

(“Petition”) to remove the American burying beetle (*Nicrophorus americanus*) from the list of endangered and threatened species. 16 U.S.C. § 1533(b)(3)(B). USFWS was required to determine if delisting of *Nicrophorus americanus* is “warranted” within 12 months of receipt of the Petition, yet it has failed to make this requisite finding to date. *Id.*

2. To remedy this violation, Plaintiffs seek declaratory relief to affirm that Defendants are in violation of the ESA due to failure to issue a 12-month finding on the Petition to delist *Nicrophorus americanus*, and Plaintiffs seek injunctive relief that establishes dates certain by which Defendants must determine if delisting of *Nicrophorus americanus* is warranted. Consistent compliance with the nondiscretionary deadlines for USFWS actions in implementing the ESA is essential to the integrity and function of the ESA regulatory program.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1533(b)(3)(B), 1540(c), 1540(g)(1)(c) (action arising under the ESA citizen suit provision); 5 U.S.C. § 702 (review of agency action under the Administrative Procedure Act (“APA”)); and 28 U.S.C. § 1331 (federal question jurisdiction).

4. The Court may grant the relief requested under the ESA, 16 U.S.C. § 1540(g) (citizen suits); the APA, 5 U.S.C. §§ 701–706 (judicial review); and 28 U.S.C. §§ 2201–2202 (declaratory and injunctive relief).

5. Plaintiffs provided 60 days’ notice to the Secretary of the intent to file this suit pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(c), by a letter dated February 22, 2017. Defendants responded by letter dated April 24, 2017, acknowledging receipt of the notice letter and stating USFWS’ intent to continue prioritizing court-ordered actions and species covered by multi-district litigation settlement agreements regardless of ESA statutory

deadlines for USFWS responses to petitions. True and correct copies of the 60-day Notice of Intent and the USFWS response are attached to this Complaint as Exhibits A and B, respectively, and are incorporated by reference into this Complaint.

6. Defendants have not remedied the ESA violation to date and have instead stated that they “anticipate that [a 12-month finding] will be submitted to the Federal Register by December 2017.” Defendants did not indicate any effort to prioritize this species status assessment nor to dedicate additional staff resources to reach a 12-month finding for *Nicrophorus americanus* in a more timely fashion or by any date certain. Therefore, an actual controversy exists between the parties within the meaning of 28 U.S.C. §§ 2201(a), 2202.

7. Plaintiffs and their members are adversely affected or aggrieved by Defendants’ violations of the ESA. Defendants’ failure to reach the statutorily-required 12-month finding on the Petition prevents completion of the timely petition and delisting process to which citizens are entitled under the ESA. Defendants’ admitted prioritization of certain petitions over others prevents equal treatment of citizen petitions under the law and presents an unacceptable rationale for what are continued restrictions placed on private land use activities pursuant to the continued endangered listing status of *Nicrophorus americanus* that is not warranted.

8. The United States District Court for the Eastern District of Oklahoma is the proper venue for this action pursuant to 16 U.S.C. § 1540(g)(3)(a) and 28 U.S.C. § 1391(e)(1). A substantial part of the events or omissions giving rise to the Plaintiffs’ claim occurred in this district and in the State of Oklahoma.

PARTIES

9. Plaintiff American Stewards of Liberty is a charitable organization under Section 501(c)(3) of the Internal Revenue Code and is headquartered in Georgetown, Texas. American

Stewards of Liberty supports the protection of private property rights, fiscal responsibility, and environmental policy based upon sound principles of science, as well as cost-effective solutions to issues associated with property management. Its members are primarily comprised of farming and ranching families who have been stewards of the land for generations. American Stewards of Liberty supports, as part of its mission: the study and research of issues that affect the protection of property rights; education of the public through seminars, publications, and programs regarding the protection of property rights; and initiation of legal proceedings to protect property rights. American Stewards of Liberty advocates for a balanced approach to environmental regulation with respect to the administration of the ESA and property rights. American Stewards of Liberty is concerned that the continued listing of *Nicrophorus americanus* is both scientifically unjustified and imposes significant and unnecessary economic and regulatory costs upon affected property owners and the regulated public. Further, public and private resources expended as a consequence of the continued listing of the species are being diverted from other activities, such as protecting species actually at risk of extinction and providing basic public goods to American citizens. Members of the American Stewards of Liberty own property within the areas identified as *Nicrophorus americanus* potential habitat, and some members' property contains occupied *Nicrophorus americanus* habitat. While *Nicrophorus americanus* remains listed as an endangered species under the ESA, private property owners face limitations on the use of portions of their land that contain potential or confirmed *Nicrophorus americanus* habitat and may incur the expense of seeking an incidental take permit from USFWS or the expense of complying with measures USFWS has deemed sufficient to avoid "take" of *Nicrophorus americanus*. This choice harms the liberty and economic interests of the affected members of the American Stewards of Liberty by forcing

them to choose between incurring potentially significant costs of undertaking the actions described above or essentially abandoning their property. If Defendants were enjoined from violating the ESA and APA, the harm to the interests of the affected American Stewards of Liberty members caused by Defendants' actions would likely be eliminated, thereby redressing members' economic injuries, because Defendants likely would proceed with delisting *Nicrophorus americanus*.

10. Plaintiff Independent Petroleum Association of America ("IPAA") is an incorporated national trade association under Section 501(c)(6) of the Internal Revenue Code that represents thousands of independent crude oil and natural gas producers and service companies across the United States, including many in Oklahoma. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy. Central to IPAA's mission is ongoing advocacy for its members' views in the executive, legislative, and judicial branches of federal government. MarkWest Oklahoma Gas Company, L.L.C. ("MarkWest") is a member of IPAA, has standing to sue in its own right, and the interests IPAA seeks to protect as a party to this lawsuit are germane to IPAA's purpose. MarkWest is a midstream company engaged in the gathering, processing, and transportation of natural gas; the transportation, fractionation, storage, and marketing of natural gas liquids; and the gathering and transportation of crude oil in the State of Oklahoma and in the known range of *Nicrophorus americanus*. If Defendants were enjoined from violating the ESA and APA, the harm to the interests of the affected IPAA members, including MarkWest, being caused by Defendants' actions would likely be eliminated, thereby redressing members' economic injuries, because Defendants likely would proceed with delisting *Nicrophorus americanus*.

11. Plaintiff Osage Producers Association is a charitable organization under Section 501(c)(3) of the Internal Revenue Code and is headquartered in Hominy, Oklahoma. The Osage Producers Association has a membership of approximately 150 member oil and gas operators and service companies who operate in Osage County, Oklahoma. The Osage Producers Association is a forum and voice on issues vital to the economic interests of its members, and on occasion the Osage Producers Association is called upon to take action on behalf of its membership as a whole. This can require raising objections to the policies, procedures, and regulations administered by the Osage Agency, Bureau of Indian Affairs, USFWS, and Department of the Interior. *Nicrophorus americanus* prospers in Osage County; in 2016, USFWS reported 57 positive surveys out of 143 and counted 437 individuals. USFWS policies and ESA implementation regarding *Nicrophorus americanus* are a major impediment to Osage Producers Association members' fulfillment of contractual obligations to produce oil and gas for the benefit of the Osage Mineral Estate.

12. Defendant Department of the Interior is an agency of the United States charged with administering the ESA for non-marine species.

13. Defendant the Honorable Ryan Zinke (hereafter, "Secretary") is being sued in his official capacity as Secretary of the United States Department of the Interior. Congress delegates to the Secretary certain responsibilities for the Department of the Interior's implementation and administration of the ESA. The Secretary's responsibilities include administering the ESA for the benefit of species and the public. The Secretary is required to ensure proper responses to petitions filed under 16 U.S.C. § 1533(b)(3)(A) to delist species.

14. Defendant USFWS is an agency within the Department of the Interior which has the delegated responsibilities of administering and implementing the ESA, including provisions concerning responses to petitions filed under 16 U.S.C. § 1533(b)(3)(A) to delist species.

15. Defendant Greg Sheehan (hereafter, “Deputy Director”) is being sued in his official capacity as Deputy Director of USFWS. The Secretary delegates most of his ESA authority to the Director or Deputy Director of USFWS, who is responsible for responses to petitions filed under 16 U.S.C. § 1533(b)(3)(A) to delist species.

16. Defendant Amy Lueders is being sued in her official capacity as the Southwest Regional Director (hereafter, “Regional Director”) of USFWS. The Deputy Director delegates most of his authority under the ESA to the Regional Director. The Regional Director is responsible for responding to petitions filed in the Southwest Region under 16 U.S.C. § 1533(b)(3)(A) to delist species.

LEGAL BACKGROUND

17. Congress enacted the ESA “to provide a program for the conservation of . . . endangered species and threatened species.” 16 U.S.C. § 1531(b).

18. Under the ESA, Defendants have the statutory authority to include a species on the list of endangered or threatened species only when specific criteria are met. 16 U.S.C. § 1533(a)(1).

19. Defendants are required to make listing determinations “solely on the basis of the best scientific and commercial data available to [them] after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State . . . or any political subdivision of a State . . . to protect such species.” 16 U.S.C. § 1533(b)(1)(A).

20. “To the maximum extent practicable, within 90 days after receiving the petition of an interested person . . . to remove a species from” the list of threatened and endangered species, Defendants must “make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A).

21. USFWS regulations define “substantial scientific or commercial information” as “credible scientific or commercial information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted.” 50 C.F.R. § 424.14(h)(1)(i).

22. Should USFWS find that the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, then Defendants must “promptly commence a review of the status of the species concerned” and, within 12 months after receiving a petition, “promptly publish each finding made under this subparagraph in the Federal Register.” 16 U.S.C. § 1533(b)(3)(A)–(B). This “12-month” review is a more thorough review than the 90-day finding and is not constrained to the content of the petition.

23. Every five years, independent of the process for citizen-submitted petitions, the Secretary must conduct a status review of each ESA-listed species to determine whether a change in the species’ listing status is warranted. 16 U.S.C. § 1533(c)(2)(A). On the basis of that “five-year status review,” the Secretary must determine whether any ESA-listed species should be removed from such list, be reclassified from an endangered species to a threatened species; or be reclassified from a threatened species to an endangered species. *Id.* § 1533(c)(2)(B).

24. The five ESA listing factors apply to all species listing status determinations, including listings, delistings, and reclassifications. 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c)–(d).

25. A species may be delisted if the best scientific and commercial data available substantiates that the species is neither endangered nor threatened based upon one or more of the following reasons: (1) extinction; (2) recovery; or (3) the original data for listing, classification, or interpretation of such data, was in error. 50 C.F.R. § 424.11(d). “Original data for classification in error” applies where “[s]ubsequent investigations . . . show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.” *Id.* § 424.11(d)(3). Thus, the delisting of a species may be warranted if the analysis of new information or the reinterpretation of the original information indicates that the existence or magnitude of the threats to the species, or both, do not support a conclusion that the species is at risk of extinction now or in the foreseeable future. *Id.* §§ 424.11, .14.

26. The ESA’s prohibitions and conservation measures apply so long as a species is maintained on the list of threatened or endangered species. *See* 16 U.S.C. § 1536(a)(2) (interagency consultation); *id.* § 1538(a)(1)(B) (“take” prohibition); *id.* § 1539 (ITPs); *id.* § 1533(a)(3) (designation of critical habitat); *id.* § 1533(f) (development of recovery plans); *id.* § 1540 (penalties and enforcement).

FACTUAL BACKGROUND

27. *Nicrophorus americanus* is the largest of the carrion beetles (Coleoptera: Silphidae) in North America. The species buries, feeds on, and reproduces on vertebrate carcasses within a certain size range. Because *Nicrophorus americanus* buries carcasses beneath the soil, the texture and moisture content of the soil upon which a carcass is found contributes to

appropriate habitat for this species. *Nicrophorus americanus* has been observed in multiple types of vegetation communities, including grasslands, grazed pastures, scrub, deciduous woodlands, pine forests, bottomland/riparian woodlands, and edge habitats.

28. USFWS listed *Nicrophorus americanus* as an endangered species in 1989. 54 Fed. Reg. 29,652 (July 13, 1989). Claims of a 90-percent reduction in the historical range of *Nicrophorus americanus* were the foundation of the USFWS decision to list *Nicrophorus americanus* as endangered. However, scientifically defensible range-wide studies of presence/absence or abundance have never been completed for this highly variable and eclectically distributed species. Anecdotal evidence of a historical decline in the range and distribution of *Nicrophorus americanus* exists in the public record; however, there exists no evidence that *Nicrophorus americanus* is currently in danger of extinction across all or a significant portion of its contemporary range.

29. Historical conditions are irrelevant to current status determinations under the ESA, as USFWS analysis of the five ESA listing factors must be based on present or threatened future conditions.

30. The known contemporary range, distribution, and abundance of *Nicrophorus americanus* has been expanding in recent decades due to the application of an increased and more effective survey effort and the implementation of multiple captive breeding and reintroduction efforts. There is now a 100-fold expansion of the known range since the species' listing. Further, there was a three percent range expansion in 2015 alone.

31. At the time of listing, USFWS was unable to identify any actual threats to current populations of *Nicrophorus americanus*, and more recent USFWS analyses of threats are based largely on speculation and assumption rather than actual evidence of downward

pressure on the current abundance or distribution of the species. Population and habitat viability modeling involving USFWS and other experts also indicates that all naturally occurring wild populations of *Nicrophorus americanus* are of sufficient size to be demographically viable for the foreseeable future.

32. Recent trends in land use and land cover change within the range of *Nicrophorus americanus* are not significant and do not suggest current changes in the overall availability of actual habitat for the species.

33. *Nicrophorus americanus* is easily raised in captivity, and reintroduction efforts are underway, including recent advances in marking techniques anticipated to improve the success of such efforts.

34. Species that inappropriately receive ESA protections cause significant economic harm. Land development, agriculture, transportation, pipeline, and utility operations are delayed or restricted due to the presence of *Nicrophorus americanus*. In Oklahoma, *Nicrophorus americanus* has cost \$6.5 million in protection efforts over the past 20 years, including \$1.3 million expended by the Oklahoma Department of Transportation on conservation actions within a 6-year period. The erroneous listing of *Nicrophorus americanus* has caused delays of essential road and bridge projects and costs Oklahoma taxpayers significant amounts of public funds that could be otherwise allocated.

35. Conservation objectives of the ESA are best served by focusing limited federal, state, and local conservation resources on species that rightly warrant the protections of the ESA. *Nicrophorus americanus* does not now and has never warranted protection under the ESA.

36. On June 16, 2008, USFWS completed a 5-year review of *Nicrophorus americanus* that did not adequately consider new information and surveys that supported a conclusion of population viability and substantially increased the known range of the species, instead continuing to maintain that listing is warranted based on a contraction in current range when compared to the assumed historical range. The USFWS 5-year review arbitrarily determined that no change in listing status was warranted.

37. The original listing of *Nicrophorus americanus* was in error and was based on faulty assumptions about the species' range, distribution, and abundance. It is now clear that *Nicrophorus americanus* exhibits stable and robust populations across several states and at least five different ecoregions. There exists no information to suggest that the status of the species is currently in decline or will become so in the foreseeable future.

38. Because the best scientific information demonstrates that *Nicrophorus americanus* is not an endangered species, and because of the significant costs associated with the regulatory status of *Nicrophorus americanus* as an endangered species, Plaintiffs petitioned Defendants, under 16 U.S.C. § 1533(b)(3)(A), to remove *Nicrophorus americanus* from the ESA list of endangered species.

39. On August 18, 2015, Plaintiffs filed the Petition to request that USFWS remove *Nicrophorus americanus* from protection under the ESA as a listed species, because the original listing was in error and the best available science does not support a finding of the existence of any threats significant enough to drive *Nicrophorus americanus* toward extinction in the foreseeable future. A true and correct copy of the August 18, 2015 *Nicrophorus americanus* delisting Petition, with its associated exhibits, is attached as Exhibit C and incorporated by reference into this Complaint.

40. USFWS failed to reach a timely 90-day finding on the Petition, and on January 20, 2016, Plaintiffs filed a notice of intent to sue for violation of the 90-day finding deadline.

41. On March 16, 2016, USFWS reached a positive 90-day finding on the Petition, concluding that the Petition presented substantial information indicating that the petitioned-for delisting may be warranted and initiating the species status review. 81 Fed. Reg. 14,048 (Mar. 16, 2016).

42. As of August 18, 2016, the USFWS 12-month finding of whether delisting of *Nicrophorus americanus* is warranted became overdue in violation of 16 U.S.C. § 1533(b)(3)(B).

43. On February 22, 2017, Plaintiffs provided USFWS 60-days' notice to the Secretary of the intent to file this suit.

44. Defendants responded by letter dated April 24, 2017, acknowledging receipt of the notice letter and stating USFWS' intent to continue prioritizing court-ordered actions and species covered by multi-district litigation settlement agreements regardless of ESA statutory deadlines for USFWS responses to petitions.

45. *Nicrophorus americanus* remains listed as an endangered species, creating significant costs for landowners, businesses, taxpayers, and state governmental entities throughout Oklahoma, including Plaintiffs.

46. MarkWest in 2016 applied to USFWS for an amended incidental take permit ("ITP") to authorize anticipated incidental take of *Nicrophorus americanus* under the USFWS-approved "Amended Oil and Gas Industry Conservation Plan Associated with Issuance of Endangered Species Act Section 10(a)(1)(B) Permits for the American Burying Beetle in Oklahoma" ("ABB ICP") (April 13, 2016). 81 Fed. Reg. 35037, 35038 (Permit TE49749B-1).

The MarkWest ITP application sought coverage for oil and gas upstream and midstream production activities, including geophysical exploration and construction, maintenance, operation, repair, and decommissioning of oil and gas well field infrastructure, as well as construction, maintenance, operation, repair, decommissioning, and reclamation of oil and gas gathering, transmission, and distribution pipeline infrastructure within Oklahoma. *Id.* USFWS issued MarkWest an amended ITP under the ABB ICP on July 18, 2016. To maintain coverage for incidental take under its ITP, MarkWest has committed to adhere to the minimization, compensatory mitigation, monitoring, and adaptive management requirements of the ABB ICP. These requirements constitute an ongoing, costly, and significant regulatory burden on MarkWest that is warranted only if *Nicrophorus americanus* merits listing and protection under the ESA. As *Nicrophorus americanus* does not now and never did meet the criteria for listing as an endangered or threatened species under the ESA, MarkWest is subjected to actual, imminent, and ongoing harm caused by the USFWS delay in reaching the requisite 12-month finding on the Petition. The Petition demonstrates that maintenance of *Nicrophorus americanus* on the list of endangered and threatened species is not warranted, and thus all USFWS regulation of *Nicrophorus americanus* based upon the species' listing status under the ESA is unwarranted. Each day of delay in issuance of a USFWS 12-month finding on the Petition beyond the ESA deadline for a 12-month finding on the Petition causes injury to MarkWest that can be redressed by declaratory and injunctive relief to compel USFWS to reach a finding on the Petition.

CLAIM FOR RELIEF

Violation of the ESA: Failure to Make a Timely 12-Month Finding on the Petition to Delist the American Burying Beetle (*Nicrophorus americanus*)

47. Plaintiffs re-allege and incorporate by reference all allegations set forth in this Complaint.

48. The ESA expressly mandates that Defendants make the 12-month finding within 12 months of the date of receipt of a petition to remove a species from the list of endangered and threatened species under the ESA. Defendants have violated that express statutory command.

49. Plaintiffs and their members are adversely affected by USFWS' ongoing failure to issue the 12-month finding and USFWS' stated intent to not meet this statutory deadline for agency decision making until, at the very least, USFWS utilizes approximately 230 percent of the statutory timeframe allowed to reach such a decision (i.e., 16 months late on a decision limited to 12 months of USFWS deliberation).

50. The APA states that a reviewing court "shall" interpret statutes and "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Alternatively, the APA states that a reviewing court shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

51. Defendants' failure to make a timely 12-month finding on Plaintiffs' Petition to delist the American burying beetle (*Nicrophorus americanus*) violates the ESA, 16 U.S.C. §§ 1533(b)(3)(B), 1540(g), and therefore constitutes agency action that has been "unlawfully withheld or unreasonably delayed" within the meaning of the APA, 5 U.S.C. § 706(1) or, alternatively, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the APA, 5 U.S.C. § 706(2).

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court enter Judgment for Plaintiffs providing the following relief:

A. Declare that Defendants violated the ESA and the APA by failing to issue a timely 12-month finding on the Petition to delist the American burying beetle (*Nicrophorus americanus*) under the ESA;

B. Order Defendants to issue, by a reasonable date certain, the 12-month finding on the Petition to delist the American burying beetle (*Nicrophorus americanus*) under the ESA, 16 U.S.C. § 1533(b)(3)(B), with instructions, if appropriate;

C. Retain jurisdiction over this matter until such time as Defendants have fully complied with the ESA and APA;

D. Award Plaintiffs their attorneys' fees and costs in this action as provided by the ESA, 16 U.S.C. § 1540(g)(4), or, in the alternative, the Equal Access to Justice Act, 18 U.S.C. § 2412; and

E. Grant Plaintiffs any other further relief that the Court deems proper under the circumstances of this case.

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Respectfully submitted,

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