

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY, et al.,)
)
Plaintiffs,)
)
v.)
)
DAVID BERNHARDT, in his official)
capacity as Secretary,)
U.S. Department of Interior, et al.)
)
Defendants.)

Case No. 1:18-cv-1547-JCB

PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56 and LCvR 7, Plaintiffs Public Employees for Environmental Responsibility, Atchafalaya Basinkeeper, Louisiana Crawfish Producers Association-West, Sierra Club – Delta Chapter, Ronald Nowak, Michael Caire, and Harold Schoeffler hereby move for summary judgment on their Administrative Procedure Act and Endangered Species Act claims.

For the reasons stated in the accompanying memorandum and supporting materials, plaintiffs respectfully request that summary judgment be granted in their favor.

Dated: April 5, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Motion for Summary Judgment, Proposed Order, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, and accompanying exhibits was served upon all counsel of record through the ECF system this 5th day of April, 2019.

/s/ Misha L. Mitchell

Misha L. Mitchell

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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INTRODUCTION

Plaintiffs Public Employees for Environmental Responsibility, Atchafalaya Basinkeeper, Sierra Club – Delta Chapter, Louisiana Crawfish Producers Association-West, Ronald Nowak, Michael Caire, and Harold Schoeffler respectfully move the Court for summary judgment on their Endangered Species Act and Administrative Procedure Act claims challenging the U.S. Fish and Wildlife Service (FWS) 2016 delisting of the Louisiana black bear. That subspecies now resides in just two percent of its historic range at under one percent of original numbers. Delisting was based primarily on claimed existence of two viable populations, yet one of those is not the Louisiana black bear but the descendant of an introduction of animals of a different subspecies, the presence of which endangers the native genome.

The FWS’s arbitrary inclusion of a subspecies that is not Louisiana black bear distorts its definition of the subspecies, its population, and range; exacerbates the threat of hybridization; and invalidates its recovery finding. The FWS’s failure to consider loss of historic range and historic population, and flawed analysis of the five-factor threats render the delisting decision untenable, and unsupported in law and fact. For reasons discussed further herein, this Court should grant summary judgment in plaintiffs’ favor because the FWS rushed to judgment, delisting the Louisiana black bear with an unsubstantiated claim of “recovery.”

LEGAL OVERVIEW

The Endangered Species Act

Congress enacted the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* (1973), “to halt and reverse the trend toward species extinction,” and to do so “whatever the cost.” *Humane Soc’y of the United States v. Zinke*, 865 F.3d 585, 589 (D.C. Cir. 2017) (quoting *Tennessee Valley Auth. (TVA) v. Hill*, 437 U.S. 153, 184 (1978)). The ESA is considered “the

most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA*, 437 U.S. at 180. Its goals include “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

The ESA achieves its goals by authorizing the Secretary of the Interior, through the FWS (*see* 50 C.F.R. § 402.01(b)), to determine “whether any species is an endangered species or a threatened species” as a result of one or more of the five factors: habitat destruction, overutilization of the species, predation or disease, inadequacy of existing regulatory mechanisms, or any other natural or manmade factors affecting the species’ continued existence. 16 U.S.C. § 1533(a)(1)(A)-(E). A species found to meet the criteria is added to the Federal Lists of Endangered and Threatened Wildlife and Plants, or in common parlance, “listed.” 16 U.S.C. § 1533(c)(1). At the same time a species is listed, the FWS is also directed to designate “critical habitat” for the species. 16 U.S.C. § 1533(a)(3)(A).

The term “species” under the ESA also includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” § 1532(16). The ESA defines “endangered species” to include “any species which is in danger of extinction throughout all or a significant portion of its range.” § 1532(6). “Threatened species” is defined as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” § 1532(20).

A listed species is subject to stringent protections applicable to both the animals themselves and their critical habitat. “Virtually all dealings with endangered species, including

taking, possession, transportation, and sale, were prohibited, 16 U.S.C. §1538 (1976 ed.), except in extremely narrow circumstances, see § 1539(b).” *TVA*, 437 U.S. at 180. Federal agencies are commanded to insure that actions authorized, funded, or carried out by them are not likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of its critical habitat. 16 U.S.C. § 1536(a)(2).

Delisting decisions are to be based on consideration of the same five factors statutorily required for listings. 50 C.F.R. § 424.11(d). Removal from the list “must be supported by the best scientific and commercial data available to the Secretary after conducting a review of the status of the species.” *Id.*; 16 U.S.C. § 1533(b)(1). In addition to demonstrating that concerns based on the five listing factors have been reduced or eliminated, “[a] species may be delisted only if such data substantiate that it is neither endangered nor threatened” for one or more of three reasons: it is extinct, recovered, or the original data for classification were in error. 50 C.F.R. § 424.11(d). “Recovery” is reached when there is “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act. [16 U.S.C. § 1533(a)(1)].” 50 C.F.R. § 402.02.

The requirement for the use of the “best scientific and commercial data available” is intended “to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.” *Bennett v. Spear*, 520 U.S. 154, 176 (1997); *Bldg. Indus. Ass'n v. Norton*, 247 F.3d 1241, 1246-47 (D.C. Cir. 2001). Regardless of the standard of review for an ESA decision, it “does not alter the categorical *requirement* that, in arriving at his decision, [the Secretary] ... use ‘the best scientific data available.’ ... It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of

decisionmaking.” *Bennett*, 520 U.S. at 172 (emphasis in original) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943)).

The ESA provides a private right of action in the form of citizen suits whereby citizens may sue violators or the Secretary for failing to perform non-discretionary duties required by the Act. *See* 16 U.S.C. § 1540(g). Such suits include instances when the Secretary failed to comply with the requirements of § 1533, which addresses determinations of the status of species as threatened or endangered. 16 U.S.C. § 1540(g)(1)(C). Prior to filing a citizen suit, a plaintiff must file a Notice of Intent at least 60 days beforehand. 16 U.S.C. §1540(g). Plaintiffs herein did so on November 2, 2017. Rather than taking any action to remedy the problems identified in the Notice, by letter dated December 12, 2017, the FWS responded that it stood by its decision to delist the Louisiana black bear.

Standard of Review

Because the ESA citizen suit provision does not include its own standard of review, review is under the standards of the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.* *Mayo v. Jarvis*, 177 F. Supp. 3d 91, 105 (D.D.C. 2016).

Under APA review, federal agency actions are to be held unlawful and set aside where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To make this finding, a court must determine whether the agency “considered the factors relevant to its decision and articulated a rational connection between the facts found and the choice made.” *Keating v. FERC*, 569 F.3d 427, 433 (D.C. Cir. 2009) (citing *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105, 103 S.Ct. 2246, 76 L.Ed 2d 437 (1983)).

Ctr. for Biological Diversity v. Salazar (In re Polar Bear Endangered Species Act Listing), 794 F. Supp. 2d 65, 79 (D.D.C. 2011). An agency's action is arbitrary and capricious if it “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence

before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In ESA cases involving cross-motions for summary judgment such as this one, "the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *Humane Soc'y of the United States v. Jewell*, 76 F. Supp. 3d 69, 101 (D.D.C. 2014), *aff'd*, *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). The court reviews the administrative record directly. *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432 (D.C. Cir. 2012).

FACTUAL BACKGROUND

The following Background relies entirely on documents in the Administrative Record (AR) prepared by the FWS, as supplemented. Dkt. Nos. 12 and No. 21.¹ The Louisiana black bear (*Ursus americanus luteolus*, hereinafter "LBB" or "*luteolus*") is one of 16 recognized subspecies of American black bear (*U. americanus*). It is Louisiana's State Mammal and was the original "Teddy Bear". The historic range of the LBB subspecies was all of Louisiana, eastern Texas, southern Arkansas, and much of Mississippi. AR 23; 001102. When compared with other American black bear subspecies, the LBB's skull is longer, narrower, and flatter, with

¹ Documents are cited by their AR number followed by their Bates stamp number(s), so "AR []; []". The initial AR for the delisting decision failed to include five important documents that the FWS later agreed should have been included, stating they had been "inadvertently excluded". Defendant's Response to Plaintiff's Motion to Complete and Supplement the Administrative Record and Notice of Filing the Certified List of the Contents of the Supplemental Administrative Record. Dkt. No. 21. Such documents are cited as "Supp. AR []; []." It should be noted that document numbers 640 through 644 appear to be assigned both in the FWS's original AR and in its Supplemental AR.

larger molar teeth. AR 63; 002210. *Luteolus* is a relatively large subspecies; adult males can exceed 600 pounds. *Id.*

The LBB's pre-colonial population size is unknown but has been estimated at 80,000 individuals. AR 654; 020071. However, by the time its Recovery Plan was issued in 1995, an estimated maximum of only 160 bears remained in Louisiana. AR 79; 002603. Thus, numbers were down to significantly less than one percent of original, and, as shall be demonstrated *infra*, not all of those bears were *luteolus*.

Pertinent ESA administrative history:

In January 1992, the FWS listed the LBB as “threatened” under the ESA. AR 63; 002210-002217. The reasons for assigning that status primarily were: a) past modification and reduction of the subspecies' habitat; b) reduced carrying capacity of the remaining habitat due to fragmentation; and c) the threat of future habitat conversion and human-related mortality. *Id.*, at 002212-002214. The FWS found that suitable habitat for the LBB had been reduced by 80% as of 1980, and that the remaining habitat was reduced in quality due to human activity, thereby stressing the remaining animals. The LBB population had been eliminated even within much of the remaining 20% of its suitable habitat. *Id.*, at 002212.

The listing decision listed all other subspecies of *U. americanus* as threatened if found within the LBB's range (Louisiana, Mississippi, and Texas) as “look-alikes” pursuant to the protections offered by the ESA. *Id.*, at 002215-00216. The FWS noted the existence in Louisiana of bears of the separate subspecies *U. a. americanus* descended from Minnesota animals purposefully introduced within the former range of the LBB in the mid-1960s to provide sport hunting. *Id.*, at 002213. The Minnesota bears were released by the Louisiana Department of Wildlife and Fisheries (LDWF) into the region known as the Upper Atchafalaya River Basin

(UARB) (discussed more, *infra*). Supp. AR 640; 020098-020102. Those *U. a. americanus* bears were not readily distinguishable in the field from the native *luteolus* subspecies. The FWS found that it would be difficult to enforce protections of the native subspecies from human-induced mortality, particularly during the hunting season, without also protecting the other subspecies. AR 63; 002216.

The 1992 listing decision noted that controversy existed as to whether the LBB subspecies was distinct from other subspecies of *U. americanus*. *Id.*, at 002210. The FWS concluded that there was morphological distinctiveness and that the LBB was a valid subspecies under the ESA. The 1992 listing concluded that: “the only practical means available for protecting any possibly remaining unique genetic material originally belonging to the native *U. a. luteolus* would be through listing and protecting the taxon now distinguished by cranial features as *U. a. luteolus*.” *Id.*, at 002214. A later detailed genetics study by Laufenberg and Clark (2014), which was funded in part by the FWS and is the most often-cited document in the delisting decision, provides clear evidence that native populations of *luteolus* maintain their genetic distinction. AR 362; 016070-016182, at 016127.

In 1995, the FWS issued its LBB Recovery Plan. AR 79; 002595-002653. Its threshold criteria needed to achieve recovery for delisting are stark and straightforward:

Recovery Criteria: Criteria for delisting the Louisiana black bear are:

- (1) At least two viable subpopulations,² one each in the Tensas and Atchafalaya River Basins;*
- (2) Establishment of immigration and emigration corridors between the two subpopulations;*
- (3) Protection of the habitat and interconnecting corridors that support each of*

² The recovery plan and delisting rule referred to the various groups of bears as “subpopulations”. However, we generally use the term “populations,” at least for the Tensas River Basin (TRB), Upper Atchafalaya River Basin (UARB), and Lower Atchafalaya River Basin (LARB) groups, as most historical and genetic information, discussed *infra*, shows that those three were largely isolated and distinct from one another for much of the 20th century.

the two viable subpopulations used as justification for delisting.

Id., at 002600.

In March 2009, the FWS published a final rule designating ESA Critical Habitat for the LBB. AR 249; 009501-009561. That designation took in approximately 1,195,800 acres, or 1,868 square miles, of prime bottomland habitat bisecting Louisiana from north to south. *Id.*, at 009502.³

In February 2014, the FWS completed its 5-year review of the status of the LBB, as required under the ESA, 16 U.S.C. § 1533(c)(2)(A), (B), which concluded the subspecies should remain protected with its “threatened” status. AR 391; 016804-016877. Then, just over a year later, on May 21, 2015, the agency proposed fully delisting the LBB. AR 548; 019194-019230. Less than one year after that, the FWS issued its final delisting rule, which also rescinded the LBB’s Critical Habitat, on March 11, 2016 (three years before the next 5-year review would have taken place). AR 654; 020049-020097. This decision relied on the fundamental assertion that the Recovery Plan’s threshold criteria, quoted *supra*, of two viable populations, one in the Tensas and the other in the Atchafalaya River Basins, connected by a secure corridor, were met. *Id.*, at 020061.

³ According to that protective habitat designation: *The primary constituent elements of critical habitat for the Louisiana black bear are the habitat components that provide: (i) Breeding habitat (i.e., within or contiguous to the home range of females in a core breeding population) consisting of hardwood forest areas having a diversity of age class and species and containing sources of hard mast (acorns and nuts) produced by such species as mature oaks, hickories, and pecan, and that may include one or more of the following: (A) Areas containing soft mast provided by a diversity of plant species, including, but not limited to, blackberry, grape, mulberry, sassafras, paw paw, etc., occurring primarily in forest openings, on spoil banks, and in areas adjacent to forested habitat. (B) Areas within forested habitat providing protein sources consisting of beetles and other colonial insects found in rotting and decaying wood found on the forest floor. (C) Grasses and sedges found in forest openings, on spoil banks with open canopies, and in vegetated areas adjacent to forested habitats. (D) Secure areas for reproduction, winter dormancy, day bedding, and escape.* AR 249; 009531.

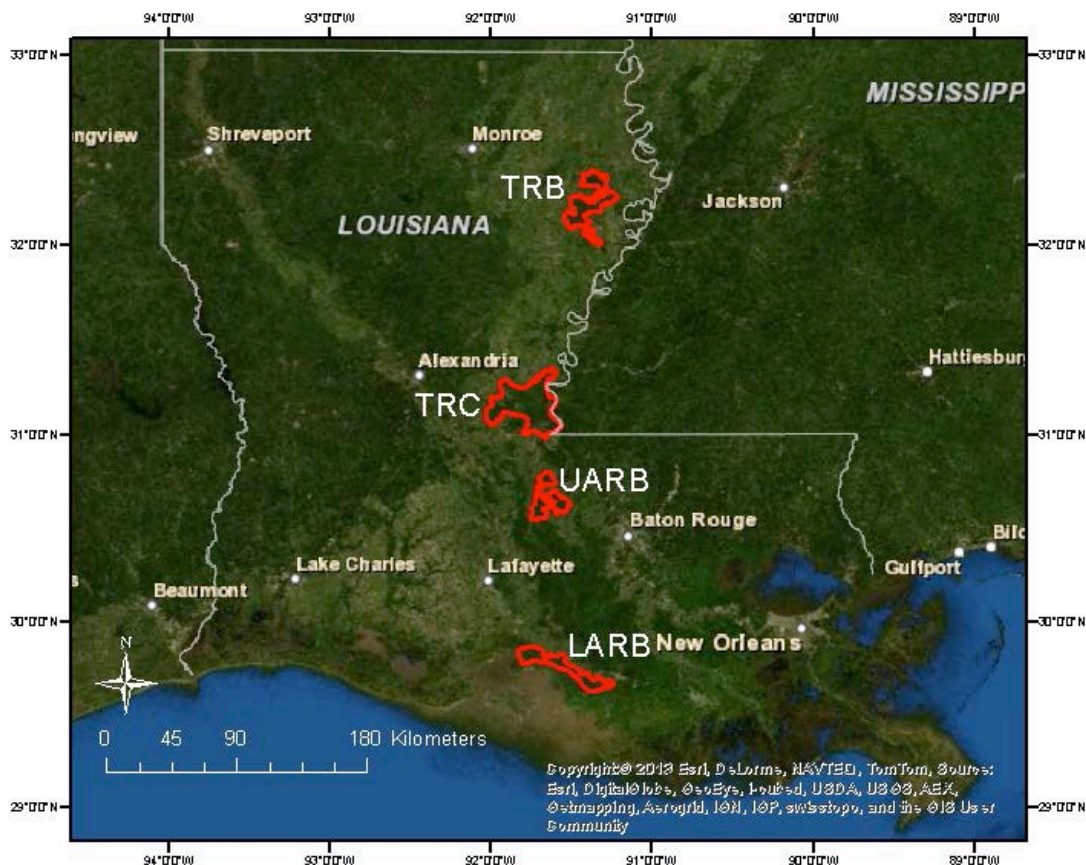
Taxonomic details of the delisting:

In the final delisting rule in 2016, as in its original listing in 1992, the FWS continued to recognize the LBB, *U. a. luteolus*, as a subspecies of black bear, *U. americanus*, distinct from two other subspecies also occurring in the Southeast: *U. a. americanus* (American black bear) and *U. a. floridanus* (Florida black bear). AR 654; 020051-020052. The delisting decision also removed those and any other subspecies of black bear found within the *luteolus* range, which had previously been listed because of their similarity of appearance, from the List of Endangered and Threatened Wildlife. *Id.*, at 020097.

Recovery areas and LBB presence/absence:

The FWS's delisting rule pointed to populations of black bears in four regions of Louisiana: the Tensas River Basin (TRB), Three Rivers Complex (TRC), Upper Atchafalaya River Basin (UARB), and Lower Atchafalaya River Basin (LARB), depicted in Figure 1.

Figure 1. LBB populations (red polygons): Tensas River Basin (TRB), Three Rivers Complex (TRC), Upper Atchafalaya River Basin (UARB), and Lower Atchafalaya River Basin (LARB). From Laufenberg and Clark (2014); AR 362; 016082.



At the time of the delisting, only the northernmost TRB area and the southernmost LARB area supported populations of native *luteolus* that had been continuously present for the subspecies' known history. No bear migration is known between those two distant regions; the FWS has characterized the likelihood of interchange among the LARB and the other population as "low". AR 654; 020095.

In contrast (and critically for purposes of this Motion for Summary Judgment), at the time of the delisting in 2016, a *U. a. luteolus* population did not occur in the central UARB, which instead contained (and still contains) a non-native bear population directly descended from founders of the separate *U. a. americanus* subspecies, which the LDWF had trucked south from Minnesota and introduced into the area in the 1960s to support game hunting. Supp. AR 640; 020098-020102. (Louisiana Wildlife and Fisheries Commission 1975 article: "Brer Bear" in the Bayou Country). Earlier research by the FWS indicated no native bears were established in the UARB at the time those Minnesota bears were released. AR 37; 001832-001848 (Nowak, R. 1986. *Status of the Louisiana Black Bear*. FWS Office of Endangered Species report, cited at AR 654; 020055.)

The genetic evidence presented by Laufenberg and Clark's 2014 study in the Record, *Population Viability and Connectivity of the Louisiana Black Bear*, a document the FWS relied on repeatedly in its delisting decision, indicated high genetic similarity between the UARB population and concurrently-sampled bears still resident in the State of Minnesota. AR 362; 016070-016182, at 016127. The FWS funded the research Laufenberg and Clark and their colleagues did over many years to study, among other issues, the genetic origin of the UARB population. According to the research that they began well prior to the LBB's delisting, with FWS cooperation and support, which is presented in the AR (but was not updated until 2018 with lead co-author Murphy), they confirmed the current genetic makeup of UARB bears identifies them closely with the introduced Minnesota subspecies *U. a. americanus*, and not with *luteolus*. Supp. AR 644; 020146-020158.⁴ They state:

⁴ Murphy, S. M., J. S. Laufenberg, J. D. Clark, M. Davidson, J. L. Belant and D. L. Garshelis. 2018. Genetic diversity, effective population size, and structure among black bear populations in

This collective evidence supports the hypothesis that the contemporary Upper Atchafalaya [UARB] population is likely the product of the historical translocated Minnesota bears.

Id., at 020152.

As Murphy et al. indicate, their study supported the earlier findings, referenced in the prior paragraph *infra*, and the findings of Csiki et al. (2003, at AR 136; 004678-004689) and Triant et al. (2004, at AR 145; 004835-004847) that the UARB bears are not *U. a. luteolus*. Murphy et al.'s findings (as well as the earlier studies cited *supra*) contradict the primary justifications for the FWS's delisting of *luteolus*, which were that: a) the UARB population and the TRB population both were native *luteolus*, b) both of those populations were viable, and c) they were connected by a secure corridor. Murphy et al. substantiate that the UARB population is not the formerly ESA-protected LBB, but is the non-native *U. a. americanus*. They also found that the separate TRB population shows no evidence of having been affected by the Minnesota introductions, thus it remains the native *luteolus*. Supp. AR 644; 020152.

Significant other Record evidence demonstrates that FWS biologists were aware that the UARB population was not the ESA-listed *luteolus* subspecies. Supp. AR 642; 020104-020137, at 020105 and 020106 (reiterating that based on Csiki et al., 2003, in the AR, cited *supra*, that the UARB bear population "...should not be protected under the ESA because of interbreeding with introduced American black bears from Minnesota."); Supp. AR 641; 020103 (1988 letter from the Secretary of the LDWF, Virginia Van Sickle, to the Director of the FWS, Frank Dunkle, reiterating that where the Minnesota bears were introduced from 1964 to 1967 the LBB may no longer exist.).

the Lower Mississippi Alluvial Valley, USA. *Conservation Genetics*, 19(5):1055-1067, <https://doi.org/10.1007/s10592-018-1075-6>.

Translocations and subsequent contamination of the *U. a. luteolus* subspecies:

The newest of the four populations is the TRC population (Fig.1). It did not exist at the time of original LBB listing, but was created through a multi-year (2001 through 2009) translocation project by the FWS as part of its effort to implement its Recovery Plan. AR 79; 002595-002653. The TRC is situated between the UARB and the TRB (Fig. 1). The translocations aimed at creating a dispersal zone between the TRB (occupied by native *luteolus*) and the UARB (occupied by non-native *americanus*). It is now known, largely through the genetics studies by Laufenberg and Clark, that there was previously virtually no natural dispersal of bears between the TRB and the distant UARB. AR 362; 016070-016182, Supp. AR 644; 020146-020158.

The Murphy et al. findings substantiate that, because the UARB population is not *luteolus*, the FWS has opened the way for genetic contamination of the native TRB bears by translocating bears into the TRC, which lies between the TRB and UARB, thereby facilitating connection and hybridization between the native subspecies to the north and the non-native subspecies to the south. Thus, this translocation effort has amounted to potentially ongoing genetic contamination of the natural genome of the native LBB.⁵

Status of the separate Lower Atchafalaya River Basin population:

The potential for natural interchange between the *luteolus* population currently in the southernmost LARB region and bears in the other three regions (TRC, TRB, UARB) is low because the LARB is isolated. AR 654; 020095. The FWS has not formally assessed the probability of long-term persistence for the LARB population nor did the agency base its

⁵ As discussed in the Argument section, *infra*, the AR is replete with documents in which the agency demonstrated awareness of this risk, yet proceeded to ignore or evade it.

conclusions about the LBB's purported meeting of the threshold criteria in the Recovery Plan on any factor related to the LARB population. *Id.*, at 020051.

Population size and occupied range area:

As of 2016 the total number of free-living black bears within the original range of the *U. a. luteolus* subspecies was approximately 692 animals including the non-*luteolus* UARB population. That includes about 296 bears in the TRB, 164 in the LARB, 69 in the UARB, and 90 to the east in Mississippi, based on the means of values provided in the delisting rule, *Id.*, at 020053-020059, plus 73 in the TRC, a figure offered in paragraph 67 of the Complaint and admitted to in the FWS answer. If the UARB non-*luteolus* bears are subtracted, the total would be approximately 620 animals. As mentioned, the original range of *luteolus* likely supported a total population estimated at about 80,000 animals. The FWS questioned that figure, AR 654; 020071, and yet in its own 1992 listing rule, AR 63; 002213, the FWS stated "Black bear populations range in density up to one to two bears per square mile." Applying those figures to LBB historic range (about 118,000 square miles), there could have been a total population as high as 118,000 to 236,000 individuals. Thus, the current total population is far less than one percent of the likely pre-colonial population size.

Based on data in the 2016 delisting rule, the total breeding range of the LBB (including the non-native UARB population) now is about 2,820 square miles (or 1,806,556 acres). AR 654; 020053. If the range of the UARB Minnesota-origin population (about 450 square miles) is excluded from the calculation, the resulting current actual LBB range is 2,370 square miles. That represents roughly two percent of the estimated pre-colonial LBB range of over 118,000 square miles based on the FWS's map of historic range in its 2014 5-year review. AR 391; 016868.

FWS delisting justification:

The FWS claimed it delisted the LBB on the basis of “recovery,” that is, the threshold criteria in the Recovery Plan had been met; thus the threats outlined in the delisting factors had been reduced or eliminated. AR 654; 020050-020051. The delisting was not premised (as it is for some ESA species) on “extinction,” that is, that the subspecies no longer existed due to interbreeding or genetic contamination; nor was delisting based on a claim of error in the original listing, for example, that there never was a distinct LBB subspecies and thus no need had existed to protect it. *Id.* The FWS predicted in the delisting decision that *luteolus* as a whole, and the TRB and UARB subpopulations in particular, likely would be viable over the next 100 years. *Id.*, at 020051. The agency further claimed there was sufficient protected habitat to support breeding and movement of individuals between the subpopulations so that the subspecies was no longer threatened.

A major fact relied upon by the FWS was the connection between populations in the TRB and the UARB via the TRC. *Id.*, at 020056. However, as explained further above and below, the UARB population did not and does not consist of the subspecies *luteolus*. The connection of the UARB population with LBB populations in the TRB, rather than contributing to recovery, threatens the remaining LBBs via hybridization and genetic contamination.

Rescission of Critical Habitat designation:

When it delisted the LBB the FWS also rescinded its Critical Habitat designation protecting 1,868 square miles of the bear’s range, which the agency had formally designated only seven years earlier. AR 63; 020097. The designation had mapped the area in which actions authorized, funded, or carried out by the federal government were subject to review pursuant to Section 7 of ESA, to ensure that they would not adversely affect the bear. Now, post-delisting,

all such “adverse effect” actions in LBB habitat that previously would have been subject to scrutiny by the FWS can proceed unchecked.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO MAINTAIN THIS ACTION

An individual plaintiff, such as Dr. Caire, Dr. Nowak, and Mr. Schoeffler, must establish independent, Article III constitutional standing. *Humane Soc’y of U.S. v. Jewell*, 76 F. Supp. 3d 69, 106 (D.D.C. 2014). Article III standing requires a claimant to show: “(1) he or she has suffered an ‘injury in fact’ that is (a) ‘concrete and particularized’ and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is ‘fairly traceable to the challenged action of the defendant;’ and (3) it is likely, as opposed to merely speculative, that the injury will be ‘redressed by a favorable judicial decision.’” *Id.* (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386, 188 L.Ed.2d 392 (2014); *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014)). As provided in plaintiffs’ declarations, Dr. Caire, Dr. Nowak, and Mr. Schoeffler satisfy these individual standing requirements. Caire Decl. at ¶¶ 13, 15-17; Nowak Decl. at ¶¶ 16-19 (“As a result [of the delisting] I am suffering and will continue to suffer scientific, professional, recreational, and aesthetic injuries due to the diminished opportunities to observe and study Louisiana black bears in the wild . . . and to the hybridization of this genetically unique species. . . . Potential conservation measures that would result from returning the Louisiana black bear to the U.S. List of Endangered and Threatened Wildlife, re-designating its critical habitat, and protecting its genome from further hybridization would greatly enhance my plans for additional study and observation.”); Schoeffler Decl. at ¶¶ 12-16.

The injury in fact requirement is met if a claimant shows that he or she “has an aesthetic or recreational interest in a particular place or animal, and that interest is impaired by a

defendant's conduct." *Jewell*, 76 F. Supp. 3d at 106 (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000)). Moreover, although a "generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interest of the plaintiff, that will suffice." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-36 (1972)); see also *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305-06 (D.C. Cir. 2013). All three individual plaintiffs have been heavily involved in research and advocacy for the LBB for decades; were actively involved in the bear's 1992 listing and accompanying management, review, and observation; and have expressed ongoing and future interests in observation of the LBB. Caire Decl. at ¶¶ 4, 6, 7-14; Nowak Decl. at ¶¶ 6, 8-15; Schoeffler Decl. at ¶¶ 4-7, 9, 12. These interests are harmed by the delisting.

An organizational plaintiff, such as Atchafalaya Basinkeeper, the Louisiana Crawfish Producers Association-West, PEER, and Sierra Club, bringing suit on behalf of their members, must establish that (1) its members have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose; and (3) neither the claims asserted nor the relief requested requires its members to participate directly in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Natural Res. Defense Council v. EPA*, 755 F.3d 1010, 1016 (D.C. Cir. 2014).

All of the organizational plaintiffs are conservation and advocacy groups. As groups dedicated to conservation, the protection of wildlife, and the use of accurate science in support of agency actions, their members' interests in observing, protecting, and studying the LBB and its habitat are germane to the organizations' purposes. Meche Decl. at ¶¶ 4-7, 12-13, 15; Nowak Decl. at ¶¶ 4-5; Schoeffler Decl. at ¶¶ 10-12, 14; Wilson Decl. at ¶¶ 4-11.

This Circuit has found that “when a defendant adversely affects a plaintiff’s enjoyment of flora or fauna, which the plaintiff wishes to enjoy again upon the cessation of the defendant’s actions,” an injury supporting Article III standing is present. *See Am. Soc’y for Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003); *see also Sierra Club v. Jewell*, 764 F.3d 1, 5-6 (D.C. Cir. 2014) (holding that organizational members who expressed interest in preserving a mountain landscape threatened by removal from the National Register of Historic Places satisfied standing requirements).

All of the plaintiffs’ declarants have amply expressed current and future interests in protecting and observing the LBB and its native habitat, which have been adversely impacted by the delisting. *See* Caire Decl. at ¶¶ 12-13, 15-17; Meche Decl. at ¶¶ 20-24; Nowak Decl. at ¶¶ 6, 10, 14-19; Schoeffler Decl. at ¶¶ 12-16; Wilson Decl. at ¶¶ 17-32. Further, none of the claims asserted or relief requested require the organizations’ individual members to participate directly in this action.

II. INCLUSION OF A NON-*LUTEOLUS* POPULATION TO SUPPORT DELISTING INVALIDATES THE DECISION

A fundamental basis for listing, or delisting, an ESA-protected species or subspecies is first correctly defining the taxon under consideration, including its population and range. Without that, it is not possible to draw any conclusions about the relevant factors. If, as here, these definitions are incorrect, that alone can invalidate the delisting decision. *See e.g., Am. Wildlands v. Norton*, 193 F. Supp. 2d 244, 252, 254 (D.D.C. 2002) (“The agency’s consideration of the existing regulatory mechanism, threats and possible diseases facing the population was necessarily affected by its definition of the population to be considered for listing.... [T]he identification of the potentially viable - or endangered - population is vital to [the] ultimate listing determination.”). The FWS’s foundational error of including the non-*luteolus*

UARB population in its analysis affected, and distorted, its definition of the subspecies and its population and range, as well as its analysis of the delisting factors. It also means that the most basic recovery criterion that the FWS claims was met – two viable interconnecting populations of LBB – was not in fact met, because one of the populations relied on is not LBB. It also means that the FWS’s efforts to interconnect populations as part of its Recovery Plan actually further threaten the LBB’s survival as a subspecies by facilitating hybridization.

A. The UARB Population Is Not *U. a. luteolus*, and Contrary Claims by the FWS Are Arbitrary and Capricious

The FWS has two contradictory responses to the UARB population and hybridization issue: First, it claims that the UARB population actually is *luteolus*, or at least partially *luteolus*, such that counting it in the LBB population is proper. As shown below, this claim is contradicted by the FWS itself and numerous other sources in the Administrative Record finding that the UARB population descended from *U. a. americanus* bears imported from Minnesota. Second, the agency claims that *luteolus* was already hybridized at the time of listing or may never have existed as a distinct subspecies, and therefore intermixing with the UARB bears does not create any *new* hybridization and is not a problem. This claim is of course contradicted by the FWS’s listing and delisting of *luteolus* as a legitimate subspecies for the very purpose of preserving its unique genome. It is also contradicted by the FWS’s admitted concerns about hybridization and its listing of other subspecies of *U. a. americanus* in the LBB range as look-alikes, but not the same as, the *luteolus* subspecies. It also is inconsistent with the first rationale that the UARB population *is luteolus*, a subspecies whose very existence the second rationale doubts.

The FWS adds to the contradictions by, on the one hand, listing the LBB to protect its unique genome, and even at delisting asserting that it has not dismissed concerns about

hybridization, AR 654; 020073, while on the other hand claiming that gene flow among the various populations, including the UARB, “benefits the Louisiana black bear and has improved its population health.” *Id.* Together, these rationales not only are contradicted by the Record, but are so internally inconsistent as to be arbitrary and capricious. The FWS has no rational basis to conclude that the UARB population is *luteolus* or does not pose a threat of hybridization.

1. *The FWS Listed U. a. luteolus as a Distinct Subspecies that Should be Protected from Hybridization.*

The LBB was legally classified as threatened under the name *U. a. luteolus*, and that name also was used in the final delisting rule, AR 654; 020049-020097, as it was in the 2014 FWS 5-Year Review, AR 391; 016804-016877; the 2015 Draft Post-Delisting Monitoring Plan, AR 546; 019135-019184; and the Louisiana Department of Wildlife and Fisheries’ Management Plan (Davidson et al. 2015) AR 500; 018791-018876. In fact, the very reason for listing LBB was to protect its unique genome; the FWS found that “the only practical means available for protecting any possibly remaining unique genetic material originally belonging to the native *U. a. luteolus* would be through listing and protecting the taxon now distinguished by cranial features as *U. a. luteolus*.” AR 63; 002214. Allowing hybridization and contamination by the genes of other subspecies is antithetical to the purpose of the listing.

The possibility that *luteolus* was never a valid subspecies, or was already hybridized, was considered and rejected in both the proposed and final delisting decisions. *See Proposed delisting*, AR 548; 019198. The final delisting decision stated: “Therefore, although we recognize that there are still questions around the taxonomy, we still consider the Louisiana black bear to be a distinct subspecies described by Hall (1981, pp. 948-951).” AR 654; 020069. *See also id.*, at 020073: “We listed the taxonomic entity defined as the Louisiana black bear in

1992 to be protective of the subspecies in recognition of those [hybridization] concerns, and we and our many partners have worked to recover this entity.”

Yet, when it responded in its delisting rule to detailed public comments that laid out concerns about hybridization, the FWS contradictorily claimed that *luteolus* either may have never existed or was already hybridized at the time of listing. Therefore, interbreeding with bears from the UARB was not a concern. *Id.*, at 020072-020073. Engaging in yet further self-contradiction and obfuscation, the agency then stated, “However, this position does not mean that we have dismissed concerns regarding the matter of hybridization and the Louisiana black bear ...”. *Id.*, at 020073. It then pivots yet again, citing recent studies suggesting that “the three subspecies in the southeast (*U. a. americanus*, *U. a. floridanus*, and *U. a. luteolus*) represent a single genetic cluster,” and should all be considered *U. a. americanus*. *Id.* However, also inconsistent with a claim that all of the bears in the southeast were all one subspecies, the FWS did not include Arkansas bear populations in listing or delisting because it was not clear whether they are *luteolus*, *americanus*, or a natural intergrade of the two. *Id.*, at 020074. *See also*, the Critical Habitat Rule, AR 249; 009501-009561, at 009507 (excluding Arkansas bears from critical habitat designation because they are not LBBs). Also, as noted above, the listing included protection for other subspecies of *americanus* in the range of the LLB as “look-alike” species, with specific reference to the Minnesota introduction, which meant that they were *not* considered functionally equivalent to the LBB. AR 63; 002215-00216.

2. *UARB Bears are Descendants of U. a. americanus Minnesota Bears and are not U. a. luteolus.*

The fact that the UARB bears are descendants of the *U. a. americanus* bears shipped from Minnesota in the 1960s is supported by the evidence in the Record that there was no breeding population of *luteolus* in the UARB at the time of the introductions, and that there is no

evidence of interbreeding in the UARB with LBB populations after that time (prior to the establishment of the TRC population by FWS, for the very purpose of facilitating such interbreeding). If the UARB contained only Minnesota bears at the time of the introductions, and there was no interbreeding with other populations since then, then there is no evidence of any other ancestry for the UARB bears other than Minnesota. This inescapable, logical conclusion is also confirmed by the Laufenberg and Clark and prior genetic studies.

The FWS attempts to obfuscate this clear conclusion with irrelevant speculation. After admitting that there was no known breeding population of native bears in the UARB at the time of the releases from Minnesota, AR 654; 020073, it postulates the possibility of LBB males traveling through the UARB. This theory is based solely on the general behavior of male black bears of sometimes traveling long distances, with no documentation of actual occurrences. *Id.* Based on this speculation about an occasional traveling bear, the FWS leaps to the conclusion that "the UARB is not strictly composed of Minnesota bears" and that it could therefore be included in its assessment as *luteolus*. *Id.* However, there was no attempt to define "strictly," to estimate the extent to which the UARB group may represent *luteolus*, or to explain how *luteolus* could have interbred with the Minnesota animals in the UARB to any significant extent if it was "very likely there was no known breeding population in that area at the time of the releases." *Id.* Contrary to the FWS's speculation about traveling males, Laufenberg and Clark's 2014 study concluded that at the time of the translocations to the TRC, "there was no potential for dispersal of either sex between the TRB and UARB subpopulations...." *Id.*, at 020056.⁶

⁶ FWS's contradictory stances on this issue are reflected in its Answer to the Complaint, where it first admits, in response to ¶ 58 in the Complaint, that "the Upper Atchafalaya River Basin ("UARB") contains a population descended in part from bears of another subspecies (*Ursus americanus americanus*) brought to the UARB from Minnesota in the 1960s to support game hunting," but then in response to ¶ 63, denies that the UARB was occupied by the non-native

Other record evidence confirms that there were no *luteolus* in the UARB at the time the Minnesota bears were put there in the 1960s. St. Amant (1959:xix, 32, 103-104, 182-183 at AR 11; 000672-000679), found that although previously present in that area, by 1950 there were no bears in the UARB. Nowak also compiled information showing that at the time of the introductions, native bears had been absent from the area for many years. AR 37; 001832-001848. The Record also confirms that the original tagged Minnesota bears did reproduce in the UARB. Taylor (1971), at AR 12; 000680-000776. An official publication of the Louisiana Wildlife and Fisheries Commission (Brunett et al. 1975, at Supp. AR 640; 020098-020102), confirmed that the only remaining native populations of *U. a. luteolus* in the state then were in the TRB and LARB and that the population in the UARB resulted from the introduced Minnesota bears and consisted of *U. a. americanus*.

The FWS has been aware for many years that the UARB contained non-native bears and of the concern about hybridization and resulting contamination of the LBB genome. During the early stages of listing consideration the official Louisiana State position remained that the native LBB survived only as two isolated populations, in the TRB and LARB. This was reiterated in a letter of June 28, 1988 to the Director of FWS from the Secretary of the LDWF, who warned of the possibility of hybridization between native bears and those imported from Minnesota. Supp. AR 641; 020103. A 2002 email exchange among FWS officials states that a paper by Csiki et al. concluded that the UARB bear population “...should not be protected under the ESA because of interbreeding with introduced American black bears from Minnesota.” The third page of the

americanus at the time when bears were translocated to the TRC. Contrary to the statement in the delisting decision that there was likely no breeding population of LBB when the Minnesota bears were brought to the UARB, in its Answer to ¶ 59 of the Complaint the FWS denies that there was no LBB population in the UARB at that time. Dkt. No. 6.

email chain contains the following quote from Csiki et al.: "Our data indicate that some of the federally-protected bear populations of Louisiana are largely derived from translocated bears." Supp. AR 642; 020104-020137, at 020105 and 020106.

In addition, accumulating genetic studies since 2003 confirm that the UARB population is of *U. a. americanus* descent. Molecular studies, including those of Csiki et al. (2003) AR 136; 004678-004689, and Triant et al. (2004) AR 145; 004835-004847, showed that the UARB population was predominantly of Minnesota origin. Triant et al. noted that gene flow from the UARB via the corridor that FWS was attempting to establish between the TRB and the UARB "may alter the genome that original conservation efforts set out to protect from extinction." *Id.*, at 004844.

Later, Laufenberg and Clark, in both 2014 and 2018, demonstrated through genetic studies that the UARB population was most closely related to current sampled Minnesota bears, not *luteolus*. Laufenberg and Clark (2014), in Figure 15A, show the individuals of the TRB population (represented by two subgroups) and the LARB population to each form a tight statistical cluster, completely distinct from each other and from the UARB and current Minnesota bears (MINN). AR 362; 016129. The latter two groups, in contrast, partly overlap one another. Remarkably, the UARB population is, on average, even more distant genetically from the TRB and LARB populations than is the MINN population. Figures 15B and 15C are less definitive but show that on axis 3 the TRB and LARB populations closely overlap, while the UARB and current MINN groups are distinct from the two native populations and from each other (likely due to genetic divergence after long separation). *Id.* In sum, Laufenberg and Clark showed that: (1) of all the various groups of bears they assessed, the two showing the closest genetic affinity to one another were those of the UARB and current MINN, and (2) there was

substantial distinction between the UARB Minnesota-sourced population and both the TRB and LARB populations. *Id.*, at 016127.

The 2018 article, with lead author Murphy and co-authored by Laufenberg and Clark, contains genetic data obtained after that of the 2014 study, but their research was underway and supported by the FWS prior to the delisting decision in 2016. Supp. AR 644; 020146-020158. The authors state: "we found no evidence that the 1960s releases of Minnesota bears influenced the Tensas River population . . . Our findings also support the conclusions . . . that the Upper Atchafalaya population may have descended from the released Minnesota bears. Results . . . suggested similar ancestry of Upper Atchafalaya and Minnesota bears . . . *This collective evidence supports the hypothesis that the contemporary Upper Atchafalaya population is likely the product of the historical translocated Minnesota bears.*" *Id.*, at 020152 (emphasis added). Again, they noted their study supports the much earlier conclusions of Csiki et al. (2003) and Triant et al. (2004) (both cited *supra*) that the UARB population is not *U. a. luteolus*.

B. It is Arbitrary and Capricious to Count the UARB Population as LBB for Delisting Purposes

Even before reaching issues concerning the Recovery Plan and threats from hybridization discussed below, the mere fact of counting non-*luteolus* bears for the purpose of delisting is enough to invalidate the decision. In *Am. Wildlands v. Norton*, the court invalidated a decision not to list a species solely on the basis of including hybrid stocks in the population considered for listing. 193 F. Supp. 2d at 252. The court reasoned that it was illogical, and therefore arbitrary and capricious, to consider hybridization as a threat, and at the same time count hybrid stocks in the population used to rebut the need for listing. *Id.* at 253. *Cf. Am. Wildlands v. Kempthorne*, 530 F.3d 991, 994 (D.C. Cir. 2008) (upholding FWS's use of morphological data where genetic

data were unavailable to determine which fish were hybridized and should not be counted in the listing).

Similar to the *Wildlands v. Norton* case, here the FWS recognized the threat of hybridization from the UARB bears, but still counted them as LBB to make its claim of recovery. The FWS recognizes hybridization under the category of “other natural or manmade factors affecting its continued existence.” AR 654; 020090-020091. It admits that at the time of listing, it recognized the threat of hybridization from Minnesota bears, *Id.*, at 020091, and that it was still a concern at the time of delisting. *Id.*, at 020073. As described above, it rationalizes including the non-native population in the delisting with unsupported double-speak about the UARB possibly containing some *luteolus* component and at the same time claiming that hybridization does not matter because *luteolus* was already hybridized at the time of listing or possibly never existed as a distinct subspecies in the first place.

Thus, the inclusion of the UARB in the population considered for delisting alone invalidates the delisting decision.

C. The Recovery Plan Criteria Are Not Met Because the UARB Population is not *U. a. luteolus*

Including the UARB bears in the delisting analysis does far more harm than improperly adding to the very modest current population and range of the LBB. It is the linchpin for meeting the Recovery Plan, contributing one of the only two populations considered viable and interconnected. The Plan calls for: “At least two viable subpopulations, one each in the Tensas and the Atchafalaya River Basins” with “Immigration and emigration corridors between the two viable subpopulations.” AR 79; 002600.

The FWS did not analyze the viability of the LARB population or include it in the LBB “metapopulation”. AR 654; 020051. The FWS found that because of its location, the LARB has

little or no potential for interconnection with the other populations. *Id.*, at 020057. The Laufenberg and Clark viability analysis upon which the agency relied did not find the TRC population of translocated bears to be viable, and in fact found that indications were that “that population may not yet be self-sustaining.” AR 362; 016157.⁷ Therefore, we are left with *only* the TRB population as an assessed viable population of true LBB. Moreover, the TRB is not connected with *any* population of true *luteolus* – viable or not – as the FWS found that it did not have potential to connect with the LARB. Once it is recognized that the UARB population is not the listed subspecies, the claim of recovery based on two viable interconnected populations on which the delisting rests evaporates.

The elimination of the UARB as an LBB population also means that FWS’s reliance on the viability of the TRB, TRC, and UARB “metapopulation,” AR 654; 020050, must be reevaluated because there is no such metapopulation.

The FWS did not explore the implications of having only one viable but isolated population in its decision, although based on the requirements of the Recovery Plan, it is clear the agency recognized the need for more than one population and interconnection in order to achieve a minimum recovery threshold. As shown below, in other ESA contexts the FWS and the courts have frequently opined that one isolated population is a dangerous and untenable situation for a species.

Laufenberg and Clark, on whose work the FWS primarily relied in the delisting decision, found that genetic and demographic interchange between LBB populations “*is essential to long-*

⁷ In addition, the recent 2018 Murphy et al. report finds that the TRC population, though originally translocated from *luteolus* populations in the TRB and LARB, is already becoming hybridized. *See* Sec. I.D below.

term viability.” AR 362; 016083 (emphasis added). In their 2018 report, with Murphy et al., Laufenberg and Clark recognized that the LBB populations at the time of listing, including the TRB, were vulnerable due to “low genetic diversity or small effective population sizes” and that more translocations might be needed to improve genetic diversity and increase effective population size. Supp. AR 644; 020146-020158.⁸

The LBB delisting decision itself recognized that habitat fragmentation prior to the 1992 listing had “caused isolation of the already small subpopulations, subjecting them to threats from such factors as demographic stochasticity and inbreeding.” AR 654; 020052. As the FWS stated in the 5-year review, “The requirement for two viable populations was based on that fact that having multiple viable populations with exchange of individuals (see Criteria 2) increases the likelihood of achieving a long-term viable Louisiana black bear population.” AR 391; 016808. “[T]he establishment of effective corridors increases the viability potential of small populations by reducing such things as demographic stochasticity and inbreeding and is a necessary component to achieving Criterion 3. This is directly related to Factor A (*the present or threatened destruction, modification, or curtailment of habitat or range; Recovery Plan Tasks 1.1-1.5.*)” *Id.*, at 016810.

Case law interpreting the listing provisions of the ESA amply supports the need for multiple and connected populations. *See Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1074 (9th Cir. 2018) (noting that FWS recognized the importance of having multiple populations as genetic reservoirs in case of unexpected stochastic events or catastrophes that may wipe out one or more populations and that FWS concluded the lack of multiple populations constituted a

⁸ While these authors advocate more interbreeding between the various populations, including those that are not *luteolus*, they were not considering the legal issues inherent in the need to preserve the subspecies that was listed under the ESA and avoid hybridization.

threat to the species); *Ctr. for Biological Diversity v. Jewell*, No. CV-15-00019-TUC-JGZ (I), 2018 U.S. Dist. LEXIS 56436, at *48 (D. Ariz. 2018) (finding provision for a single, isolated population of 300 to 325 Mexican wolves, with one to two effective migrants per generation, “does not further the conservation of the species and is arbitrary and capricious,” especially because the final rule did not account for the fact that the population was not connected to a metapopulation); *Survivors v. Dep’t of Interior*, 321 F. Supp. 3d 1011, 1023 (N.D. Cal. 2018) (“Isolated populations are typically at greater risk of extinction due to genetic and demographic concerns such as inbreeding depression, loss of genetic diversity, and Allee effect (the difficulty of individuals finding one another), particularly where populations are small”); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 246 F. Supp. 3d 1272, 1285 (N.D. Cal. 2017) (listing decision was flawed and had to be reconsidered because the FWS failed to acknowledge the small, declining, and isolated nature of the coastal marten populations); *Defenders of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 1005-06 (D. Mont. 2016) (granting summary judgment against the FWS for failing to consider small population size and lack of genetic diversity); *Am. Wildlands*, 193 F. Supp. 2d at 256 (isolation of population is a factor that the agency should consider in making its listing determination, either as a "modification or curtailment of [the species'] habitat or range," 16 U.S.C. § 1533(a)(1)(A), or as a "natural or manmade factor[] affecting its continued existence," 16 U.S.C. § 1533(a)(1)(E)).

In sum, the criteria of the LBB’s Recovery Plan have not been met. While recovery plans are not regulatory documents and do not necessarily entirely determine suitability for delisting, here the FWS relied on its claim that the Recovery Plan criteria were met as a central pillar of its decision. AR 654; 020061. Its decision cannot stand without it. Even beyond whether or not the recovery criteria were met, the agency has not analyzed the implications for delisting of what

is the reality of only one viable but isolated and relatively small population of *luteolus*. Based on FWS's own statements and the case law, it is apparent that *luteolus*'s delisting could not be justified under the current actual conditions.

D. The FWS Has Increased the Threat of Hybridization by Creating the TRC

The FWS determined that in order to find that LBB had recovered and could be delisted, at least two viable and connected populations would be needed. In its haste to achieve delisting, the agency more than cut corners and actually caused the bears to be even more threatened by its translocation project intended to connect the *luteolus* population in the TRB with the non-*luteolus* population in the UARB.⁹ The hybridization that will destroy the natural genome of an animal that played a major role in the history, ecology, and culture of a vast region of the southern United States is literally going on before our eyes.

Although the importation of Minnesota bears into the LBB range in the 1960s had the potential to pose a threat of hybridization, in fact that threat was not realized at that time, due to the distances and geographic features within Louisiana that then separated the imported population from the native populations. Laufenberg and Clark found no potential for dispersal between the nearest population, the TRB, and the UARB before creation of the TRC. AR 654; 020056. But the previously unrealized threat is now reality due to the actions of FWS. With the creation of the TRC closer to the UARB, the agency created the potential for interchange

⁹ The FWS has also interfered with a subspecies of *americanus* in the White River Basin (WRB) of southeastern Arkansas, participating in translocations of WRB bears to Felsenthal National Wildlife Refuge, some of whom then migrated into Louisiana. AR 654; 020074. Although this non-*luteolus* population of bears has had some natural contact and modest interbreeding with TRB *luteolus*, AR 362; 016131, excessive contact and interbreeding as a result of manipulation and translocation can disrupt the normal genetic balance between two such groups. In the delisting, the FWS inexplicably refers to this group of WRB migrant bears as "Louisiana black bear", AR 654; 020053, table 1, and there are reports of dispersal of bears from Felsenthal to the TRB, AR 352; 016160, adding to the hybridization concerns facing *luteolus* in the TRB.

between the UARB and TRC populations, and genetics data show that gene flow has occurred. *Id.* In fact, 20 of the 35 cubs in the TRC showed evidence of being sired by UARB males. *Id.*, citing Laufenberg and Clark. *See also*, AR 438; 017789-017794, another Laufenberg and Clark paper stating that genetic analysis showed that bears from the UARB bred with bears from the TRC. Laufenberg and Clark's 2014 genetic study, figure 16A, AR 362; 016130 shows that while many TRC individuals are genetically similar to the TRB population, a substantial group is genetically intermediate between the TRB and the UARB populations. Thus, the TRC bears, while starting out as *luteolus*, have become a partially hybridized population and continued interchange with the UARB bears will make it more so over time.

Fortunately, there is not yet evidence of significant hybridization between the UARB and the TRB bears directly or via the intermediate TRC, but the potential exists. Three males were captured in the TRB that had dispersed from the TRC. AR 654; 020058. At least one male with UARB ancestry was captured in the TRB. *Id.*, at 020056. According to the delisting rule, recent LDWF capture records documented the presence of additional resident breeding females between the TRC and the TRB, "which may significantly increase the probabilities for interchange." *Id.*, at 020055. Of course, the whole purpose of translocating bears to the TRC was to facilitate interchange between the UARB and the TRB, and without further intervention to reverse the trend, it is likely to eventually succeed.

In sum, the FWS's actions to implement its Recovery Plan to connect populations have not benefitted the LBB subspecies, but instead have resulted in the partial hybridization of a formerly LBB population in the TRC and the threat of much more such genetic contamination to come if the FWS plan continues unchecked.

III. THE FWS'S FAILURE TO CONSIDER LOSS OF HISTORIC RANGE ALSO INVALIDATES THE DELISTING DECISION

While the FWS very generally defined the historic range of the LBB as all of Louisiana, eastern Texas, southern Arkansas, and much of Mississippi, AR 23; 001102, and also generally defined the bear's relatively minute current range, AR 654; 020053, the agency explicitly disclaimed the need to consider the loss of historic range in its delisting decision. The delisting states, "[t]he recovery status of the Louisiana black bear is not contingent upon its occupying a particular portion of suitable habitat within its historical range," because the subspecies as a whole has reached recovery because its metapopulation of the TRB, TRC, and UARB has long-term viability. *Id.*, at 020078. While finding that LBB habitat and range has increased since its listing in 1992, e.g., *Id.*, at 020054 and 020078, the FWS conducted no comparative assessment of the historic and current ranges, and did no analysis of how much habitat is enough to render the subspecies no longer threatened or of how the loss of historic range is affecting the subspecies today. This is especially problematic because at the time of listing, and the FWS found that the LBB met "the criteria for protection under the Act on the basis of past habitat loss alone," AR 63; 002210, and its current habitat is still only approximately two percent of its historic range.¹⁰ (See Facts, *supra*, under "Population size and occupied range area:").

The FWS is simply wrong that loss of historic habitat need not be addressed if there is a finding that the current population is viable. In *Humane Soc'y of the United States v. Zinke*, 865 F.3d 585, 603 (D.C. Cir. 2017), the D.C. Circuit held that a failure to consider the effects of loss

¹⁰ The FWS relies on the fact at the time of the delisting decision, the breeding range of the LBB in Louisiana and Mississippi had increased by over 500% since listing, and that forested land in Habitat Restoration and Planning Area has increased by 7.5% to 11.4%. AR 654; 020075. While certainly steps in the right direction, the extremely modest scope of these increases is illustrated by the fact that even with them, LBB still occupies only about 2% of its historic range.

of historic range rendered a delisting decision arbitrary and capricious. The court noted that the FWS's own Range Policy "is explicit that a species may be endangered or threatened throughout all or a significant portion of its current range *because* [a] loss of historical range is so substantial that it undermines the viability of the species as it exists today. Range Policy, 79 Fed. Reg. at 37,584 (emphasis added)." *Id.* at 605. The D.C. Circuit rejected as a "*non sequitur*" the agency's argument that it need not consider loss of historic range because it had determined that the current population at issue would "remain viable." *Id.* at 606. "[W]hatever the Service prognosticates about future viability in certain portions of the current range cannot be reliably reasoned if it was made in a historical vacuum." *Id.* While a species need not be restored to its entire historical range, that does not obviate the requirement "to contend with the implications of massive range loss for the species' endangered or threatened status within its current environment." *Id.* See also *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1067 (9th Cir. 2018) (holding that the FWS must consider the historical range of a species in evaluating other aspects of the agency's listing decision, including habitat degradation).

IV. THE FWS FAILED TO CONSIDER LOSS OF HISTORIC POPULATION

As with historical range, the FWS disclaimed the need to consider any comparison of current and historical population numbers, to analyze the impact of the loss of historical population on the LBB today, or to determine the minimum population that could support delisting. This is true even though the FWS acknowledged that population is "an important component in a species' status," AR 654; 020071, and there is a great deal of historical population data in the Record, *e.g.*, Garshelis et al. (2008) AR 214; 008591-008602, which the FWS ignored.

The agency claimed that the Laufenberg and Clark viability study is the “best science” for estimating the species’ probability for long-term persistence, and therefore there was no need to estimate a “minimum viable population size.” AR 654; 020071. It further stated:

Regardless of the method used to estimate historical population numbers, it is important to note that the recovery status of the Louisiana black bear is not contingent upon such figures. We determined that the Louisiana black bear has reached recovery because its metapopulation has long-term viability, there is adequate long-term protection of its habitat; and it no longer faces long-term threats to its viability.

Id.

There are several problems with this approach. The FWS essentially put all of its eggs in the basket of the Laufenberg and Clark viability calculations, reasoning that if the UARB-TRB-TRC metapopulation is viable, then there must be adequate population and adequate habitat, without the need to independently analyze these factors or to compare them with historical levels. As noted above, the D.C. Circuit rejected this approach as related to historic range, and the same should logically apply to historic population. In addition, the Laufenberg and Clark viability analysis depends on the inclusion of the non-*luteolus* UARB population, which negates its value in resolving the question of LBB long-term viability. This increases the importance of looking at other factors such as an assessment of the overall loss of the historic population.

As previously noted (see Facts, *supra*, under “Population size and occupied range area:”), as of 2016 the total number of free-living black bears within the range of *luteolus* was about 692 bears. That consisted of about 296 bears in the TRB, 164 in the LARB, 69 in the UARB, 73 in the TRC; and 90 to the east in Mississippi. If the UARB non-*luteolus* bears are subtracted, the total would be about 620 animals. That figure would have to be further reduced because, as discussed above, some of the TRC bears are hybrids of TRB and UARB animals.

In contrast, the historical population was estimated at 80,000 bears based on multiple data sources. AR 654; 020071. While the final delisting rule questioned the estimate and stated that the historical population was likely “significantly lower,” the FWS did not provide an estimate of its own, and in its Answer to the Complaint, the FWS admitted that it had no knowledge of what the historical population was. Dkt. No. 6, Answer to ¶ 67 of the Complaint.

Assuming that the historic population was “significantly lower” than the 80,000 bears estimate in the Record, even by half, it would still mean that the current population is only roughly 1.6% of the historic population. (620 compared with 40,000). In other words, the current LBB population is tiny compared with its historic population. Ignoring the implications of this fact was a “fail[ure] to consider an important part of the problem’ facing FWS and was arbitrary and capricious.” *Am. Wildlands*, 193 F. Supp. at 256 (quoting *Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 43 (1983)).

V. THE LBB IS THREATENED IN A SIGNIFICANT PORTION OF ITS RANGE --THE LARB

The delisting decision contains a “Significant Portion of the Range Analysis” (SPR), which, the agency acknowledges, is required by the ESA and its implementing regulations to determine whether the species is endangered or threatened in “all or a significant portion of its range.” AR 654; 020094-020095. The FWS analyzes the issue by first determining if the species is endangered or threatened in all of its range. If not, then it must consider whether it is endangered or threatened in any portion of its range and whether that portion is “significant.” If so, the entire species must remain listed. *Id.*, at 020094. While plaintiffs disagree that the LBB is no longer threatened in all of its range, it is also the case that the subspecies is at the least still threatened in the LARB and that the LARB is a significant portion of its range. Therefore, the entire subspecies must remain listed.

The FWS recognized that in comparison with the other populations in Louisiana, “the LARB subpopulation ... may be at greater risk of extinction due to its additional potential threat from future anticipated development and sea level rise,” *Id.*, at 020090, and that its probability of interchange with the other populations is low (*i.e.* it is isolated). *Id.*¹¹ The agency nevertheless concluded that this population is neither threatened nor “significant,” and therefore no further SPR analysis was done. *Id.* Neither of these conclusions was rational or supported by the record.

To delist a species based on recovery, the FWS has the burden to “substantiate,” based on the “best scientific and commercial data available,” that the species is “no longer endangered or threatened.” 50 C.F.R. 424.11(d). The FWS has not done so for the LARB population. While FWS insists that the type of viability analysis that Laufenberg and Clark performed for the TRB, TRC, and UARB is the best available science, *e.g.*, AR 654; 020069-020071, no such analysis was done for the LARB. Therefore, the best scientific data available does not substantiate the LBB’s recovery there. In fact, the FWS found: “The probability of long-term persistence for the LARB is unknown.” *Id.*, at 020059.

Despite this admission, the FWS attempted to substitute the “best scientific data” with speculation to suggest (certainly not “substantiate”) that the LARB population may no longer be threatened. The delisting decision merely noted that its population was “stable to increasing”. *Id.*, at 020095. Further, that it may be able to adapt to loss of coastal habitat by moving to more suitable areas, and that projected successional changes in the Atchafalaya Basin may create more

¹¹ The FWS’s 5-year review of the LBB, published only slightly more than a year before the delisting proposal, recognized the potential for catastrophic natural events such as hurricanes and tropical storms to affect the habitat if the LARB, damaging trees, causing exposure to salt water and replacement of native food source plants, and forcing bears to higher areas where there could be road mortality and nuisance behavior. AR 391; 016849. It also noted that climate change could result in the need for more frequent openings of the Morganza spillway, with increased effects on the LARB bears. *Id.*, at 016850.

suitable bear habitat by 2030. *Id.*, at 020095 and 020091. The FWS did not address the fact that the LARB habitat has not expanded since it was listed in 1992, indicating that there are likely not other areas the bears could expand into if they lose habitat due to sea level rise, or they would have done so already. In fact, the FWS found that LBB had little potential for immigration because it was boxed in by poor habitat quality to its north and U.S. Highway 90. *Id.*, at 020056-020057. Further, the agency did not consider whether, if parts of the Atchafalaya Basin later convert from swamp to forest as predicted, there could be competition, including from humans, to occupy those areas in ways that would harm or exclude the bears, especially without the protections of the ESA and the Critical Habitat designation. The FWS also did not consider that if the LARB habitat expanded to allow interchange with the UARB as it postulates, AR 654; 020057, it would put the LARB, which now faces a minimal threat of hybridization, in more severe danger thereof.

The speculative nature of the assertion that the LARB population may no longer be threatened is further illustrated by the FWS statement that “*if* the current stability or increasing size continues, it is unlikely that the subspecies would be in danger of extinction (or likely to become so) in this portion of its range.” *Id.* (emphasis added).

Moreover, the FWS did not find that the factors that caused the species to be listed in the first place, primarily habitat loss, have been reduced or eliminated for this population. Unlike the other populations, the range of the LARB bears has not increased since listing. *Id.*, at 020053, n. 3, and as noted above, the FWS recognizes the barriers to range expansion. Also, the mean estimated size of the LARB population (164 bears) is barely half that of the TRB population (296), its overall distribution is much smaller, and only 5.8 percent of its breeding

habitat is protected, compared to 49.2 percent in the TRB (*Id.*, at 020053, Table 1; 020054; 020056; 020058, and 020057, Table 3).

Perhaps conceding that it cannot “substantiate” that the LARB population is no longer threatened, the FWS goes on to claim that loss of the LARB population would not cause the entire species to be endangered or threatened because the TRB and UARB populations have been found to be viable. Per the FWS’s claims, the LARB population, even if still threatened, does not occupy a “significant” portion of the LBB range. *Id.*, at 020095. The FWS based this determination on its estimates of long-term viability of the TRB and UARB populations, which it stated make up the majority of LBB population, *Id.*, at 020095, even though the UARB population is much smaller than the LARB population (69 versus 164) (See Facts, *supra*, under “Population size and occupied range area.”). Shockingly, the FWS appears prepared to write off more than a quarter of the entire estimated LBB population (164 of 620).

Apart from the lack of evidence to support the FWS conclusion that the loss of the entire LARB would not threaten the LBB, that conclusion relies on the viability of the TRB and UARB, while only one of those populations is actually the listed subspecies, *luteolus*. The FWS has not analyzed the true situation, where loss of the LARB bears would leave only one true *luteolus* population, in the TRB (given that the UARB is *americanus* and the TRC population is now partially hybridized). Loss of the LARB would also eliminate the only long-term possibility of eventual connection and beneficial interbreeding between two separated *luteolus* populations.

When the FWS has made errors in its analysis of a species (here considering that UARB as *luteolus*), it must revisit its SPR finding with those errors corrected. *Defenders of Wildlife v. Jewell*, 176 F. Supp. at 1007 (granting plaintiffs summary judgment against FWS’s application of the SPR policy because of the flawed premises of its threat analysis).

In sum, because there is no record support or rational basis for concluding that the LARB population is no longer threatened, or that it is not a “significant” part of the overall LBB population, the SPR analysis, and thereby the delisting decision, must be reversed.

VI. EXISTING REGULATORY MECHANISMS ARE INADEQUATE TO PROTECT LBB HABITAT IN THE ATCHAFALAYA BASIN

Existing regulatory mechanisms are inadequate to ensure the LBB’s survival. *See* 16 U.S.C. § 1533(a)(1)(D). The FWS removed the LBB from the Federal List of Endangered and Threatened Wildlife, also removing the critical habitat for the LBB, “based on recovery criteria in the recovery plan and the five-factor threats analysis” required under the ESA. AR 654; 020051. Finding that the threats to the subspecies had been “largely ameliorated or reduced”, the Service considers the LBB to be “recovered” because “all substantial threats . . . have been eliminated or reduced and adequate regulatory mechanisms exist”, relying heavily on the jurisdiction of the Clean Water Act (CWA). AR 654; 020051 and 020089. However, the best available information pertaining to application of existing regulatory mechanisms, at least within the Atchafalaya Basin, suggests that the existing mechanisms do not adequately address the threat of habitat destruction and fragmentation.

The FWS initially found the CWA “insufficient to ensure the long-term protection of Louisiana black bear corridors.” AR 654; 020063. However, in the delisting decision, the FWS found that existing environmental regulations, including compensatory wetland mitigation, “federal legislation restricting agricultural conversion of wetlands, and the nature of conservation easements” provide sufficient long-term protection of LBB habitat and interconnecting corridors called for under the Recovery Plan and in response to the five-factor threats analysis. *Id.* Although “adequate regulatory mechanisms” may not be tantamount to the stalwart protection of

the ESA, it does require “considerably more than no special protection at all.” *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F. 3d 1015, 1032 (9th Cir. 2011).

The Service alleges that legal cases have expanded the regulatory and enforcement authority of the U.S. Army Corps of Engineers under the CWA. AR 654; 020063 and 020089. However, the lawsuit the Service cites in support of the Corps’ expanded authority preceded the listing decision by over ten years. *Id.* (citing *Avoyelles Sportsmen’s League, Inc. v. Alexander*, 511 F. Supp. 278 (W.D. La. 1981)). The FWS designated critical habitat for the LBB in 2009, determining that such a designation was “prudent” and that, in some cases, “critical habitat designations may provide greater regulatory benefits to the recovery of a species than would listing alone.” AR 548; 009507 and 009523. Yet, the proposed and final delisting rules both failed to explain how existing mechanisms would adequately protect from the recognized threats of development and federal actions following removal of critical habitat and delisting. It is unclear how cases and revised legal interpretations, some of which predate the LBB’s listing and critical habitat designation, have substantially altered the regulatory landscape to now provide adequate regulatory means of protecting LBB habitat from these recognized threats.

Moreover, Jody Meche and Dean Wilson, leaders and members of plaintiff organizations the Louisiana Crawfish Producers Association-West (LCPA) and Atchafalaya Basinkeeper (ABK) respectively, have observed the failure of existing regulatory mechanisms to protect wetlands and LBB habitat throughout the Atchafalaya Basin since the removal of ESA protections for critical habitat. Both Meche and Wilson discuss the efforts of LCPA and ABK to challenge destructive development projects permitted since the delisting decision and removal of critical habitat for the LBB. Meche Decl. at ¶ 17; Wilson Decl. at ¶ 23; *see also Atchafalaya*

Basinkeeper, et al. v. U.S. Army Corps of Eng'rs, No. 3:18-cv-23-SDD-EWD (M.D. La. 2018).¹²

Further, both declarants identify legal challenges to unpermitted activities impacted by the delisting. Meche Decl. at ¶ 18; Wilson Decl. at ¶ 24; *see also Louisiana Crawfish Producers Association-West, et al., v. U.S. Army Corps of Eng'rs*, No. 6:11-cv-00461-RFD-PJH (W.D. La. 2011).¹³ These are just a few examples of the activities authorized under the current regulatory mechanisms that contribute to the degradation of wildlife habitat, including for the LBB.

In its Critical Habitat Designation rule, the FWS found that “most bottomland hardwoods within the critical habitat boundary are jurisdictional wetlands,” AR 249; 009503, and subject to Corps permitting under the CWA. However, the FWS has failed to show that, without the additional protections afforded through critical habitat designation, compensatory mitigation approved to compensate for unavoidable wetland losses in Corps permits can adequately protect against habitat loss, fragmentation, or further isolation of habitat. *See* AR 654; 020089-020090.

¹² In this current challenge of the Corps’ CWA section 404 permit authorizing construction of the 162-mile crude oil pipeline across the Atchafalaya Basin, the plaintiffs there argue, among other things, that the Corps failed to consider the history of noncompliance with § 404 permit conditions and failed enforcement in the Basin, and the inadequacy of proposed wetland mitigation for conversion of forested wetlands, including the unique importance of cypress-tupelo wetland forests (which provide suitable den trees for LBB), pursuant to its duties under the National Environmental Policy Act and the Clean Water Act. *See also*, Critical Habitat Rule (2009) AR 249; 009515-009516 (discussing the service of bald cypress as den trees in areas along flooded sloughs, lakes, bayous, and rivers, and their importance for female reproductive success in areas subject to flooding).

¹³ In this suit, the plaintiffs challenged the Corps’ issuance of after-the-fact permits to violators of the CWA, claiming, among other things, that the Fisher Lake project diminished habitat and water quality, including habitat of the LBB, and that the Corps violated the ESA. Following the 2016 delisting of the LBB, the court dismissed plaintiffs’ ESA claims as moot. In seeking dismissal of plaintiffs’ ESA-related claims, the Corps argued that, despite the FWS’s statements in the LBB delisting rule regarding the adequacy of existing regulatory mechanisms, the delisting “does not impose any continuing legal duties on the Corps.” 6:10-cv-01085, *Reply Memorandum in Support of Partial Motion to Dismiss First and Third Causes of Action*, ECF No. 233-1 (filed June 2, 2016). These consolidated cases highlight concerns regarding enforcement and compliance with environmental regulations in the Basin, and the impact of the delisting and removal of critical habitat.

Not only is the efficacy of compensatory mitigation unproven¹⁴, but on-the-ground impacts from recent development projects described above indicate that wetlands mitigation within the Atchafalaya Basin, including LBB habitat, may fail to adequately compensate for all types of lost wetland functions. *See Atchafalaya Basinkeeper*, No. 3:18-cv-23-SDD-EWD (M.D. La. 2018) (challenging the Corps' approval of compensatory mitigation to replace the lost aquatic function of permanently converted cypress-tupelo forested wetlands with credits from a mitigation bank fifty miles from the impacted area in a "restored" agricultural field).¹⁵

Existing regulatory mechanisms do not respond to the threats from habitat loss and fragmentation that still exist, especially for the LARB population. As FWS acknowledges, fragmentation of habitat limits the potential for breeding range expansion and creates barriers to movement that can impact population demographics and genetic integrity. AR 654; 020082. Although the current isolation and low probability of migration to or from the LARB may be desirable considering the non-*luteolus* UARB population that is its nearest neighbor, this isolation and ongoing habitat fragmentation is incompatible with any sustainable, long-term approach to recovery for the LBB, which as FWS acknowledges, requires interconnected populations. The ESA permits some habitat loss, "SO long as that loss does not rise to the level of a threat". *Defenders of Wildlife v. Kempthorne*, 535 F. Supp. 2d 121, 129 (D.D.C. 2008).

¹⁴ See Government Accountability Office, Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring 17 (Sept. 2005), available at <https://www.gao.gov/products/GAO-05-898> (describing the lack of enforcement in mitigation by the Corps).

¹⁵ Although the FWS claimed that for projects that would impact LBB habitat it "routinely requests that any associated wetland mitigation project . . . be sited in a location, and conducted in a manner, that would result in the restoration of suitable" LBB habitat, AR 654; 020089 (emphasis added), without the consultation required for critical habitat under Section 7 of the Act, this is unenforceable and discretionary. *See Or. Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998) (interpreting 16 U.S.C. § 1533(a)(1)(D) to mean that "the [agency] must base its decision on current, enforceable measures").

(emphasis in original). However, considering the many recognized threats facing the LARB population and the FWS's reliance on the bear's ability to adapt and disperse, the FWS should have retained the listing in order to ensure maintenance of suitable habitat in the Atchafalaya Basin to accommodate and respond to these threats. The long-term effect of habitat conversion and destruction on bear mortality and dispersal, enabled under existing regulatory mechanisms, remains a substantial threat to the LBB.

CONCLUSION

The FWS made its 2016 delisting decision for the Louisiana black bear on the basis of "recovery". However, as shown above, the agency failed to meet its own threshold recovery criteria. The Administrative Record shows that the FWS failed to rely on the best available scientific and commercial information, arbitrarily and capriciously included a population of black bears that is not the listed *U. a. luteolus*, and failed to make a number of essential findings necessary to support an ESA delisting decision. For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted and the 2016 delisting of the Louisiana black bear should be vacated.

Dated: April 5, 2019

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY, et al.,)
)
Plaintiffs,)
)
v.)
)
DAVID BERNHARDT, in his official)
capacity as Secretary,)
U.S. Department of Interior, et al.)
)
Defendants.)

Case No. 1:18-cv-1547-JCB

**[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

This matter comes before this Court on the Motion for Summary Judgment of Plaintiffs Public Employees for Environmental Responsibility (PEER), et al. in the above-captioned matter.

Upon consideration of the Plaintiffs' Motion for Summary Judgment, supporting documents of all sides, the administrative record, and the record in this case, the Court finds that summary judgment in plaintiffs' favor is warranted and hereby GRANTS plaintiffs' motion, and VACATES the 2016 Louisiana black bear delisting decision.

IT IS SO ORDERED.

Dated: _____

JOHN D. BATES
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY, et al.,)
)
Plaintiffs,)
)
v.)
)
DAVID BERNHARDT, in his official)
Capacity as Secretary,)
U.S. Department of Interior, et al.)
)
Defendants.)

Case No. 1:18-cv-1547-JCB

DECLARATION OF DR. MICHAEL J. CAIRE

I, DR. MICHAEL J. CAIRE, hereby declare as follows:

1. I make this declaration on my own behalf. I have personal knowledge of each of the facts stated herein, and if called as a witness, would and could competently testify thereto.
2. This Declaration is being submitted pursuant to 28 U.S.C. § 1746.
3. I am a resident of West Monroe, Louisiana. I have resided in West Monroe since 1977.
4. I have spent much time in Louisiana gathering information and advocating for the Louisiana black bear. I have a strong interest in the Louisiana black bear (*Ursus americanus luteolus*) based on my years of environmental advocacy and habitat preservation.
5. I received a degree in Zoology from the University of North Carolina Chapel Hill and my MD from Louisiana State University Medical School in New Orleans. I have expertise and experience evaluating the best available science.
6. I have been actively involved with the Louisiana black bear since the early 1980s. For most of my adult life I have been involved with environmental advocacy, and in

particular the actions of our state and federal governments regarding our nation's wildlife and public lands.

7. With respect to the Louisiana black bear, my involvement dates back to the early 1980s when I was involved with the movement to preserve the largest remaining bottomland hardwood forest of the Mississippi Alluvial Plain. This effort led to the preservation of the Tensas River National Wildlife Refuge and contiguous Big Lake Water Management Area, which is now at the core of the restoration effort to restore the Louisiana black bear.
8. Thereafter, I participated as a guest in 1988 in a meeting of the Louisiana Forestry Association's Wildlife Committee where it was decided to work using Endangered Species Act processes to facilitate recovery of the Louisiana black bear. This ultimately led to the formation of the Black Bear Conservation Coalition (BBCC), which was responsible for facilitating cooperation among diverse communities and governmental agencies, resulting in an increase in population figures, occupied habitat, restored habitat, and increased study and scientific understanding of these issues.
9. I am a life member of the Black Bear Conservation Coalition. I have received several awards for my work on the Louisiana black bear, including the Louisiana Wildlife Federation Volunteer Conservation Award and the Chevron Conservation Award. I was active with the Tensas Conservancy Coalition, where my work led to the purchase of the Tensas National Wildlife Refuge (NWR) and the adjacent Big Lake Wildlife Management Area, which are the core habitats of the present Tensas River Basin Louisiana black bear population.

10. I have been mentioned in the Congressional Record citing my work in the establishment of the Tensas NWR and in the protection of the Louisiana black bear.
11. I have a long history of undertaking efforts to restore the Louisiana black bear.
12. I have spent many years studying the Louisiana black bear and visiting and observing its habitat in Louisiana, and plan to continue to do so. My enjoyment and ability to study and observe the bear in the future would be diminished if the subspecies' distribution or population numbers were reduced.
13. My involvement with the Louisiana black bear will continue into the future. I intend to continue studying bear issues, including conservation, visiting and observing bear habitat, and working to restore the bear throughout its range. If the delisting were reversed and the Louisiana black bear relisted on the U.S. List of Endangered and Threatened Wildlife, my plans for additional study and observation would be greatly enhanced.
14. The introduction of Minnesota bears into the Upper Atchafalaya River Basin area in Louisiana was known and raised prior to the original ESA listing. Based on my involvement and understanding of the listing process for the Louisiana black bear under the U.S. List of Endangered and Threatened Wildlife in 1992, one intent of the original listing was to preserve the unique genetic material of the Louisiana black bear.
15. The 2016 delisting decision negatively affects my recreational, conservation, and aesthetic interests. The delisting decision took away necessary protections for the remaining *luteolus* populations and their habitat, and allows for the continued exposure of true native *luteolus* to the risks of hybridization with an introduced, non-native *americanus* population in the Upper Atchafalaya River Basin unit. I am concerned that the delisting decision will have serious impacts to the genetic integrity of *luteolus*, and on

its habitat. As a result, I am suffering and will continue to suffer recreational, conservation, and aesthetic injuries due to the diminished opportunities to observe and study Louisiana black bears in the wild and the reduction in protections of *luteolus* habitat. These are actual, particularized, and concrete injuries specific to my interest and study of the Louisiana black bear.

16. My recreational, conservation and aesthetic interests will be harmed if the Louisiana black bear is not re-listed on the U.S. List of Endangered and Threatened Wildlife, and if critical habitat is not re-designated. This redress would greatly enhance my ability and plans for future observation and study of the bear in its native habitat.

17. Unless these injuries are redressed through relisting and re-designation of critical habitat, I will suffer substantial harm.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 4th day of April, 2019, in Pensacola, Florida.

A handwritten signature in cursive script that reads "Michael J. Caire MD". The signature is written in black ink and is positioned above a horizontal line.

Dr. Michael J. Caire

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY, et al.,)
)
Plaintiffs,)
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v.)
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DAVID BERNHARDT, in his official)
Capacity as Secretary,)
U.S. Department of Interior, et al.)
)
Defendants.)

Case No. 1:18-cv-1547-JCB

DECLARATION OF JODY MECHE

I, JODY MECHE, hereby declare as follows:

1. I make this declaration on behalf of the Louisiana Crawfish Producers Association-West. I have personal knowledge of each of the facts stated herein, and if called as a witness, would and could competently testify thereto.
2. I make this declaration in accordance with 28 U.S.C. § 1746.
3. I am a resident of Henderson, Louisiana.
4. I have been an active member of the Louisiana Crawfish Producers Association-West, Inc. (“LCPA”) since 1995. I currently serve as the President of LCPA. My responsibilities are to act as a spokesperson on behalf of the organization. I also work to inform members of their rights to use navigable waters, and help them advocate for those rights through legal means.
5. LCPA is a non-profit organization incorporated under the laws of Louisiana. LCPA’s mission is to protect the economic, environmental, and cultural interests of the Atchafalaya Basin and its residents, and to promote a healthy habitat for crawfish, fish,

and other wildlife that the Basin supports. Additionally, LCPA works to protect public access to the waters of the United States within the Basin, and to ensure that the state and federal laws and regulations intended to preserve and enhance the Basin's natural resources and wildlife are followed.

6. At the core of LCPA's mission is our collective advocacy, outreach, and public education to keep local residents, agencies, and government officials informed of the goings-on in the Basin that affect our culture and livelihood, and ultimately the sustainability and health of the Atchafalaya Basin. We engage in advocacy ranging from public comments on proposed activities in the Basin to legal challenges to development or privatization that threatens not only the interests of our members, but the capacity of the Basin to withstand both natural and man-influenced modifications and developments into the future, and to support wildlife and the local inhabitants. Activities, development, and occurrences, both natural and anthropogenic, that impact the health of the Atchafalaya Basin, and the sustainability of its wildlife habitats, ecosystems, navigable waterways, and public access directly influence our advocacy and outreach endeavors. We regularly engage in public and legal advocacy to prevent harmful development that impedes public access and disrupts water flow and health of our waterbodies, which impacts our members' ability to make a living fishing in the Basin, and our cultural connection with this treasured area.
7. LCPA has approximately 500 members, including recreational and commercial fishermen, hunters and recreationists who live, work, and recreate in and around the Basin. These members, including myself, regularly use the Basin in pursuit of these interests, including the areas impacted by the 2016 delisting of the Louisiana black bear,

including formerly designated critical habitat for the bear. Members of LCPA, including myself, also enjoy observing animals and wildlife in the Basin.

8. I am a third-generation, full-time, commercial Cajun crawfisherman. I have been making a living in the Atchafalaya Basin my entire life, and I plan to continue to use the Basin in both my work and recreational activities. I learned how to hunt, fish, trap, and provide an income in the Basin for my family from my father, and he from his father. I have worked as a crawfisherman in the Atchafalaya Basin for more than twenty (20) years.
9. The Basin provides much more to me than just a job and way to make my living. The Basin, its waters, and wildlife habitat allow for the continuing of tradition and our Cajun culture that has been handed down from generations of families living and working in the Basin. Most of our members are recreational or commercial fishermen whose trade has been passed down from a line of fisherfolk whose families have lived, worked, and recreated in the Basin for generations.
10. The Atchafalaya Basin is one of the most unique places in the world. It is home to hundreds of species of migratory birds, as well as alligators, fish, crawfish, and the Louisiana black bear.
11. The Atchafalaya Basin provides subsistence for the minority Cajun people that have lived in and relied upon the Basin for generations. We have made our living and ability to feed our families in the Basin for over a century.
12. I, like many members of LCPA who were born and raised in the Basin, work and live in the geographic area of the Atchafalaya River Basin Louisiana black bear population's habitat. LCPA consists of members native to this area, much like the Louisiana black bear. We have experienced many of the same trends that threatened both our survival and

that of the Louisiana black bear in these areas of the Basin. We are sympathetic to their decline, as we have likewise experienced destruction of our native fishing grounds and reduction in the number of members in our community able to make a living in the Basin.

13. LCPA's members, including me, fish, hunt, hike, and recreate all year in the native habitat of the Louisiana black bear, including the areas north in the Sherburne Wildlife Management Area, the Atchafalaya National Wildlife Refuge, the Bayou Des Ourses, and in the Whiskey Bay Pilot channel, and plan to continue to do so.
14. I grew up learning about the "Des Ourses bottom" or "the bear's bottom" in the Cajun fishing culture of the Atchafalaya Basin, an area north of where I was raised, near the Sherburne Wildlife Management area. The Louisiana black bear has had a significant impact on the local culture of the Atchafalaya Basin.
15. Our members have long observed and captured on game cameras the presence of the black bear in the Basin. We have and will continue to seek to observe the Louisiana black bear in its native habitat in the Atchafalaya Basin.
16. The 2016 delisting of the Louisiana black bear harms the commercial, recreational, conservation, cultural, and aesthetic the interests of our members engaged in ecotourism, wetlands protection, and commercial and subsistence fishing. Our members', including my own, recreational and employment interests are impaired by the decision, as reduced habitat protections subject these areas to increased development and impairment. The mission of LCPA in protecting wildlife habitat, public access, navigability, and legal enforcement is consistent with these interests.
17. LCPA and our members, including me, are harmed by the delisting decision. Without protections for critical bear habitat, areas that support the Basin populations of Louisiana

black bear are no longer protected from development. Since the bear's delisting in 2016, there have been several development projects that have resulted in destruction of bear habitat and denning trees in particular, e.g., the Bayou Bridge and Enterprise Products pipelines across the west side of the Basin. LCPA has expended resources to challenge these development projects, engaging in litigation to challenge the Bayou Bridge pipeline and the failure of the Corps to account for wildlife habitat disruption, a failure to replace aquatic functions in areas directly and indirectly impacted by the project, and the lack of adequate review of the overall impacts under federal law. These development projects not only impact habitat critical for the Louisiana black bear, but also impair water quality, and other wildlife habitat in the Atchafalaya Basin, which affects the health of our fisheries and the accessibility and productivity of our fishing grounds.

18. LCPA has also devoted significant resources to challenge the unpermitted activities in Fisher Lake, in the Whiskey Bay Pilot Channel area. These efforts have been negatively impacted by the delisting and removal of critical habitat designations for the Louisiana black bear, as after-the-fact permits for illegal activities and failure to consult with the Fish and Wildlife Service were found to be acceptable and moot now that the area is no longer critical habitat. As more development is authorized in areas previously designated as critical habitat, the ability of our members to make a living in areas with exacerbated sedimentation, impaired water quality, obstructions to navigability, privatization, and disruption of crawfish and other wildlife habitat is severely diminished.

19. The 2016 delisting decision also negatively impacts our cultural interests, as members of the native minority Cajun fishing communities of the Basin. Our members have a historical and cultural connection with the bear and its habitat. We make our living in the

wetlands, bayous, lakes, and swamps in the areas surrounding native bear habitat. The delisting decision has resulted in the removal of critical protections for bear habitat.

Without the protections that accompany listing of a threatened or endangered species, the viability of the Louisiana black bear, and the Lower Atchafalaya River Basin population in particular, is threatened. The cultural and historical connection of our members and organization with the Louisiana black bear, our ability to observe the bear, as well as its native habitat, is imperiled by the decision to delist and to remove critical habitat designations.

20. Our members, including myself, intend to continue using the Basin to advance their economic, recreational, cultural, and aesthetic interests, including bear sightings in the Basin and protection of areas formerly designated as critical habitat for the Louisiana black bear.
21. The Services' 2016 delisting decision conflicts with one of the core missions of LCPA to protect and promote the health and sustainability of wildlife habitat in the Atchafalaya Basin. As a result of the delisting, the removal of critical habitat for the Louisiana black bear leaves many irreplaceable, productive areas vulnerable to unsustainable development projects and activities that undermine LCPA's advocacy efforts to promote and protect public access and ecological health in these areas.
22. The interests of LCPA's members in having a thriving ecosystem, healthy waters, and productive fisheries for commercial, recreational, and cultural interests are consistent with the mission of LCPA to protect and promote wildlife habitat, public access, and legal enforcement in the Basin.

23. Potential conservation measures that would result from returning the Louisiana black bear to the U.S. List of Endangered and Threatened Wildlife, and re-designating its critical habitat, will protect existing populations and habitat, and would redress the particularized, concrete injuries of our members and of our organization by preserving and restoring wildlife habitat, protecting existing populations from further harm and thus enhancing and protecting the commercial, recreational, conservation, cultural, and aesthetic interests of our members for which our organization advocates.

24. Unless these injuries are redressed through relisting and re-designation of critical habitat, LCPA, our members and myself personally will continue to suffer substantial harm.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 4th day of April, 2019, in Henderson, Louisiana.



Jody Meche

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY, et al.,)
)
Plaintiffs,)
)
v.)
)
DAVID BERNHARDT, in his official)
Capacity as Secretary,)
U.S. Department of Interior, et al.)
)
Defendants.)

Case No. 1:18-cv-1547-JCB

DECLARATION OF DR. RONALD M. NOWAK

I, DR. RONALD M. NOWAK, hereby declare as follows:

1. I make this declaration on my own behalf. I have personal knowledge of each of the facts stated herein, and if called as a witness, would and could competently testify thereto.
2. This Declaration is being submitted pursuant to 28 U.S.C. § 1746.
3. I am a Louisiana native and current resident of Falls Church, Virginia.
4. I am a long-time member of plaintiff Public Employees for Environmental Responsibility (PEER). I worked with PEER staff to represent my own and others' interests in the conservation of the Louisiana black bear by bringing this lawsuit. I join this lawsuit both as an individual plaintiff and as a member of PEER.
5. PEER is a non-profit, public interest organization incorporated in the District of Columbia and headquartered in Silver Spring, Maryland. Its organizational purpose focuses broadly on the environment, and includes the conservation of wildlife such as the Louisiana black bear. PEER has a nationwide group of members and supporters who are

current and former government environmental professionals (like me) as well as others concerned about protecting the environment and integrity in government.

6. I have spent much time in Louisiana and elsewhere gathering information on the Louisiana black bear. I have a strong interest in the Louisiana black bear (*Ursus americanus luteolus*). This interest is based on my years of education, training, and professional experience.
7. I am a Ph.D. biologist. I also have a B.A. in history and political science from Tulane University. I received my Ph.D. from the University of Kansas in 1973 following completion of a dissertation on the study of wolves and related animals.
8. I have authored eleven (11) books on mammals, mostly with Johns Hopkins University Press, several of which discuss the Louisiana black bear and other kinds of bears.
9. I was staff mammalogist at the Office of Endangered Species, U.S. Fish and Wildlife Service, from 1974 to 1987, during which time, as part of my duties, I conducted several surveys and produced several reports on the Louisiana black bear and other kinds of bears. It was I who first brought the precarious status of the Louisiana black bear to the attention of the Fish and Wildlife Service. From 1987 until my retirement from the Service at the end of 1997, I continued to occasionally gather and review information on various kinds of bears as part of my duties with the Office of Scientific Authority. Prior and subsequent to my regular employment by the Fish and Wildlife Service, I was contracted by the Service to do studies on wolves and cougars.
10. Over the past fifty-six (56) years, I have made numerous trips to and through Louisiana, often for the purpose of observing, learning about, and conducting research on bears, wolves, and other wildlife of the state. I long have had a professional and personal

interest in the history and conservation of the four large carnivorous mammals that were native to the state: the Louisiana black bear, red wolf, Florida panther, and jaguar. A major objective in my life's work was to confirm the existence and insure the protection and survival of all of those species, if not in Louisiana itself, then in other parts of their original ranges in the southern United States.

11. In the 1960s and 1970s I routinely interviewed and accompanied hunters, trappers, and other outdoorsmen, and visited museums and other appropriate facilities in Louisiana, Mississippi, Florida, and Texas, to attempt to observe those animals in the wild and to examine the remains of dead individuals.
12. In the 1980s, in association with my work for the U.S. Fish and Wildlife Service, I made several trips to Louisiana and Mississippi, specifically to wildlife refuges and other sites in the Tensas and Atchafalaya regions, and to museums in those states, as well as to the Smithsonian in Washington, D.C., in order to examine specimens of the Louisiana black bear and to collect information about it. I personally examined nearly all specimens of the native subspecies, *Ursus americanus luteolus*, that were available at that time, as well as very many examples of other black bear subspecies.
13. From the 1990s to the present I have continued to frequently visit Louisiana and Mississippi for recreational and academic purposes, and to travel by car, boat, and foot into current or former black bear habitat in the Atchafalaya, Florida Parishes, and Pearl River areas. I have been making these visits about once or twice a year, and I plan to continue to do so in the future, with a visit planned in June 2019. I remain hopeful of seeing living examples of the true native Louisiana subspecies, to the survival of which I have dedicated much of my professional life.

14. As noted above, I make periodic visits to Louisiana to attempt to observe and study the Louisiana black bear and its habitat. My enjoyment and ability to conduct such activity on future visits would be diminished if the subspecies were to be reduced in numbers or distribution or if it were to undergo hybridization with an alien subspecies.
15. I enjoy these once or twice a year visits to these areas inhabited by Louisiana black bears. My strong professional and recreational interest in the Louisiana black bear and its habitat dictates that I will continue to attempt to study and observe the bear in its native habitat. I intend to return to these areas in the future for continued observation.
16. The 2016 delisting decision negatively affects my scientific, professional, recreational, and aesthetic interests. The delisting decision took away necessary protections for the remaining *luteolus* populations and their habitat, and allows for the continued exposure of true native *luteolus* to the risks of hybridization with an introduced, non-native *americanus* population in the Upper Atchafalaya River Basin unit. I am concerned that the delisting decision will have serious impacts to the genetic integrity of *luteolus*, and on its habitat. As a result, I am suffering and will continue to suffer scientific, professional, recreational, and aesthetic injuries due to the diminished opportunities to observe and study Louisiana black bears in the wild and in the museum and laboratory, and to the hybridization of this genetically unique species with another black bear subspecies (*Ursus americanus americanus*). These are actual, particularized, and concrete injuries.
17. My scientific, professional, personal, recreational, and conservation interests will be harmed if the Louisiana black bear is not re-listed on the U.S. List of Endangered and Threatened Wildlife, and if critical habitat is not re-designated.

18. Potential conservation measures that would result from returning the Louisiana black bear to the U.S. List of Endangered and Threatened Wildlife, re-designating its critical habitat, and protecting its genome from further hybridization would greatly enhance my plans for additional study and observation.

19. Unless these injuries are redressed through relisting and re-designation of critical habitat, I will suffer substantive harm.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 3RD day of APRIL, 2019, in FALLS CHURCH, Virginia.

Ronald M. Nowak

Dr. Ronald M. Nowak

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY, et al.,)
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Plaintiffs,)
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v.)
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DAVID BERNHARDT, in his official)
Capacity as Secretary,)
U.S. Department of Interior, et al.)
)
Defendants.)

Case No. 1:18-cv-1547-JCB

DECLARATION OF HAROLD SCHOEFFLER

I, HAROLD SCHOEFFLER, hereby declare as follows:

1. I make this declaration on my own behalf. I have personal knowledge of each of the facts stated herein, and if called as a witness, would and could competently testify thereto.
2. I make this declaration in accordance with 28 U.S.C. § 1746.
3. I am a longtime resident of Lafayette, Louisiana.
4. I have had a long-term interest in the survival of the Louisiana black bear and the protection of its habitat. I have spent decades of my life canoeing, camping, hiking, hunting, fishing, and recreating in the Atchafalaya Basin. I regularly fish and recreate in the Atchafalaya Basin, including areas within the native habitat for the Louisiana black bear.
5. I have a long history of involvement in efforts to conserve the bear and protect its habitat, including spending decades of time and effort seeking to have the Secretary of the Interior protect the bear under the Endangered Species Act (ESA).

6. In March 1987, I personally drafted a citizens' petition to have the bear listed as a threatened species under the ESA.
7. I was a plaintiff in both the litigation that resulted in the 1992 listing of the Louisiana black bear on the U.S. List of Endangered and Threatened Wildlife, and the designation of critical habitat in 2009.
8. The Louisiana black bear is symbolic of the wilderness of the South. The important historical attributes of the bear necessitate protection of the bear and its habitat; habitat that would preserve the bear and other wildlife native to these areas in the Atchafalaya Basin.
9. I believe preserving the Atchafalaya Basin is vital to save the bear because the region includes some of the bear's best remaining habitat. My involvement with the Louisiana black bear and its habitat will continue into the future. I use the Basin on a regular basis, four or five days a week, for fishing, crabbing, canoeing and hunting, and I will continue to do so.
10. I am also a member of both the Sierra Club, Delta Chapter and the Louisiana Crawfish Producers Association-West, two of the organizational plaintiffs to this lawsuit. I have been an active member of LCPA since 2001. I have been an active member of the Sierra Club since 1982.
11. Sierra Club is the oldest grassroots organization in the U.S. dedicated to the protection and preservation of the environment. Sierra Club has over 803,000 members dedicated to exploring, enjoying, and protecting the wild places of the Earth; practicing and promoting the responsible use of the Earth's ecosystems and resources; education and enlisting humanity to protect and restore the quality of the natural and human environment; and

using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the protection of wildlands, wildlife and habitat, water resources, air, climate, public health, and the health of its members. The Delta Chapter of the Sierra Club has 3,251 Sierra Club members living in Louisiana, including within the Atchafalaya Basin. Many Sierra Club members recreate, boat, and fish in the Atchafalaya Basin. Members of the Delta Chapter of the Sierra Club, including myself, also enjoy observing wildlife in the Basin, the coast, and throughout Louisiana.

12. As described herein, I have many interests in the survival of the Louisiana black bear and the protection of its habitat, as an individual and as a member of Sierra Club and LCPA. If the delisting were reversed and the Louisiana black bear relisted on the U.S. List of Endangered and Threatened Wildlife, my plans for additional recreation and wildlife observation in the Atchafalaya Basin would be greatly enhanced and preserved.
13. The 2016 delisting decision negatively affects my recreational, conservation and aesthetic interest in the Louisiana black bear and its habitat. The delisting decision took away necessary protections for the remaining population of Louisiana black bears and their habitat. I am suffering and will continue to suffer recreational, conservation and aesthetic injuries due to the diminished opportunities to observe the native wildlife, including the Louisiana black bear, and the reduction and degradation of bear habitat. These are actual, particularized and concrete injuries specific to my interest in the bear, its habitat and the entire ecosystem native to these areas in south Louisiana in which I have grown up and regularly recreate and enjoy.
14. I suffer these injuries both as an individual and as a member and supporter of the Louisiana Crawfish Producers Association-West and Sierra Club.

15. My recreational, conservation and aesthetic interests will be harmed if the Louisiana black bear is not re-listed to the U.S. List of Endangered and Threatened Wildlife, and if critical habitat is not re-designated. This redress would greatly enhance my ability to continue to recreate, fish, canoe, camp, hike and hunt in the bear's habitat within the Atchafalaya Basin, and it would greatly enhance my plans for future observation and recreation in the bear's native habitat.

16. Unless these injuries are redressed through relisting and re-designation of critical habitat, I will continue to suffer substantial harm.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 5th day of April, 2019, in Lafayette, Louisiana.



Harold Schoeffler

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY, et al.,)
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Plaintiffs,)
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v.)
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DAVID BERNHARDT, in his official)
Capacity as Secretary,)
U.S. Department of Interior, et al.)
)
Defendants.)

Case No. 1:18-cv-1547-JCB

DECLARATION OF DEAN WILSON

I, DEAN WILSON, hereby declare as follows:

1. I make this declaration on behalf of Atchafalaya Basinkeeper. I have personal knowledge of each of the facts stated herein, and if called as a witness, would and could competently testify thereto.
2. I make this declaration in accordance with 28 U.S.C. § 1746.
3. I am a 32-year resident of Plaquemine, Louisiana in Iberville Parish and within the Atchafalaya Basin.
4. I am the Executive Director and member of Atchafalaya Basinkeeper, one of the plaintiffs in this case. I have served as director since Atchafalaya Basinkeeper’s creation in 2004. Atchafalaya Basinkeeper, Inc. (“Basinkeeper” or “ABK”) is a 501(c)(3) non-profit corporation incorporated under the laws of the State of Louisiana with its principal place of business in Plaquemine, Louisiana.
5. Basinkeeper’s purpose is to preserve and restore the ecosystems of the Atchafalaya Basin, including wildlife habitat to support the sustainability of these ecosystems.

- Basinkeeper works to protect the Basin for present and future generations from illegal development, unsustainable accretion, and destructive permitted conduct; to engage, educate, and advocate for the Basin's communities and coastal Louisiana; and to restore navigation and deep-water habitat for wildlife, commercial, and recreational interests.
6. Basinkeeper is a member of Waterkeeper Alliance, an international grassroots advocacy organization of over 350 programs working to protect watersheds across the globe. Each organization that is part of Waterkeeper Alliance has one staff member designated as the "keeper" for the water body the organization seeks to protect. Waterkeeper Alliance designated me as the "keeper" of the Atchafalaya Basin, so I refer to myself as the Atchafalaya Basinkeeper.
 7. Atchafalaya Basinkeeper has over 1,200 members, including members who live in and around the Atchafalaya Basin, who work in the Basin, and who recreate and enjoy the diverse ecosystems represented in the Basin.
 8. Protection of native wildlife and wildlife habitat and educating the public of the importance of the Basin and its ecosystems are cornerstones of our mission at Atchafalaya Basinkeeper to preserve and restore the Atchafalaya Basin for future generations.
 9. As part of our program work, ABK engages in community outreach, providing information pertaining to the Basin, its primary threats, and its importance to the health and safety of surrounding communities, the state, and the nation. This includes informing our members and the general public of projects, activities, or actions that may adversely affect the Basin, its ecosystems, waters, or communities. Furthermore, as part of our program work, Basinkeeper regularly monitors by land, water, and air to investigate

sources of harm and ascertain the health of the Basin's ecosystems, waterways, and wildlife.¹

10. Monitoring, enforcement, education, and outreach are at the core of ABK's mission to protect the Atchafalaya Basin. As part of our monitoring and enforcement program work, ABK engages with local fishermen, hunters, recreationists, and residents to monitor the health and sustainability of native wildlife habitat and populations, and to enforce legal protections to ensure that these areas are, and continue to be, adequately protected from illegal or unsustainable development and modifications that impair the health of these native ecosystems.
11. Many of Atchafalaya Basinkeeper's members are recreationists, ecotourists, and recreational hunters and fishers who recreate and enjoy the Basin's wildlife habitat and ecosystems, including by observation of the Louisiana black bear and its habitat.
12. As the Atchafalaya Basinkeeper, the founder and a member of the organization, I have over fifteen (15) years of experience patrolling, monitoring, and advocating for the protection and restoration of the Basin. I engage in all levels of advocacy, from educating the public of the value of the Basin and its many threats, to alerting the regulatory agencies of unpermitted actions and failures to comply with permits, and if necessary, engaging in litigation to seek enforcement and compliance with applicable laws and permits to protect the interests of the Basin and those who rely upon it.
13. Locally, Basinkeeper works to protect the long-term health and sustainability of the Atchafalaya Basin. This includes protecting and restoring wildlife habitat. The Atchafalaya Basin contains some remaining cypress-tupelo legacy trees over 1,000 years

¹ <https://www.basinkeeper.org/projects>.

old. Hollowed cypress trees provide suitable dens, shelter, and protection for Louisiana black bears. Since our inception, Basinkeeper has worked to protect these cypress-tupelo forests that remain from unsustainable and illegal destruction, development, and logging for the health of the entire ecosystem and for the protection of wildlife habitat, including the Louisiana black bear. Our Cypress-Shield Campaign, part of our Monitoring and Enforcement Program work, has been one of our most successful efforts to combat unsustainable and illicit logging in the Basin.²

14. Before starting Atchafalaya Basinkeeper, I was a full-time commercial fisherman in the Atchafalaya Basin for sixteen (16) years and many more years part-time.
15. I am also the owner of Last Wilderness Swamp Tours, a company I created in 2000 to educate people about the Atchafalaya Basin and its wetlands, swamp culture, wildlife, and threats. People come from all over the world to experience the Atchafalaya Basin and for a chance to observe its native and migratory wildlife, including the Louisiana black bear. The tour goes deep into the Basin's wetlands, forests and, among many other things, visitors learn about how the Louisiana black bear has adapted to this swamp ecosystem. Just the possibility of seeing the "swamp bear" in its native habitat is a major draw for visitors to our swamp tours, most of our customer are fascinated by the "swamp bears."
16. The presence and habitat of the Louisiana black bear in the swamps of the Atchafalaya Basin creates a major draw for ecotourism in the Basin, and therefore supports my business, and the education and outreach program work of Atchafalaya Basinkeeper. Visitors are fascinated to learn about and potentially observe how Louisiana black bears have adapted to make nests in this swamp habitat, with tree brush or inside the huge,

² <https://www.basinkeeper.org/logging>.

hollowed cypress trees that remain. Visitors often join as members of Atchafalaya Basinkeeper to stay informed about the Basin, its threats, and our advocacy efforts. The benefits of ecotourism in the Basin are far reaching, and include additional public awareness and attention on the Basin, its importance to Louisiana and the Gulf Coast, its unique aquatic functions, and its need for advocates.

17. I have a strong interest in the native and migratory wildlife of the Atchafalaya Basin as a resident of the Basin, staff and member of Atchafalaya Basinkeeper, ecotourism business owner, and former commercial fisherman. This interest is based on my years of working and living in the Atchafalaya Basin. This interest is also based on my recreational interests as a fisher, wildlife watcher, and outdoor enthusiast. I enjoy boating, hiking, and canoeing in the Basin. The Atchafalaya Basin is my church, a place I go to pray and feel closer to God. I taught my children to fish and canoe in the Basin. The Atchafalaya Basin, its wildlife, and habitat is a special place to both me and my family.
18. Over the past thirty-two (32) years, I have spent numerous hours boating and recreating in the Atchafalaya Basin, including in areas previously designated critical habitat for the Louisiana black bear at the heart of the Atchafalaya Basin along the Atchafalaya River. I regularly fish, hike, tour, and monitor in the Bayou Sorrel, Bayou Pigeon, Grand River, Belle River, and Atchafalaya River areas of the Atchafalaya Basin.
19. I enjoy visiting, working, and recreating in these areas of the Basin, and I use them on a continuing and ongoing basis. I intend to continue to visit, work and recreate in these areas of the Basin. On behalf of Atchafalaya Basinkeeper, I will continue to work, observe, and protect wildlife habitat in these areas of the Basin in pursuit of our mission and on behalf of our membership.

20. The March 2016 delisting of the Louisiana black bear has harmed the recreational, aesthetic, and conservation interests of Atchafalaya Basinkeeper, its members, and my interest in the Atchafalaya Basin. The delisting decision impacts the Louisiana black bears' protections in the Lower Atchafalaya River Basin population and the ecosystems they depend on, which has repercussions on ecotourism as well as on the protections employed in the Basin to ensure the longevity of the Louisiana black bear subspecies and its habitat.
21. The decision adversely impacts the mission and ability of Atchafalaya Basinkeeper to protect and restore the ecosystems and wildlife habitat of the Atchafalaya Basin. The Louisiana black bear is an integral part of the Basin's ecosystems. Without the protections that accompany listing of a threatened or endangered species, the viability of the Louisiana black bear, and the Lower Atchafalaya River Basin population in particular, remains at risk.
22. Atchafalaya Basinkeeper is also injured by the decision to delist because, without protections for critical bear habitat, areas that support the Basin populations of Louisiana black bear are no longer protected from development.
23. Since the bear's delisting in 2016, there have been several development projects that have resulted in destruction of bear habitat and denning trees in particular, e.g., the Bayou Bridge and Enterprise Products pipelines across the west side of the Basin. These development projects not only impact habitat critical for the Louisiana black bear, but also impair water quality and other wildlife habitat in the Atchafalaya Basin. Basinkeeper has expended organizational resources to challenge the Bayou Bridge pipeline and the inadequacy of the permitting agency's assessment of environmental impacts, including

the irreparable harm of removing legacy cypress trees that provide important habitat for Louisiana black bears and other wildlife along the pipeline's path. The delisting decision, and removal of critical habitat designations, has impaired our ability to adequately protect these areas from unsustainable development, and interfered with our monitoring and enforcement program work.

24. The 2016 delisting of the Louisiana black bear has adversely affected ABK's ability to protect critical habitat in the Basin. Illegal roads and dams within previously designated critical habitat along and north of I-10, as well as the draining of Fisher Lake, dredging and placement of a dam south of I-10 and west of the Whiskey Bay Pilot Channel have contributed to degradation of these areas previously protected from development under the critical habitat designation. ABK has expended additional resources, that may have been unnecessary had the bear remained listed or were re-listed, to challenge these illegal and destructive developments, but without success. Because these areas formerly designated as critical habitat for the Louisiana black bear are no longer protected from development projects, ABK's ability to adequately protect through legal advocacy and agency enforcement and restoration of these critical areas is impaired.
25. The destruction of denning trees continues on formerly designated critical habitat and surrounding areas in the Basin. Large hollow cypress trees, most over 1,000 years old, are irreplaceable and provide necessary denning habitat for bears.
26. The delisting decision directly conflicts with ABK's mission to protect and restore the Basin. The delisting decision, and removal of critical habitat designations, has impaired the efficacy of ABK's programmatic work, and undermined the ability of ABK to pursue our monitoring and enforcement work. Destruction and/or development of black bear

habitat, including legacy cypress forests, directly conflicts with our Cypress Shield Campaign services; impacts our ability to monitor wildlife habitat through significant modifications to navigability, sedimentation deposition, and water flow; and the removal of critical habitat designations as a result of the delisting decision neutralizes our efforts to advocate for enforcement of legal protections to critical wildlife habitat across the Basin pursuant to our monitoring and enforcement program. The Service's conduct has significantly impaired our ability to perform our core services in protecting and restoring the ecosystems of the Atchafalaya Basin, of which wildlife habitat is an integral part.

27. My recreational interests in wildlife sightings and observing the bear, which I plan to continue to do, are also injured by the delisting decision. Moreover, my business will be adversely affected, with bear sightings in decline, ecotourism supported by sightings of native Louisiana black bear in the Basin's swamps will suffer.
28. The delisting decision harms the conservation and recreational interests of Atchafalaya Basinkeeper and our members, as well as my personal, recreational, conservation, and employment interests. The ability of Basinkeeper members, swamp tour visitors, and myself to observe and enjoy sightings of the Louisiana black bear and its habitat in the Atchafalaya Basin, now and in the future, is adversely impacted by the delisting decision.
29. Moreover, my interests as a member and Executive Director of ABK, as well the interests of our members who include commercial and recreational fishermen, recreationists and hunters, in protecting remaining Louisiana black bear populations and habitat is consistent with the mission and programmatic work of Atchafalaya Basinkeeper.
30. I am concerned that the delisting will continue to adversely impact the Basin's ability to serve as viable habitat for the Lower Atchafalaya River Basin population of Louisiana

black bears, as well as the overall productivity of the wetlands and ecosystems in the Atchafalaya Basin.

31. Potential conservation measures that would result from returning the Louisiana black bear to the U.S. List of Endangered and Threatened Wildlife and re-designating its critical habitat, will protect existing populations and habitat, and would redress these particularized, concrete injuries by preserving and restoring wildlife habitat, protecting existing populations from further harm and thus enhancing ABK's ability to fulfill its mission to protect the Basin's native wildlife and its habitat, as well as the recreational, conservation and aesthetic interests of our members.

32. Unless these injuries are redressed through relisting and re-designation of critical habitat, ABK, our members and myself personally will continue suffer substantial harm.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 2 day of APRIL, 2019, in Plaquemine, Louisiana.



Dean A. Wilson