

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

	)	
IN RE ENDANGERED SPECIES ACT	)	
SECTION 4 DEADLINE LITIGATION	)	
	)	Misc. Action No. 10-377 (EGS)
	)	MDL Docket No. 2165
This Document Relates To:	)	
<i>WildEarth Guardians v. Salazar,</i>	)	
Nos. 10-cv-0048; 10-cv-0421;	)	
10-cv-1043; 10-cv-1045; 10-cv-1048;	)	
10-cv-1049; 10-cv-1050; 10-cv-1051;	)	
10-cv-1068; 10-cv-2299; 10-cv-2595;	)	
and 10-cv-3366.	)	
	)	

**GUARDIANS’ AND FEDERAL DEFENDANTS’  
PROPOSED JOINT RECOMMENDATION FOR FURTHER PROCEEDINGS**

Pursuant to the Court’s order, dated May 12, 2011, Federal Defendants Ken Salazar, in his official capacity as Secretary of the U.S. Department of the Interior, and the U.S. Fish and Wildlife Service (“Service”) (collectively, the “Federal Defendants”); WildEarth Guardians (“Guardians”), which is the plaintiff in the above-captioned twelve cases in this multidistrict (“MDL”) proceeding; and Center for Biological Diversity (“CBD”), which is the plaintiff in the one remaining case in this MDL proceeding, *Center for Biological Diversity v. Salazar*, No. 10-cv-230, conferred on May 13, 2011, and have agreed to file two separate proposed recommendations due to the parties’ possible disagreement as to CBD’s current status in Guardians’ twelve cases, as explained below. Accordingly, Guardians and the Federal Defendants respectfully submit the following Proposed Joint Recommendation for Further Proceedings proposing a schedule by which this matter may proceed.

**I. Current Status**

On May 10, 2011, Guardians and the Federal Defendants (collectively, the “Signatory Parties”) filed a Settlement Agreement (“Agreement”), Docket (“Dkt.”) 31-1, in the twelve above-captioned cases in which Guardians is the sole plaintiff. As discussed in the Signatory Parties’ Joint Motion for Approval of Settlement Agreement and Order of Dismissal of Guardians’ Claims (“Joint Motion for Approval”), Dkt. 31, the Agreement negotiated between the Signatory Parties reflects a comprehensive settlement that seeks to reduce litigation over the Service’s Endangered Species Act (“ESA”) listing program and to extend the protections of the ESA to more species that warrant those protections. This Agreement is the product of extensive settlement negotiations involving the court-appointed mediator (Mr. Robert Fisher) and representatives of the Service, the U.S. Department of the Interior, the U.S. Department of Justice, Guardians, and CBD over more than seven months, as well as subsequent settlement discussions after the close of mediation on April 13, 2011. CBD is not a signatory to the Agreement. However, if the Agreement is approved by the Court, the Signatory Parties believe that the Agreement will resolve all of the allegedly overdue 90-day and 12-month petition findings at issue in both Guardians’ twelve cases as well as CBD’s one remaining case in this MDL proceeding.

**II. Joint Recommendation of Guardians and the Federal Defendants**

With regards to the one case in this MDL proceeding in which CBD is the sole plaintiff, the Federal Defendants do not intend to move for the dismissal of CBD’s claims as moot unless and until this Court has approved the Agreement, and only if CBD is not otherwise amenable to a stipulation of dismissal. Therefore, it is Guardians’ and the Federal Defendants’ position that CBD’s response to a prospective motion that may be filed by the Federal Defendants upon the

Court's approval of the Agreement – the procedural route proposed by CBD in its Response to the Joint Motion for Approval, Dkt. 32 at 2 – is not the appropriate vehicle for responding to the Joint Motion for Approval, which was filed only in the twelve cases in which Guardians is the sole plaintiff.

CBD is not a party to Guardians' twelve cases in this MDL proceeding. *See* Initial Practice & Procedure Order, Dkt. 2 ¶ 9 (“The terms of this order shall not have the effect of making any person, corporation, or entity a party to any action in which he, she, or it has not been named, served, or added as such, in accordance with the Federal Rules of Civil Procedure.”). Therefore, it is Guardians' and the Federal Defendants' position that CBD currently lacks the appropriate status in these twelve cases to file a response to the Joint Motion for Approval.

However, if CBD is able to obtain such status, Guardians and the Federal Defendants would not object to CBD filing a response to the Joint Motion for Approval.<sup>1</sup> Specifically, Guardians and the Federal Defendants would not oppose a motion from CBD for leave from this Court to participate in these twelve cases as *amicus curiae*, provided CBD is able to move for such leave in a timely manner so as to avoid any significant disruption to the current briefing schedule for the Joint Motion for Approval.<sup>2</sup> In the event that the Court grants such a motion

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<sup>1</sup> To the extent that CBD raises substantive objections to the Agreement now, *see, e.g.*, Recommendation of CBD for Further Proceedings, Dkt. 35 at 4-6, these objections are premature and instead should be raised in its briefing in response to the Joint Motion for Approval, provided CBD is permitted by this Court to file such a response. Moreover, the Federal Defendants strongly disagree with CBD's characterization of the parties' negotiations and note that a full response to these allegations is precluded by the parties' confidentiality agreement.

<sup>2</sup> Alternatively, if CBD seeks to move to intervene in these twelve cases, *see* Recommendation of CBD for Further Proceedings, Dkt. 35 at 6, the Federal Defendants note that CBD must first establish its standing for intervention as of right and may be required to establish standing for permissive intervention as well. *See, e.g., Fund for Animals v. Norton*, 322 F.3d 728, 731

from CBD, Guardians and the Federal Defendants propose that the current briefing schedule for the Joint Motion for Approval, as provided in Civil Local Rule 7(b) and (d), remain intact, as follows:

1. Any respondent that has been permitted by this Court to participate in the twelve above-captioned cases, in which Guardians is the sole plaintiff, shall file any opposition or other response to the Joint Motion for Approval no later than May 24, 2011; and
2. Guardians and/or the Federal Defendants shall file any reply in support of their Joint Motion for Approval no later than May 31, 2011.

Guardians and the Federal Defendants believe that the current schedule provides CBD and any other potential respondents with ample opportunity to seek leave from this Court to participate in these twelve cases and to respond to the Joint Motion for Approval.

Dated: May 16, 2011

Respectfully submitted,

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*/s/ Clifford E. Stevens, Jr.*

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(D.C.Cir. 2003); *EEOC v. National Children's Ctr., Inc.*, 146 F.3d 1042, 1045-46 (D.C.Cir. 1998).

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 16, 2011, I electronically filed the foregoing Guardians' and Federal Defendants' Proposed Joint Recommendation for Further Proceedings with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

*/s/ H. Hubert Yang*

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