Congress made between threatened and endangered species. The Plaintiffs do not dispute this distinction; they merely disagree with the Service's expert judgment about the imminence of the threats to the northern long-eared bats. Second, misapplying a formal agency interpretation and the Service's rationale for its decision to list the polar bear as a threatened species, the Plaintiffs argue that a "foreseeability" analysis must include a discussion of how the species' life history "relates" to the threats the species faces. Courts, however, have agreed with the agency that foreseeability must be determined on a species-by-species basis. Here, as in the polar bear listing, the Service rationally focused its attention on the rate at which the threats to the species were advancing when analyzing whether

the northern long-eared bat was likely to become an endangered species in the foreseeable future. Finally, the decision-making approach urged by the Plaintiffs to determine if a species is threatened or endangered "throughout all or a significant portion of the range" has the potential to violate the statute by yielding a species simultaneously qualifies as a threatened *and* an endangered species—a circumstance that the Plaintiffs argue should actually be the case for the northern long-eared bat. The Service properly adopted a decision-making approach that is consistent with the statute and avoids this result.

The Service applied its expert judgment based upon the best available information to determine that the northern long-eared bat qualifies as a threatened species, but is not yet an endangered species. The Plaintiffs argue that the Service should have interpreted and weighed the evidence differently, but they identify no legal error in the agency's scientific analysis or lack of rationale in its judgments. And, despite the Plaintiffs' insinuations to the contrary, the public notice and comment procedures as well as the internal review procedures employed by the Service as it reviewed the status of the northern long-eared bat and exercised its judgment to apply the ESA's listing standards were proper.

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.

BACKGROUND

The Associations incorporate by reference the legal and factual background provided in the Federal Defendants' Opposition and Partial Motion for Summary Judgment on the Listing Claims, ECF No. 53 at 3-7 ("Fed. Def. Br."), with the following supplement. *See* Memorandum

in Support of Motion to Intervene, ECF No. 32, Ex. 1 at 1 ("Intervenor-Defendants agree to 'stagger' briefing to file after the Federal Defendants and avoid unnecessary repetition . . .").

The Service undertook a careful examination of the northern long-eared bat, properly soliciting information from the states and the public to better inform its decision. The lengthy public process is reflected in the following table.

October 2, 2013	78 Fed. Reg. 61046	Proposed rule published with a 60-day public comment period.
December 2, 2013	78 Fed. Reg. 72058	Public comment period extended an additional 30 days.
June 30, 2014	79 Fed. Reg. 36698	Service announces it will take additional 6 months to issue decision and re-opens public comment, soliciting comments through August 29, 2014.
November 18, 2014	79 Fed. Reg. 68657	Service reopens public comment for an additional 30 days to December 18, 2014.
January 16, 2015	80 Fed. Reg. 2371	Service publishes a proposed interim 4(d) rule for the species and re-opens public comment on the listing decision for an additional 60 days.
April 2, 2015	80 Fed. Reg. 17974	Service lists the northern long-eared bat as a threatened species and adopts an interim 4(d) rule.

The multiple, extended public comment periods served two purposes. First, they provided the public with ample opportunity to review and comment on the information upon which the Service would base its decision. Notably, the Service opened the public comment period on November 18, 2014 for the express purpose of allowing the public to comment on the data provided by the states. 79 Fed. Reg. 68657, 68659 (November 18, 2014); *see also* LAR 66712.

Second, the public comment process provided the Service with data and information—as it evolved over time—that improved and expanded its knowledge of the species, the threats facing the species, and the quality of the agency's decision-making. For example, as a result of data submitted by states and the public, the Service became aware that the population of northern long-eared bats in southeastern states such as Tennessee and Kentucky was larger than it had believed at the time it proposed to list the species. 80 Fed. Reg. 17974, 18009. This larger population is reflected in the Service's rough estimate of the numbers of northern long-eared bats on the landscape in the Final Rule. *Id.* ("We have corrected this in the final listing rule within the 'Southern Range' section of the *Distribution and Relative Abundance* discussion . . ."). The Service also clarified its discussion of the various ways to survey northern long-eared bats. The Service's "preferred" method is winter hibernacula counts, but upon extensive comments from states and the public arguing that the Service was relying upon flawed information by preferring winter hibernacula counts over summer surveys, the Service explicitly discussed the merits and drawbacks of each form of survey and better explained how it was using winter hibernacula counts (*i.e.* to discern a relative trend in population rather than estimate overall population size). *See id.* at 17996, 18008, 18010. The final decision also reflects a better understanding of the threats facing the northern long-eared bat. For example, it demonstrates a much more sophisticated understanding of the role of forest management in the conservation of the species.

Whereas the proposed rule focuses only on timber removal, the final rule expressly notes the beneficial role that many forest management activities play for the conservation of the species and identifies the specific activities that pose a risk to the species. *Compare* 78 Fed. Reg. 61046, 61059-61 (Oct. 2, 2013) *with* 80 Fed. Reg. 17974, 17990-93 (Apr. 2, 2015).

With this improved information, the Service was able to develop a more rigorous evaluation process. After the Service had obtained state data and while that information was available for public comment, the Service developed a white paper summarizing the best available science on the northern long-eared bat. LAR 66753. This document synthesized the Service's best scientific understanding of the species and the threats it faced. *Id.* ("This White Paper serves as a reference guide to the best available scientific and commercial information pertinent to the proposal to list the Northern long-eared bat. . . . [T]he drafters believe this document contains the best available scientific information in support of any outcome."). The document was provided to the Regional Directors charged with making a listing determination. LAR 41029 (official distribution of white paper). Those officials convened for a conference in which they analyzed the best available information on the species against the statutory listing standards. *See* LAR 41021 (agenda); LAR41141 (demonstrative for meeting identifying statutory listing factors and typical fact patterns of endangered species). Ultimately the decision-makers reached a preliminary decision. *See* LAR 43011 (summary of key points of preliminary determination). Various personnel within the agency were then charged with drafting sections of the listing determination within the areas of their expertise. However, throughout the drafting process it was clear that the determination being drafted was a preliminary one, and that "all available options" remained open for listing should the ultimate decision-makers determine that the preliminary decision was incorrect. *See, e.g.*, LAR 66816 (Memo to Regional Director on

Next Steps, dated March 3, 2015) ("[a]ll available options remain: list as Endangered, list as Threatened, list as Threatened with a 4(d) Rule, or do not list."). Ultimately, the drafting teams developed a comprehensive articulation of the Regions' joint preliminary determination that earned the endorsement of the affected regions. *See, e.g.*, LAR 55148 (Region 4 position) ("we agree that this section provides a clear and logical rationale for the change in status, from endangered to threatened" and agree with the statement that "the northern long-eared bat resides firmly in this category where no bright line exists to differentiate between endangered and threatened"); LAR 55146 ("I think it lays out a strong case for T or E. R6 supports this direction . . ."); LAR 57792 ("Given the wide-ranging nature of this species, I think you all did a great job bringing the best science to the decision, and facilitating the decision in a transparent and structured process."). Based upon the best available information and its careful application of the statutory standards, the Service listed the northern long-eared bat as a threatened species on April 2, 2015.

ARGUMENT

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

A. The Service's Public Notice and Comment Procedures Complied with the APA and ESA.

The Plaintiffs claim that the threatened designation was not a logical outgrowth of the proposed rule to list the northern long-eared bat as an endangered species because it relied on "brand-new rationales." Plaintiffs' Partial Motion for Summary Judgment on Their Listing Claims, ECF No. 52 at 42 ("Pl. Br."). The Plaintiffs argue that any change in designation from the Service's proposed "endangered" rule requires a notice of the change of designation and the "new" rationales to support the changed designation along with a new comment period. *Id.* at 41-44. Neither the ESA nor the Administrative Procedure Act requires this. *See* 16 U.S.C. §

1531 *et seq.*; 5 U.S.C. § 500 *et seq.* To the contrary, as the Service notes, an agency is required to provide additional opportunity for notice and comment on a proposed rule only if the final rule is not a "logical outgrowth" of the initial proposal. Fed. Def. Br. at 53-55; *Natl. Mining Ass'n v. Mine Safety and Health Admin.*, 512 F.3d 696, 699 (D.C. Cir. 2008). "A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (internal quotations omitted).

For the reasons identified by the Service, in the context of an ESA listing, the Plaintiffs were well aware that a change from an endangered listing to a threatened listing was possible. Indeed, the Plaintiffs commented on the possibility of a designation change in their comments and opposed it on substantive grounds. SuppAR 68191 (Center for Biological Diversity comments) ("The call by opponents for a downgraded listing status as threatened . . . disregards the weight of evidence concerning the species' current vulnerability and attempts to elevate speculation about the disease's future course to the status of credible theory . . ."); SuppAR 40661 (Center for Biological Diversity comments, joined by Defenders of Wildlife) ("We take issue with the claims of those calling for FWS to list the northern long-eared bat as threatened rather than endangered."). The ESA expressly limits the range of a rulemaking outcome to three: list the species as an endangered species, list the species as a threatened species, or do not list the species. The agency must elect one of the three. And it must make that election upon reasoned consideration of the record before it. None of these three options can be fairly argued to be a "surprise" at the conclusion of a listing process.

Moreover, changes in listing status after public comment period are relatively common in ESA practice. A review of the listing process for currently listed species shows that sixty-one species were initially proposed as one designation, and given a different designation in the final rule. *See* Exhibit 1 (Species With Status Changes During Listing Process). Of these sixty-one species, the majority were proposed as endangered and ultimately listed as threatened. In each of these cases except for one, the relevant federal agency did not issue a new proposed rule before issuing the final rule changing the species' listing status. Indeed, these circumstances are so common that Plaintiff Center for Biological Diversity has already experienced it at least once. *See* 79 Fed. Reg. 10236 (Feb. 24, 2014) (listing the Georgetown salamander and Salado salamander as threatened species after initially proposing to list them as endangered species and noting that Plaintiff Center for Biological Diversity had petitioned to list the species). The Plaintiffs have presented no argument as to why the change of designation for the northern long-eared bat was any different than the 60 other times the Service has made the same change. Decades of practice support the agency's well-reasoned legal position that neither the APA nor ESA require the Service to provide an opportunity for public comment on a "new rationale" because a change is listing status is a logical outgrowth of the proposed rule. Therefore this argument should be rejected.

B. The Service Has the Discretion to Adopt Internal Work Flow Processes Appropriate to a Given Species.

"Until evidence appears to the contrary," the procedures by which the Service evaluates the northern long-eared bat 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)); *see also Friedman v. Fed. Aviation Admin.*, 841 F.3d 537, 541 n.1 (D.C. Cir. 2016) ("Without evidence to the contrary, we must presume an agency acts in

good faith.") (internal quotations omitted); *Abington Mem'l Hosp. v. Burwell*, 216 F. Supp. 3d 110, 139 (D.D.C. 2016) (relying on the "well-established principle that the Court must presume the validity of the agency's action [.]"). The Plaintiffs have presented no evidence rebutting this presumption.

The Plaintiffs claim, without support, that the Service "creat[ed] a process that allowed the regional directors to reach their decision on the determination independent of the scientists evaluating the Bat's conservation status in drafting the final rule[.]" Pl. Br. at 42. To the contrary, the Service's process included extending the notice-and-comment period on the proposed rule four times and hosting a public hearing, allowing significantly more time for interested parties to share with the Service concerns, claims, arguments and, of course, additional scientific bases regarding the northern long-eared bat and its designation. Indeed, the record reflects that the agency carefully analyzed the best available information and applied it to the statutory standards. *See supra* at 7-9. The Plaintiffs' claims that the Service created this process to avoid the science is specious, unfounded and cannot rebut the presumption that the Service's process was one of "regularity" and "validity." *F.T.C. v. Bisaro*, 757 F. Supp. 2d at 10; *Abington*, 216 F. Supp. 3d at 139.

Similarly, the Plaintiffs' insinuations that the agency's determination was improperly influenced by the significant public attention to the listing fall well short of the standard established by the Court of Appeals for identifying improper political influence. *Aera Energy LLC v. Salazar*, 642 F.3d 212, 224 (D.C. Cir. 2011). "[P]ublic advocacy plays a healthy role in our system," *id.*, and the Plaintiffs overreach in their suggestion (Pl. Br. at 15-16) that congressional interest and legislation and comments from affected states, industry, or members of the public are improper. *Aera Energy*, 642 F.3d at 224 ("We have held that congressional

actions not targeted directly at [agency] decision makers—such as contemporaneous hearings—do not invalidate an agency decision."). It is only when "political pressure crosses the line and prevents an agency from performing its statutorily prescribed duties" that a court may remand the matter for the agency to reevaluate the decision. *Id.* The Plaintiffs do not claim that such circumstances existed here, nor could they on the record here.

Moreover, the Plaintiffs' claims that the Service's threatened designation was predetermined are unsupported by the record. As evidence, the Plaintiffs point to meeting notes from a "NLEB Decision maker Meeting," held on December 16, 2014, just a month before the Service issued the proposed threatened rule, where participants extensively debated a threatened versus an endangered designation and discussed the nature of a 4(d) rule. LAR58575; *see also* NLEB03571-80 (notes from the same December 16, 2014 NLEB meeting). The Plaintiffs also rely on Service email correspondence discussing the process of informing public of a "*preliminary* decision to list as threatened and the *plan* to move forward with a 4d rule" (LAR43029 (emphasis added)) and addressing the public's concern that the Service had pre-decided threatened listing because all "conservation measures," including a 4(d) rule, were being considered (LAR30409), as evidence that the Service had already made up its mind.

To the contrary, these conversations indicate that the Service was in the midst of a lengthy and thorough deliberative process and wanted to be sure that its decision, whatever it would ultimately be, would be rational, well-informed, and defensible. When the Service's Regional Directors met to reach a preliminary determination, they had the benefit of years of consideration, public comment, and agency analysis synthesized into a white paper summarizing the agency's assessment of the best available information on the species. Moreover, as Regional Directors, these decision-makers brought with them extensive experience, both with the science

related to at-risk species, and with the policies underlying and legal requirements of the ESA. Far from being a flaw in the agency's process, convening this group for a conference to analyze the information available on the status of the northern long-eared bat and work together to reach their best application of the statutory listing standards demonstrates the agency's dedication to properly applying the statute to this species.

At the time of the conference, near the conclusion of the agency's fourth public comment period on the proposed rule, the agency was properly moving toward a decision. Far from being "pre-decisional," this preliminary determination was an important part of the agency's review process. Equipped with best available information the agency made a preliminary decision and began the lengthy process of drafting a final rule reflecting that decision. Yet, even during the drafting process, the record is clear that "all options" remained available. *See* LAR 66816. That the Service had made a "preliminary decision" to list the northern long-eared bat as threatened, and avoided predetermining this designation, is no indication that the Service deviated from regular procedures. Here, where the Plaintiffs have not presented any evidence to the contrary, the Court is to presume the Service has acted with regularity and in good faith.

II. The Service Properly Applied the Statutory Standards When Determining that the Northern Long-Eared Bat is a Threatened Species.

Each species the Service evaluates for potential protection under the ESA presents a distinct fact pattern. The Service's task is to apply the listing standards established by Congress to those particular facts. The ESA defines a "threatened species" as one that "is likely to become an endangered species within the foreseeable future throughout all or a significant part of its range." 16 U.S.C. § 1532(20). An endangered species, in turn, is defined as a species "which is in danger of extinction throughout all or significant portion of its range . . . ." 16 U.S.C. § 1532(6).

The Plaintiffs take issue with the Service's application of three elements of the statutory definition of a "threatened species": "in danger of extinction," "foreseeable future" and "throughout all or a significant portion of its range." Plaintiffs' arguments, however, express policy differences, not legal errors by the Service. As such, the Service's determination should be upheld.

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

The Plaintiffs repeatedly claim that the Service's interpretation of "in danger of extinction" is "unreasonably narrow." Pl. Br. at 23-25. However, the entirety of the argument they present in support of this proposition is this: If the northern long-eared bat does not meet the Service's interpretation of "in danger of extinction," then the interpretation, rather than the result, must be flawed. *Id.* at 23-24. But this amounts to nothing more than a disagreement with the result of the Service's analysis. Because the Plaintiffs have identified no legal error in the Service's analysis, this indirect attack should be rejected.

The Service applied the term "in danger of extinction" in this case in a manner consistent with its long-standing practice, as described in 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 (LAR 23067-84) ("Polar Bear Memorandum"). *See* Fed. Def. Br. at 15-16. At this Court's request, the Service prepared the Polar Bear Memorandum to provide further explanation of the Service's understanding of the statutory term. Polar Bear Mem. at 1. The Service explained that, to give effect to the temporal distinction drawn between threatened and endangered species in the text of the statute, it works from a general principle that a species "in danger of extinction" is one that is "currently on the brink of extinction in the wild." Polar Bear Mem. at 3, 7; *see also* Fed. Def. Br. at 16. As stated in the Polar Bear Memorandum,

> Under the ESA the statutory definition of 'endangered species' as a species that 'is in danger of extinction' clearly connotes an established, present condition. In contrast, the definition of a 'threatened species' as one that is 'likely to become an endangered species within the foreseeable future' equally connotes a predicted or expected future condition.

Id. at 7. This is an undeniable reading of the statute, and the Plaintiffs do not dispute it. Indeed, the temporal distinction is the *only* distinction Congress drew between threatened and endangered species. The statutory purpose of having two categories of protected species would be entirely nullified if the Service did not give effect to the temporal difference between endangered species, which are currently in danger of extinction, and threatened species, which are not yet in danger of extinction but are likely to become so in the foreseeable future.

Although the Plaintiffs claim to dispute the Service's interpretation of "in danger of extinction" as summarized in the Polar Bear Memorandum, they do not actually dispute the temporal distinction that the Service has properly drawn between endangered and threatened species—they merely believe that the Service erred when it placed the northern long-eared bat on the threatened side of the line. To make that judgment, particularly in the case of the northern long-eared bat, the Service's expertise is highly relevant. As the Service explained in the Polar Bear Memorandum, species and the threats they face are almost infinitely varied. Polar Bear Mem. at 3. A one-size-fits-all interpretation of the phrase "in danger of extinction" would be impracticable and inconsistent with Section 4 of the Act, which requires the Service to evaluate multiple factors when determining whether a given species warrants protection. Nevertheless, over the course of its forty years of implementing the ESA, the Service has identified four typical fact patterns meeting the "endangered" standard of a species "on the brink of extinction in the wild." *Id.* at 4-6.

The northern long-eared bat's circumstances most closely resemble the category for "a species [that] still has relatively widespread distribution, but has nevertheless suffered ongoing major reductions in numbers, range, or both as a result of factors that have not abated." 80 Fed. Reg. 17974, 18020, citing Polar Bear Mem. at 6. This category, however, requires the Service to apply its judgment because, "[t]hreatened species typically have some of the characteristics of [this] category," so there is no bright line between threatened species and endangered species in this fact pattern. Polar Bear Mem. at 6. "Whether a species in this situation is ultimately an endangered species or a threatened species depends on the specific life history and ecology of the species, the nature of the threats, and population numbers and trends." Polar Bear Mem. at 6, cited in 80 Fed. Reg. 17974, 18020. Notably, the Plaintiffs do not dispute that these factors should inform the Service's analysis of whether a species in this situation is currently on the brink of extinction in the wild. Pl. Br. at 24-25.

The crux of the Plaintiffs' dispute with the Service is how the Service weighed the evidence regarding the species' status—a judgment that Congress charged the Service with rendering. *Trout Unlimited v. Lohn*, 559 F.3d 946, 961 (9th Cir. 2009). The Service evaluated the factors that the Plaintiffs agree it should have—the species' life history and ecology (80 Fed. Reg. 17974, 17975, 17984-89), the nature of the threats to the species, with a detailed analysis of the impact of the primary threat, WNS, including its rate of spread and its impacts on affected populations (*id.* at 17989-18006), and the status of the species across its range by region, including overall population estimates and trends (*id.* at 17975-84). Based on this review, the Service concluded that "the northern long-eared bat resides firmly in [the] category where no distinct determination exists between endangered and threatened." *Id.* at 18020. The Service undertook the task Congress assigned it, evaluated the best available information and made its

best judgment as to whether the threats to the northern long-eared bat amount to a current risk of extinction or a foreseeable risk of extinction. Based upon four key facts, the Service concluded that the northern long-eared bat was not *yet* "on the brink of extinction" at the time the listing decision was made. *Id.* at 18021. Thus, the Service properly listed the northern long-eared bat as a threatened species—one for which a risk of extinction is anticipated and foreseeable, but not yet present.

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

The Plaintiffs' critique of the Service's "foreseeability" analysis fundamentally misunderstands the purpose of the analysis. The Plaintiffs argue that the Service failed to "define the Bat's 'foreseeable future' in a way that explains or supports the agency's conclusion that the Bat will be in danger of extinction *only* in the foreseeable future—as opposed to being in danger of extinction already." Pl. Br. at 24. The question of whether a species is in danger of extinction "already" is answered by the Service's analysis of whether it is currently on the brink of extinction and is unrelated to the Service's analysis of the foreseeable future for the species. Foreseeability, in contrast, goes to the Service's level of certainty about the impacts of anticipated future impacts. *See* "The Meaning of 'Foreseeable Future' in Section 3(20) of the Endangered Species Act," M-37021 (Jan. 16, 2009) ("M-Opinion 37021"), Pl. Ex. 2 ("Congress intended the term 'foreseeable future' to describe the extent to which the Secretary can reasonably rely on predictions about the future in making determinations about the *future* conservation status of the species.") (emphasis added).

Even if the Plaintiffs were correct about the purpose of the foreseeability analysis (and they are not), their concern is misplaced because the Service's analysis was appropriate for the northern long-eared bat. The Service has maintained, and this Circuit has agreed, that the

question of what is "foreseeable" must be determined on a species-by-species basis. *In re Polar Bear Endangered Species Act Listing*, 709 F.3d 1, 15-16 (D.C. Cir. 2013). Nevertheless, the Plaintiffs fault the Service for allegedly failing to apply elements of the foreseeability analysis it used in the polar bear listing to the northern long-eared bat. Pl. Br. at 24-25.

Plaintiffs claim that the Service's "foreseeability" analysis is flawed because it allegedly fails to discuss how the timeframe for the expected spread of WNS throughout the northern long-eared bat's range "relates" to the species' life history or its known response to WNS. Pl. Br. at 25. As a point of clarification, the Service did not rely on polar bear biology when it established a timeframe of 45 years as the foreseeable future for that species. *In re Polar Bear Endangered Species Act Listing,* 709 F.3d at 16 (quoting the listing rule). For the polar bear, like the northern long-eared bat, the Service focused on the "timeframe over which the best available scientific data allows [it] to reliably assess the effect of *threats* on the species [as] the critical component for determining the foreseeable future." *Id.* at 15 (emphasis added), quoting 73 Fed. Reg. 28212, 28253 (May 15, 2008). In the case of the polar bear, the Service also examined the species' biology and life history to provide "greater confidence" in the listing determination, but the Court of Appeals did not rely on that portion of the agency's analysis when it concluded that the Service's definition of foreseeable future for the polar bear was reasonable. *Id.* at 16.

For the polar bear listing, the species' life span and biology provided useful information in understanding how the species may be affected by climate change. However, the primary threat to the northern long-eared bat differs significantly from climate change, both in time span and, presumably, in the impact on affected populations. Whereas climate change is a relatively slow phenomenon, measured in decades, and there are no records of polar bears dying en masse at temperatures above a certain threshold, the spread of WNS is measured in years, and the

record reflects high mortality within a few years of it reaching a northern long-eared bat population. Thus, the rate at which the threat is advancing is of much greater significance to determining the foreseeable future for the northern long-eared bat than it was for the polar bear, and the Service appropriately devoted substantial attention to making their best judgment about that rate. 80 Fed. Reg. 17974, 17997-98; *see also* LAR 66753 (white paper on best available information); email correspondence regarding rate of spread at, *e.g.*, LAR 55180, 54623, 54943, 50524, 50456, 50467, 50431, 50408, 50402.

In recognition of the northern long-eared bat's markedly different situation than the polar bear, the Service appropriately focused its foreseeability analysis on the impact of the disease—how quickly it was spreading (80 Fed. Reg. 17974, 17997-98), the rate of impact within an affected community (*id.* at 17996-98), and the susceptibility and potential for resistance to the disease within the population (*id.* at 17997-98). The Service further analyzed the key parts of the northern long-eared bat's life cycle (winter hibernation and summer roosting) that are believed to be relevant to the impact of WNS. The Service expressly noted that winter hibernacula counts are a leading indicator of WNS's progress. *Id.* at 17997 ("summer monitoring in Virginia from 2009 to present has revealed that declines in northern long-eared bats were not observed by VDGIF until 2 years after the severe declines were observed during winter and fall monitoring efforts in the State"). Thus, the winter hibernacula counts were used in determining the average rate of approximately 175 miles per year at which the disease had been and was expected to continue spreading. *Id.* at 17997-98, 18010-11.

It is undisputed that WNS is the primary factor contributing to the decline of northern long-eared bats. Therefore, the Service properly focused its efforts to determine the future status of the species, *i.e.*, whether and when it would become at risk of extinction, on determining the

best estimate of the rate at which the disease would spread. In this way, and consistent with the agency's interpretation of "foreseeable future" reflected in M-37021, the Service improved the reliability of the predictions about the future of the species that are reflected in its determination that the northern long-eared bat is a threatened species.

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

The definitions of both "endangered species" and "threatened species" extend to species meeting the applicable standards "throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (20). As the Plaintiffs note, this statutory phrase has been the subject of significant dispute. Pl. Br. at 45-47. When the Service listed the northern long-eared bat, it applied its recently promulgated formal interpretation of the phrase. 80 Fed. Reg. 17974, 18018. The Plaintiffs do not dispute that the Service's interpretation of the phrase as applied to this species is consistent with the Service's formal interpretation. Pl. Br. at 55-57. Instead, the Plaintiffs argue that the formal interpretation itself is in error. While this case was being briefed, a district court in Arizona vacated the policy for reasons different than those expressed by the Plaintiffs in this litigation, and the geographic extent of the vacatur is currently in question. *CBD v. Jewell*, No. CV-14-02506-TUC-RM (Pygmy Owl 12-month finding) (March 28, 2017).[1]

Regardless of whether the formal interpretation is upheld, the question before this Court is whether the Service's evaluation of the northern long-eared bat fulfilled the statutory mandate to consider whether it warrants protection as a threatened species or endangered species. Put simply, the Plaintiffs argue that the Service should have determined that the northern long-eared bat is an endangered species throughout a significant portion of the range. Pl. Br. at 55-57.

[1] The Federal Defendants in that matter have moved to alter or amend the judgment, and that motion is currently pending.

The Federal Defendants argue that because the ESA defines a "threatened species" as one that may become but is not yet an "endangered species," Congress intended the two statuses to be distinct—that no species could qualify as both a threatened species and an endangered species at the same time. Fed. Def. Br. at 45-48, citing 16 U.S.C. § 1532(20), (6). As the Federal Defendants note, the statute's instruction on how a listing determination should be made supports this interpretation: The Service is instructed to "determine whether any species is an endangered species ***or*** a threatened species" based upon the listing factors enumerated in Section 4. 16 U.S.C. § 1533(a)(1) (emphasis added). The disjunctive "or" indicates that a species may not simultaneously qualify for both categories.

Precisely how or in what order the Service should evaluate a whether a species qualifies for either of these two categories is left to the Service's scientific judgment. *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543-45 (1978) ("Absent constitutional constraints of extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to charge their multitudinous duties.") (internal quotation marks and alterations omitted). Although the Plaintiffs would prefer that the Service evaluate whether a species that is threatened "throughout" its range may also be endangered in a "significant portion of its range," the ESA does not mandate this approach. Indeed, the Service's approach has better support in the statute. The Service's process ensures that each species evaluated for listing receives as much protection as intended by Congress, but no more protection than was intended by Congress.

When a species is listed as threatened the Service retains the discretion to grant it the full protections applicable to an endangered species if so warranted, but it may also tailor the

protections as appropriate for its status—including protections that may differ by region depending on the threats faced by the species. 16 U.S.C. § 1533(d); *see also* 119 Cong. Rec. 25669 (July 24, 1973) (citing the differing status of the alligator in the Mississippi Delta as opposed to the Florida Everglades in support of granting the Secretary the discretion to impose geographically tailored protections). When a species is listed as endangered, courts have held that the full set of protections should apply to the species throughout its range, even if the species is not endangered throughout its range. *See, e.g., Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010).

Although the Plaintiffs may prefer stripping the Service's discretion to tailor protections for threatened species from a policy perspective, it is not consistent with the statute. The conservation purpose of the ESA is not served with a reflexive default to the highest level of protection for all species. Indeed, Congress's decision to establish two categories of species with differing levels of protection is evidence that Congress did not intend an unchecked "precautionary" principle to rule listing decisions. Instead, as noted by the Service in the Polar Bear Memorandum, Congress intended the Service to have "flexibility to fashion restrictions according to the needs of [threatened] species, which reflects the generally longer time frames available to test differing conservation strategies." Polar Bear Mem. at 8. Only those species that meet the statutory standard of endangered species are automatically extended the full suite of ESA protections, and the Service is charged with developing appropriate protections for species in less immediate peril. 16 U.S.C. §§ 1538, 1533(d). Thus, the Service properly adopted an evaluation approach for the northern long-eared bat that preserved its discretion to tailor the protections for the species, including providing variable protection for the species depending on whether the primary risk to the species, WNS, was present.

III. The Service's Scientific Evaluation of Information on the Status of the Northern Long-Eared Bat is Within the Scope of Its Expertise.

The Plaintiffs' primary dispute in this case is with the Service's evaluation of the evidence regarding the status of the northern long-eared bat. Congress charged the Service with evaluating the threats to a species and determining whether those risks are such that it meets the statutory definition of either a threatened or an endangered species. 16 U.S.C. § 1533. The Plaintiffs disagree with the Service's expert judgments in this matter, but they do not identify legal error in the agency's decisions. The Associations incorporate by reference the Federal Defendants' explanation of the key facts underlying its listing decision at 21-30, with the following supplement.

First, the Plaintiffs claim that the Service failed to explain a "meaningful" difference between the time frame used in the proposed rule for the estimated time in which WNS[2] would extend throughout the northern long-eared bat's range ("a short timeframe") and the time frame used in the listing rule (8-13 years). Pl. Br. at 27-28. The meaningful difference is apparent on the face of the Plaintiffs' critique. What the Service had when it determined that the species was threatened that it did not have when it proposed to list it as an endangered species was specificity. As discussed in Section II.A above, the only difference between a threatened species and an endangered species is the imminence of the threat of extinction. Thus, having a more precise estimate as to how long it would take WNS to spread throughout the northern long-eared

[2] The Plaintiffs also quibble with the Service's references to both WNS and Pd when discussing analysis of the spread of the disease. Pl. Br. at 30. As the Service noted, there are gaps in the available information on how Pd progresses to WNS. *See* 80 Fed. Reg. 17974, 17996 (noting variation in spread dynamics and the impact of WNS/Pd when it arrives at a northern long-eared bat population). Some of the information on the disease measures the observed symptoms, WNS, and some measures Pd. *See id.* at 17997 (discussing models that use each approach). Because the ESA mandates that the Service make a decision with the "best available" information, the Service properly evaluated all of this information and discussed it in its listing determination.

bat's range made a critical difference in the Service's ability to evaluate how to apply the temporal distinction between the threatened and endangered categories for this species. *See* LAR 66778, 66780 ("We have been pretty upfront that we have not received game-changing new data. We are revising our determination based on having a more specific timeframe associated with the spread of WNS."). To inform its decision-making, the Service devoted significant resources and attention to evaluating the rate of spread. It evaluated and ground-truthed models of spread with more rigor than demonstrated in the proposed rule. *Compare* 78 Fed. Reg. 61046, 61064-65 (Oct. 2, 2013), *with* 80 Fed. Reg. 17974, 17997-98 (Apr. 2, 2015). With the benefit of this analysis, the Service developed a hypothesis about the rate of spread that it was not in a position to make when it issued the proposed rule. It is not new data, but new analysis that distinguished the final rule from the proposed rule.

Second, the Plaintiffs challenge the total population estimates relied upon in the listing determination, arguing that the Service erred when it used coarse population estimates derived from summer mist surveys. Pl. Br. at 34. The Plaintiffs argue that the Service has stated that winter hibernacula counts represent the "best available scientific data on the Bat's population." *Id.* This is a misreading of the Service's statements. When challenged by states and the public for its reliance on winter hibernacula counts and discounting of summer survey data, the Service clarified its position. It acknowledged the difficulties with winter hibernacula counts for establishing population estimates because "northern long-eared bats are often difficult to observe during winter hibernacula surveys due to their tendency to roost deep in cracks and crevices within hibernacula." 80 Fed. Reg. 17974, 18010. The Service expressly stated, "in recognition of the limitations of these data, we 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." *Id.* The Service concluded that winter hibernacula data provided the best available information on the species' population *trends*, but the Service agreed with the states that winter hibernacula counts should not be used to estimate absolute population size.

Third, the Plaintiffs contend that the Service failed to analyze cumulative impacts to the species, "when combined with WNS." Pl. Br. at 40. As the Federal Defendants explain, that is simply not the case. The Service explicitly identified and analyzed the potential for cumulative impacts. Fed. Def. Br. at 12-14. Moreover, the data the Service analyzed to identify the impact of WNS in affected areas necessarily reflected the cumulative impact on the species. To the extent factors other than WNS interacted with WNS to contribute to declines, that effect was included in the overall population declines observed in WNS-affected areas. WNS was first observed in New York state and has moved throughout the highly developed northeastern portion of the United States, during which time it moved across a landscape populated by other potential threats to northern long-eared bats, and any cumulative impact presented by these threats is reflected in the observed population trends. To the extent the Plaintiffs imply that there is some synergistic impact to the species that has not been observed or that may yield population declines greater than those recorded and considered in the listing decision, they are incorrect.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Federal Defendants' Opposition and Partial Motion for Summary Judgment on the Listing Claims, 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 28th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2017, I caused to be electronically filed the foregoing document, Defendant-Intervenors' Brief in Opposition to Plaintiffs' Partial Motion for Summary Judgment and Defendant-Intervenors' 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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Exhibit 1

In Support of Defendant-Intervenors' Brief in Opposition to Plaintiffs' Partial Motion for Summary Judgment and Defendant-Intervenors' Cross-Motion for Partial Summary Judgment

in

Center for Biological Diversity et al. v. Jim Kurth et al., No 1:15-cv-00477-EGS

and

Defenders of Wildlife v. Jim Kurth et al., No. 1:16-cv-00910-EGS

Consolidated Cases

Species With Status Changes During Listing Process

	Scientific Name	Common Name	Proposed Federal Listing Status	Federal Register Citation for Proposed Listing	Final Federal Listing Status	Federal Register Citation for Final Listing
1	Agelastes meleagrides	White-breasted guineafowl	Endangered	59 Fed. Reg. 14496 (Mar. 28, 1994).	Threatened	60 Fed. Reg. 2899 (Jan. 12, 1995).
2	Ambrysus amargosus	Ash Meadows naucorid	Endangered	48 Fed. Reg. 46590 (Oct. 13, 1983).	Threatened	50 Fed. Reg. 20777 (May 20, 1985).
3	Amphispiza belli clementeae	San Clemente sage sparrow	Endangered	41 Fed. Reg. 22073 (June 1, 1976).	Threatened	42 Fed. Reg. 40682 (Aug. 11, 1977).
4	Anguispira picta	Painted snake coiled forest snail	Endangered	41 Fed. Reg. 17742 (Apr. 28, 1976).	Threatened	43 Fed. Reg. 28932 (July 3, 1978).
5	Branchinecta lynchi	Vernal pool fairy shrimp	Endangered	57 Fed. Reg. 19856 (May 8, 1992).	Threatened	59 Fed. Reg. 48136 (Sept. 19, 1994).
6	Cambarus callainus	Big Sandy crayfish	Endangered	80 Fed. Reg. 18709 (Apr. 7, 2015).	Threatened	81 Fed. Reg. 20449 (Apr. 7, 2016).
7	Caretta caretta	Loggerhead sea turtle	Endangered and Threatened[1]	75 Fed. Reg. 12598 (Mar. 16, 2010).	Endangered and Threatened[2]	76 Fed. Reg. 58868 (Sept. 22, 2011).
8	Centrocercus minimus	Gunnison sage-grouse	Endangered	78 Fed. Reg. 2485 (Jan. 11, 2013).	Threatened	79 Fed. Reg. 69191 (Nov. 20, 2014).
9	Cicindela dorsalis dorsalis	Northeastern beach tiger beetle	Endangered	54 Fed. Reg. 40458 (Oct. 2, 1989).	Threatened	55 Fed. Reg. 32088 (Aug. 7, 1990).
10	Crotalus willardi obscurus	New Mexican ridge-nosed rattlesnake	Endangered	42 Fed. Reg. 27007 (May 26, 1977).	Threatened	43 Fed. Reg. 34476 (Aug. 4, 1978).
11	Dionda diaboli	Devils River minnow	Endangered	63 Fed. Reg. 14885 (Mar. 27, 1998).	Threatened	64 Fed. Reg. 56596 (Oct. 20, 1999).

[1] The rule includes different listing status for different populations.
[2] The rule includes different listing status for different populations.

12	Drosophila mulli	Hawaiian picture-wing fly	Endangered	66 Fed. Reg. 3964 (Jan. 17, 2001).	Threatened	71 Fed. Reg. 26835 (May 9, 2006).
13	Equus grevyi	Grevy's zebra	Endangered	42 Fed. Reg. 64382 (Dec. 23, 1977).	Threatened	44 Fed. Reg. 49218 (Aug. 21, 1979).
14	Equus zebra hartmannae	Hartmann's mountain zebra	Endangered	42 Fed. Reg. 64382 (Dec. 23, 1977).	Threatened	44 Fed. Reg. 49218 (Aug. 21, 1979).
15	Eurycea chisholmensis	Salado Salamander	Endangered	77 Fed. Reg. 50767 (Aug. 22, 2012).	Threatened	79 Fed. Reg. 10235 (Feb. 24, 2014).
16	Eurycea naufragia	Georgetown Salamander	Endangered	77 Fed. Reg. 50767 (Aug. 22, 2012).	Threatened	79 Fed. Reg. 10235 (Feb. 24, 2014).
17	Eurycea tonkawae	Jollyville Plateau Salamander	Endangered	77 Fed. Reg. 50767 (Aug. 22, 2012).	Threatened	78 Fed. Reg. 51277 (Aug. 20, 2013).
18	Gila nigrescens	Chihuahua chub	Endangered	45 Fed. Reg. 82474 (Dec. 15, 1980).	Threatened	48 Fed. Reg. 46053 (Oct. 11, 1983).
19	Hamiota australis	Southern sandshell	Endangered	76 Fed. Reg. 61482 (Oct. 4, 2011).	Threatened	77 Fed. Reg. 61663 (Oct. 10, 2012).
20	Huso huso	Beluga sturgeon	Endangered	67 Fed. Reg. 49657 (July 31, 2002).	Threatened	69 Fed. Reg. 21425 (Apr. 21, 2004).
21	Masticophis lateralis euryxanthus	Alameda whipsnake (=striped racer)	Endangered	59 Fed. Reg. 5377 (Feb. 4, 1994).	Threatened	62 Fed. Reg. 64306 (Dec. 5, 1997).
22	Notropis girardi	Arkansas River shiner	Endangered	59 Fed. Reg. 39532 (Aug. 3, 1994).	Threatened	63 Fed. Reg. 64772 (Nov. 23, 1998).
23	Phaeognathus hubrichti	Red Hills salamander	Endangered	40 Fed. Reg. 45175 (Oct. 1, 1975).	Threatened	41 Fed. Reg. 53032 (Dec. 3, 1976).
24	Polioptila californica californica	Coastal California gnatcatcher	Endangered	56 Fed. Reg. 47053 (Sept. 17, 1991).	Threatened	58 Fed. Reg. 16742 (Mar. 30, 1993).
25	Pseudemys alabamensis	Alabama red-bellied turtle	Threatened	51 Fed. Reg. 24727 (July 8, 1986).	Endangered	52 Fed. Reg. 22939 (June 16, 1987).
26	Pyrgulopsis bernardina	San Bernardino springsnail	Endangered	76 Fed. Reg. 20464 (Apr. 12, 2011).	Threatened	77 Fed. Reg. 23060 (Apr. 17, 2012).
27	Rana draytonii	California red-legged frog	Endangered	59 Fed. Reg. 4888 (Feb. 2, 1994).	Threatened	61 Fed. Reg. 25813 (May 23, 1996).

28	Salvelinus confluentus	Bull Trout	Threatened and Endangered[3]	62 Fed. Reg. 32268 (June 13, 1997).	Threatened	63 Fed. Reg. 31647 (June 10, 1998).
29	Succinea chittenangoensis	Chittenango ovate amber snail	Endangered	41 Fed. Reg. 17742 (Apr. 28, 1976).	Threatened	43 Fed. Reg. 28932 (July 3, 1978).
30	Taylorconcha serpenticola	Bliss Rapids snail	Endangered	55 Fed. Reg. 51931 (Dec. 18, 1990).	Threatened	57 Fed. Reg. 59244 (Dec. 14, 1992).
31	Thamnophis gigas	Giant garter snake	Endangered	56 Fed. Reg. 67046 (Dec. 27, 1991).	Threatened	58 Fed. Reg. 54053 (Oct. 20, 1993).
32	Triodopsis platysayoides	Flat-spired three-toothed Snail	Endangered	41 Fed. Reg. 17742 (Apr. 28, 1976).	Threatened	43 Fed. Reg. 28932 (July 3, 1978).
33	Zapus hudsonius preblei	Preble's meadow jumping mouse	Endangered	62 Fed. Reg. 14093 (Mar. 25, 1997).	Threatened	63 Fed. Reg. 26517 (May 13, 1998).
34	Acanthomintha ilicifolia	San Diego thornmint	Endangered	60 Fed. Reg. 40549 (Aug. 9, 1995).	Threatened	63 Fed. Reg. 54938 (Oct. 13, 1998).
36	Aconitum noveboracense	Northern wild monkshood	Endangered	41 Fed. Reg. 24523 (June 16, 1976).	Threatened	43 Fed. Reg. 17910 (Apr. 26, 1978).
37	Asclepias welshii	Welsh's milkweed	Endangered	49 Fed. Reg. 23399 (June 6, 1984).	Threatened	52 Fed. Reg. 41435 (Oct. 28, 1987).
38	Astragalus montii	Heliotrope milk-vetch	Endangered	46 Fed. Reg. 3188 (Jan. 13, 1981).	Threatened	52 Fed. Reg. 42652 (Nov. 6, 1987).
39	Astragalus phoenix	Ash meadows milk-vetch	Endangered	48 Fed. Reg. 46590 (Oct. 13, 1983).	Threatened	50 Fed. Reg. 20777 (May 20, 1985).
40	Centaurium namophilum	Spring-loving centaury	Endangered	48 Fed. Reg. 46590 (Oct. 13, 1983).	Threatened	50 Fed. Reg. 20777 (May 20, 1985).
41	Chorizanthe pungens var. pungens	Monterey spineflower	Endangered	56 Fed. Reg. 55107 (Oct. 24, 1991).	Threatened	59 Fed. Reg. 5499 (Feb. 4, 1994).
42	Coryphantha ramillosa	Bunched cory cactus	Endangered	41 Fed. Reg. 24523 (June 16, 1976).	Threatened	44 Fed. Reg. 64247 (Nov. 6, 1979).
43	Coryphantha sneedii var. leei	Lee pincushion cactus	Endangered	41 Fed. Reg. 24523 (June 16, 1976).	Threatened	44 Fed. Reg. 61554 (Oct. 25, 1979).

[3] The rule includes different listing status for different populations.

44	Cycladenia humilis var. jonesii	Jones Cycladenia	Endangered	50 Fed. Reg. 1247 (Jan. 10, 1985).	Threatened	51 Fed. Reg. 16526 (May 5, 1986).
45	Deinandra (=Hemizonia) conjugens	Otay tarplant	Endangered	60 Fed. Reg. 40549 (Aug. 9, 1995).	Threatened	63 Fed. Reg. 54938 (Oct. 13, 1998).
46	Enceliopsis nudicaulis var. corrugata	Ash Meadows sunray	Endangered	48 Fed. Reg. 46590 (Oct. 13, 1983).	Threatened	50 Fed. Reg. 20777 (May 20, 1985).
47	Erigeron parishii	Parish's daisy	Endangered	56 Fed. Reg. 58332 (Nov. 19, 1991).	Threatened	59 Fed. Reg. 43652 (Aug. 24, 1994).
48	Fitzroya cupressoides	Chilean false larch	Endangered	40 Fed. Reg. 44329 (Sept. 26, 1975).	Threatened	44 Fed. Reg. 64730 (Nov. 7, 1979).
49	Grindelia fraxinipratensis	Ash Meadows gumplant	Endangered	48 Fed. Reg. 46590 (Oct. 13, 1983).	Threatened	50 Fed. Reg. 20777 (May 20, 1985).
50	Mentzelia leucophylla	Ash Meadows blazingstar	Endangered	48 Fed. Reg. 46590 (Oct. 13, 1983).	Threatened	50 Fed. Reg. 20777 (May 20, 1985).
51	Nervilia jacksoniae	No common name	Endangered	79 Fed. Reg. 59363 (Oct. 1, 2014).	Threatened	80 Fed. Reg. 59423 (Oct. 1, 2015).
52	Orcuttia inaequalis	San Joaquin Orcutt grass	Endangered	58 Fed. Reg. 41700 (Aug. 5, 1993).	Threatened	62 Fed. Reg. 14338 (Mar. 26, 1997).
53	Peucedanum sandwicense	Makou	Endangered	56 Fed. Reg. 55862 (Oct. 30, 1991).	Threatened	59 Fed. Reg. 9304 (Feb. 25, 1994).
54	Pseudobahia peirsonii	San Joaquin adobe sunburst	Endangered	57 Fed. Reg. 56549 (Nov. 30, 1992).	Threatened	62 Fed. Reg. 5542 (Feb. 6, 1997).
55	Schiedea spergulina var. spergulina	No common name	Endangered	56 Fed. Reg. 55862 (Oct. 30, 1991).	Threatened	59 Fed. Reg. 9304 (Feb. 25, 1994).
56	Schoenocrambe argillacea	Clay reed-mustard	Endangered	56 Fed. Reg. 14910 (Apr. 12, 1991).	Threatened	57 Fed. Reg. 1398 (Jan. 14, 1992).
57	Sclerocactus glaucus	Colorado hookless Cactus	Endangered	41 Fed. Reg. 24523 (June 16, 1976).	Threatened	44 Fed. Reg. 58868 (Oct. 11, 1979).
58	Sclerocactus mesae-verdae	Mesa Verde cactus	Endangered	41 Fed. Reg. 24523 (June 16, 1976).	Threatened	44 Fed. Reg. 62471 (Oct. 30, 1979).
59	Silene hawaiiensis	No common name	Endangered	57 Fed. Reg. 59951 (Dec. 17, 1992).	Threatened	59 Fed. Reg. 10305 (Mar. 4, 1994).
60	Townsendia aprica	Last Chance	Endangered	49 Fed. Reg. 22352	Threatened	50 Fed. Reg. 33734

		townsendia		(May 29, 1984).		(Aug. 21, 1985).
61	Tuberolabium guamense	No common name	Endangered	79 Fed. Reg. 59363 (Oct. 1, 2014).	Threatened	80 Fed. Reg. 59423 (Oct. 1, 2015).