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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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AMERICAN BIRD CONSERVANCY,  
AMERICAN LITTORAL SOCIETY,  
CITIZENS CAMPAIGN FOR THE  
ENVIRONMENT, DEFENDERS OF  
WILDLIFE, DELAWARE AUDUBON  
SOCIETY, DELAWARE RIVERKEEPER  
NETWORK, NATIONAL AUDUBON  
SOCIETY, NEW JERSEY AUDUBON  
SOCIETY, SIERRA CLUB – DELAWARE  
CHAPTER and SIERRA CLUB -NEW  
JERSEY CHAPTER,

Plaintiffs,

vs.

DIRK KEMPTHORNE, SECRETARY,  
UNITED STATES DEPARTMENT OF THE  
INTERIOR and H. DALE HALL,  
DIRECTOR, UNITED STATES FISH AND  
WILDLIFE SERVICE,

Defendants.

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Civil Action

Docket No: 06-2641 (JAP) (MCA)

FILED ELECTRONICALLY

**FIRST AMENDED COMPLAINT**

## INTRODUCTION

1. This is a civil action for declaratory and injunctive relief. Plaintiffs seek a declaration from this Court that Defendants Dirk Kempthorne, Secretary of the United States Department of the Interior and H. Dale Hall, Director of the United States Fish and Wildlife Service violated the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”) and the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2004) (“ESA”), by (1) arbitrarily and capriciously rejecting petitions to list the imperiled *Calidris canutus rufa* (commonly known as and referred to in this Complaint as the “Red Knot”), a migratory shorebird, as an endangered species on an emergency basis, pursuant to the ESA; (2) failing to perform its mandatory duty to make a 90-day finding on the listing of the Red Knot; (3) considering factors other than the listing factors as prescribed by the ESA when acting on petitions to emergency list the Red Knot as endangered; and (4) failing to rely solely on the best scientific and commercial data available when acting on petitions to emergency list the Red knot as endangered. Plaintiffs seek injunctive relief in the form of an order from this Court compelling Defendants to list the Red Knot on an emergency basis, or, in the alternative, to reconsider their final agency action in accordance with applicable law and to make the 90-day finding required by the ESA. Defendants are obligated to determine whether a species should be listed as endangered or threatened under the ESA and to conserve the ecosystems upon which those species depend. Secretary Kempthorne and Director Hall are sued in their official capacities. The Parties to this action are:

Plaintiffs

American Bird Conservancy  
P.O. Box 249  
The Plains, VA 20198

American Littoral Society  
Building 18, Sandy Hook  
Highlands, NJ 07732

Citizens Campaign for the Environment  
225a Main Street  
Farmingdale, NY 11735

Defenders of Wildlife  
1130 17<sup>th</sup> Street, NW  
Washington, DC 20036

Delaware Audubon Society  
Chapter of National Audubon  
Box 1713  
Wilmington, DE 19899

Delaware Riverkeeper Network  
P.O. Box 326  
Washington Crossing, PA 18977

National Audubon Society  
700 Broadway  
New York, NY 10003

New Jersey Audubon Society  
9 Hardscrabble Road  
P.O. Box 126  
Bernardsville, NJ 07924

Sierra Club – Delaware Chapter  
100 West 10th Street  
Suite 1107  
Wilmington, DE 19801

Sierra Club – New Jersey Chapter  
145 West Hanover Street  
Trenton, NJ 08618

Defendants

Dirk Kempthorne, Secretary  
United States Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

H. Dale Hall, Director  
United States Fish and Wildlife Service  
1849 C Street, NW  
Washington, DC 20240

2. The Red Knot is a medium-sized shorebird that makes an extraordinary 30,000 km hemispheric migration each year from wintering grounds in Patagonia and Tierra del Fuego to breeding grounds in the high Arctic.

3. The Red Knot makes a critical stop along the shores of the Delaware Bay (“the Bay”) on its flight from its wintering grounds to its breeding grounds. There, the Red Knot must

double its weight by feeding primarily on horseshoe crab eggs to have enough reserves to complete its journey to its breeding grounds.

4. One of the most studied shorebirds in the world, the Red Knot has suffered a population crash, with its numbers plummeting from approximately 100,000 in the mid-1980s to approximately 13,000 in 2006. Recent scientific studies predict that the Red Knot is on a path to certain extinction if substantial conservation measures are not taken immediately to halt and reverse the species' startling decline.

5. Overharvesting of horseshoe crabs in the Delaware Bay, and the resulting decrease in available eggs for forage, is considered the primary threat to the Red Knot's survival.

6. Alarmed by the swift decline of the Red Knot, in late July and early August of 2005, Plaintiffs petitioned the United States Fish and Wildlife Service ("FWS" or "the Service") and the United States Department of the Interior ("Interior") to list the Red Knot as "endangered" on an emergency basis, and to designate "critical habitat" in the Delaware Bay ecosystem under the ESA ("Petitions"). (July 2005 Petition attached as Exhibit A; August 2005 Petition attached as Exhibit B)

7. In recent years, substantial new data has come to light regarding the conservation status and needs of the Red Knot. This startling information is detailed extensively in Plaintiffs' Petitions and compels the FWS to use its emergency listing authority to immediately protect the Red Knot from further decline.

8. In the Petitions, Plaintiffs provided copious evidence that the Red Knot met all of the listing factors prescribed in Section 4(a) of the ESA and that emergency circumstances exist to warrant immediate listing as an endangered species.

9. Four months later, in a letter dated December 22, 2005, Defendants denied the Petition's request to list the Red Knot on an emergency basis and declined to determine at that

time, as required by the ESA, whether “the petition presents substantial information” that a listing is warranted. In its December 22, 2005, denial letter, Defendants committed to making the required 90-day finding in “early 2006.” To date, Defendants have not made this finding. (December 2005 Denial Letter attached as Exhibit C).

10. On May 15, 2006 and June 8, 2006, Plaintiffs served Defendants with notices of violations and of Plaintiffs intent to sue under the ESA pursuant to 16 U.S.C. § 1540(g)(2)(A) and (C). (May 2006 and June 2006 Notice Letters attached as Exhibits D and E, respectively).

11. Plaintiffs now seek injunctive relief in the form of an order from this Court compelling Defendants to list the Red Knot on an emergency basis, or, in the alternative, to (1) reconsider their final agency action in accordance with applicable law and (2) make the 90-day and 12-month findings required by the ESA.

#### **JURISDICTION AND VENUE**

12. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (federal defendant), 16 U.S.C. § 1540(g) (citizen suit provision of the ESA) and the APA, 5 U.S.C. §§ 701-706.

13. More than 60 days have elapsed since Plaintiffs served Defendants with a notice of intent to sue for violations of the ESA.

14. This Court is authorized by Rule 65 of the Federal Rules of Civil Procedure to order injunctive relief. The requested relief is proper under 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief), 16 U.S.C. § 1533(g)(1) and 5 U.S.C. §§ 705 and 706.

15. Venue is proper in the United States District Court for the District of New Jersey, pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e)(2), because a substantial part of the events giving rise to the claim take place in New Jersey, and pursuant to 28 U.S.C. § 1391(e)(3), because members of Plaintiffs reside in New Jersey.

## PARTIES

16. American Bird Conservancy (“ABC”) is a 501(c)(3) not-for-profit membership organization dedicated to the conservation of wild birds and their habitats in the Americas. ABC has offices in The Plains, Virginia and Washington, D.C., and staff in Colorado, Oregon, Missouri, Montana, and Vermont. ABC’s members enjoy, appreciate, and benefit from wildlife species and have a longstanding interest in Red Knot conservation. ABC’s members enjoy and benefit from studying and observing Red Knots in the wild. Defendants’ acts and omissions adversely affect the interests of ABC, its officers, directors, advisors, trustees, employees, members, and supporters because, in the absence of the protections of the ESA, the Red Knot is likely to go extinct in the foreseeable future.

17. The American Littoral Society (“ALS”) is a 501(c)(3) not-for-profit organization headquartered in Sandy Hook, Highlands, New Jersey. ALS and its members are dedicated to the protection and conservation of coastal zones and their ecosystems. ALS’s members enjoy, appreciate, and benefit from wildlife species and have a longstanding interest in Red Knot conservation. Its members enjoy and benefit from studying and observing Red Knots in the wild. Defendants’ acts and omissions adversely affect the interests of ALS, its officers, directors, advisors, trustees, employees, members, and supporters because, in the absence of the protections of the ESA, the Red Knot is likely to go extinct in the foreseeable future.

18. Citizens Campaign for the Environment (“CCE”) is a 501(c)(4) environmental and public health advocacy organization working in New York, Connecticut, New Jersey, and Washington, D.C. CCE is headquartered in New York, and registered as Long Island Citizens Campaign, Inc., and has approximately 80,000 members. CCE works to build widespread citizen understanding and support for policies and actions designed to manage and protect interdependent land and water resources, wildlife and public health. CCE carries out this

mission through public education and outreach, research, lobbying and organizing. CCE's members enjoy, appreciate, and benefit from wildlife species and have a longstanding interest in Red Knot conservation. Its members enjoy and benefit from studying and observing Red Knots in the wild. Defendants' acts and omissions adversely affect the interests of CCE, its officers, directors, advisors, trustees, employees, members, and supporters because, in the absence of the protections of the ESA, the Red Knot is likely to go extinct in the foreseeable future.

19. The Defenders of Wildlife ("Defenders") is a not-for-profit conservation organization recognized as one of the nation's leading advocates for wildlife and their habitat. Founded in 1947, Defenders is headquartered in Washington, D.C., has field offices across the country and has approximately 500,000 members and supporters. Defenders maintains a staff of wildlife biologists, attorneys, educators, research analysts, and other conservationists. Defenders uses education, litigation, and research to protect wild animals and plants in their natural communities. Defenders advocates new approaches to wildlife conservation that will help keep species from becoming endangered and employs education, litigation, research, legislation, and advocacy to defend wildlife and their habitat. Its programs reflect the conviction that saving the diversity of our planet's life requires protecting entire ecosystems and ensuring interconnected habitats. Defenders' members enjoy, appreciate, and benefit from wildlife species and have a longstanding interest in Red Knot conservation. Its members enjoy and benefit from studying and observing Red Knots in the wild. Defendants' acts and omissions adversely affect the interests of Defenders, its officers, directors, advisors, trustees, employees, members, and supporters because, in the absence of the protections of the ESA, the Red Knot is likely to go extinct in the foreseeable future.

20. The Delaware Audubon Society ("Delaware Audubon") is a 501(c)(3) not-for-profit corporation headquartered in Wilmington, Delaware and is a state chapter of the National

Audubon Society. Delaware Audubon is dedicated to developing a better appreciation of our natural environment and working for species and habitat conservation. It advocates for environmental issues, and sponsors programs, field trips, and school educational activities. It focuses on the protection of the Delaware Bay and the Atlantic Coastal Zone. Delaware Audubon's members enjoy, appreciate, and benefit from wildlife species and have a longstanding interest in Red Knot conservation. Its members enjoy and benefit from studying and observing Red Knots in the wild. Defendants' acts and omissions adversely affect the interests of Delaware Audubon, its officers, directors, advisors, trustees, employees, members, and supporters because, in the absence of the protections of the ESA, the Red Knot is likely to go extinct in the foreseeable future.

21. The Delaware Riverkeeper Network ("DRN") is a non-profit membership organization with its main office located in Washington Crossing, Pennsylvania. DRN is affiliated with ALS, and its 6,500 members are committed to restoring and preserving the natural balance of the Delaware River, its tributaries, its watershed and the Delaware Bay, as well as the wildlife supported by these bodies of water. DRN's members enjoy, appreciate, and benefit from wildlife species and have a longstanding interest in Red Knot conservation. Its members enjoy and benefit from studying and observing Red Knots in the wild. Defendants' acts and omissions adversely affect the interests of DRN, its officers, directors, advisors, trustees, employees, members, and supporters because, in the absence of the protections of the ESA, the Red Knot is likely to go extinct in the foreseeable future.

22. The National Audubon Society ("Audubon") is a not-for-profit corporation organized under the law of the State of New York, with headquarters in New York, New York, a public policy office in Washington, D.C., and over 500 chapters in the Americas. Founded in 1905, Audubon's mission is to conserve and restore natural ecosystems, focusing on birds and



other wildlife as well as their habitats for the benefit of humanity and the Earth's biological diversity. Audubon works to achieve that mission through science-based public education and advocacy. Audubon has approximately 500,000 members nationwide. Audubon's members enjoy, appreciate, and benefit from wildlife species and have a longstanding interest in Red Knot conservation. Its members enjoy and benefit from studying and observing Red Knots in the wild. Defendants' acts and omissions adversely affect the interests of Audubon, its officers, directors, advisors, trustees, employees, members, and supporters because, in the absence of the protections of the ESA, the Red Knot is likely to go extinct in the foreseeable future.

23. The New Jersey Audubon Society ("NJAS") is a not-for-profit corporation headquartered in Bernardsville, New Jersey, with eight staffed centers. Its mission is to preserve the critical habitat and resources of New Jersey and protect endangered wildlife species. NJAS works to develop and encourage conservation by conducting research on threatened and endangered wildlife species, distributing information about the natural environment, spreading awareness of New Jersey's flora and fauna and how they relate to the habitat on which they depend, and by acquiring and maintaining wildlife sanctuaries and educational centers. NJAS currently maintains thirty-four such sanctuaries. NJAS's members enjoy, appreciate, and benefit from wildlife species and have a longstanding interest in Red Knot conservation. Its members enjoy and benefit from studying and observing Red Knots in the wild. Defendants' acts and omissions adversely affect the interests of NJAS, its officers, directors, advisors, trustees, employees, members, and supporters because, in the absence of the protections of the ESA, the Red Knot is likely to go extinct in the foreseeable future.

24. The Sierra Club is a nonprofit corporation organized under California law, with 65 chapters and over 750,000 members nationwide. The Delaware and New Jersey Chapters are state chapters of the Sierra Club have more than 25,000 members. The Sierra Club's mission is

to explore, enjoy and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. Sierra Club's members of the New Jersey and Delaware Chapters enjoy, appreciate, and benefit from wildlife species and have a longstanding interest in Red Knot conservation. Their members enjoy and benefit from studying and observing Red Knots in the wild. Defendants' acts and omissions adversely affect the interests of Sierra Club, its officers, directors, advisors, trustees, employees, members, and supporters because, in the absence of the protections of the ESA, the Red Knot is likely to go extinct in the foreseeable future.

### **STATUTORY AND REGULATORY BACKGROUND**

#### **The Administrative Procedure Act, 5 U.S.C. §§ 551-553 and 701-706**

25. The Administrative Procedure Act ("APA") provides for judicial review of agency actions. 5 U.S.C. § 702.

26. Interior and the Service are federal agencies whose actions are subject to judicial review under the APA. 5 U.S.C. § 551(1).

27. Under the APA, a reviewing court is required to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

28. Under the APA, a reviewing court is required to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

29. The APA provides that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). The APA defines a "person" as "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2).

30. For the purposes of the APA, Plaintiffs are “persons.” 5 U.S.C. § 551(2).

**The Endangered Species Act, 16 U.S.C. §§ 1531-1544**

31. Congress enacted the ESA, in part, “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).

32. Under the ESA, the Secretary has a statutory duty to administer the Act. 16 U.S.C. § 1531 *et seq.* With respect to terrestrial species like the Red Knot, the Secretary has delegated his duties to the FWS to implement the provisions of the ESA. 50 C.F.R. § 402.01(b).

33. Section 4(a) of the ESA requires the Secretary to list species of wildlife or plants determined by him to be endangered or threatened with extinction. § 4(a) ESA, 16 U.S.C. §1533(a)(1).

34. Under the ESA, a species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6).

35. Under the ESA, a “species” 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.” 16 U.S.C. § 1532(16).

36. Upon receipt of a listing petition or at his own discretion, the Secretary is required to determine whether a species is endangered or threatened due solely to any of the following factors set forth in Section 4(a) of the ESA:

- a. the present or threatened destruction, modification, or curtailment of its habitat or range;
- b. overutilization for commercial, recreational, scientific, or educational purposes;
- c. disease or predation;

- d. the inadequacy of existing regulatory mechanisms; or
- e. other natural or manmade factors affecting its continued existence.

ESA § 4(a), 16 U.S.C. § 1533(a) (setting forth the listing factors); 50 C.F.R. § 424.11(c); see also 5 U.S.C. § 533(e) (authorizing interested parties to petition).

37. If the Secretary finds that an emergency exists that poses a significant risk to the well-being of any species of fish or wildlife or plants, Section 4(b)(7) requires him to list a species immediately upon notification to the affected states and publication of a regulation to that effect in the Federal Register. ESA § 4(b)(7), 16 U.S.C. § 1533(b)(7).

38. An emergency listing remains in effect for 240 days following the date of publication. During this period, the Secretary must comply with the ordinary rulemaking procedures under the ESA and the APA. 16 U.S.C. § 1533(b)(7).

39. For non-emergency listings, the Secretary is required to make a finding as to whether a petition presents substantial scientific or commercial information that listing may be warranted “to the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(c) of [the APA].” 16 U.S.C. § 1533(b)(3)(A).

40. If the Secretary determines that non-emergency listing may be warranted, she must make a finding within twelve months after receipt of the petition. 16 U.S.C. § 1533(b)(3)(B).

41. The Secretary is required to make all listing determinations solely based on the best scientific and commercial data available. 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b).

42. Once a species is listed, the Secretary must develop and implement a “recovery plan” for the “conservation and survival” of the listed species. 16 U.S.C. § 1533(f)(1).

43. Section 4(a)(3)(A) of the ESA requires that, “to the maximum extent prudent and determinable,” the Secretary concurrently designate any habitat of a species determined to be

endangered or threatened when that habitat is considered to be critical for the species recovery and survival. ESA § 4(a)(3)(A), 16 U.S.C. § 1533(a)(3)(A).

44. The ESA defines “critical habitat” as “(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A).

### **RED KNOT FACTS**

#### ***Red Knot Taxonomy, Appearance, and Life Span***

45. The Red Knot, a type of sandpiper, belongs to the Order Charadriiformes, Family Scolopacidae, Genus *Calidris*, Species *canutus*, Subspecies *rufa*.

46. The Red Knot is distinguishable from other shorebirds by the colorful breeding plumage from which it derives its name. Other distinguishing characteristics are the bill, which is black year round, and the legs, which are dark gray to black.

47. The average mass of the Red Knot, which varies greatly throughout the year, is 135 grams and its average body length ranges from twenty-three to twenty-five centimeters.

48. The average lifespan of the Red Knot is estimated to be seven years. However, individual Red Knot adults, banded for identification and tracking purposes, have been sighted along the Delaware Bay with estimated ages between ten and thirteen years.

#### ***Range of the Red Knot***

49. The Red Knot is a migratory shorebird that each year undertakes a round-trip transcontinental journey from South America to the Arctic.

50. The Red Knot is found in the Arctic regions of Canada during its breeding season, which occurs from mid-June through mid-August.

51. The Red Knot winters from November to mid-February primarily in two separate areas in South America: Tierra del Fuego in Chile and Argentina and the Maranhão in northern Brazil. In Tierra del Fuego, the birds are found along the Bahia Lomas Bay in Chile and on the northwest side of the islands in Argentina.

52. The Red Knot has other peripheral wintering sites located along the Patagonian coast.

### ***Red Knot Migration and the Importance of Delaware Bay***

53. Most Red Knots spend the winter in southern South America and embark on their northern migration in February, with peak numbers leaving Argentina and southern Chile in mid-March to mid-April.

54. Long distance migrations can only occur when the Red Knot has productive refueling stops, particularly on the northward migrations, which involve fewer stops than the southward migrations.

55. For most Red Knots, the first stopover during the northward migration is along the coast of southern Brazil.

56. During the northward migration, the final Red Knot stopover before the birds fly directly to the Arctic is the Delaware Bay; this stop occurs between late April and early June. During this time the population at the Delaware Bay peaks between mid-May and the end of May.

57. The Delaware Bay is the most crucial spring stopover for the Red Knot because it is the final stop at which the birds can refuel in preparation for their nonstop flight to the Arctic.

58. The primary food of the Red Knot in the Delaware Bay is the horseshoe crab egg. The Bay hosts the largest number of spawning horseshoe crabs in the United States.

59. Horseshoe crabs' spawning season peaks in May and June and at evening high tides during the full and new moons.

60. The Red Knot's arrival at the Delaware Bay coincides with the spawning of the horseshoe crabs.

61. The Red Knot doubles its weight during its two to three week stay at the Delaware Bay before flying 1,000 miles in early June to its breeding grounds in the low Canadian Arctic. It must reach this critical mass during that stopover in order to successfully complete the final leg of its northward migration and to arrive in prime breeding condition.

62. One estimate of the number of horseshoe crab eggs that an individual Red Knot must eat to double its weight is 135,000 eggs.

63. Historically, by June 5<sup>th</sup> few Red Knots remain at the Bay, as most have begun migrating to the Canadian Arctic.

64. When the Red Knot arrives at its breeding destination in the Canadian Arctic, weather conditions can be harsh and food can be scarce. Its fat reserves, built up while feeding at the Delaware Bay, must sustain it not only during its flight but also upon its arrival in the Arctic during breeding season until food resources become more plentiful.

65. Upon first arrival at its Arctic breeding grounds when snow is often still present, the Red Knot is restricted to feeding on vegetable foods. Once the snow has melted, the Red Knot's diet consists of insects, some marine invertebrates, and occasionally vegetable matter.

66. The southward migration of the Red Knot from the Canadian Arctic begins in mid-July. They arrive in South America along the coast of the Guianas in mid to late August.

67. From the Guianas, Red Knots continue to move southward along the Atlantic coastline of South America, and the greater part of the population continues on to Tierra del Fuego to spend the winter.

### *Red Knot Reproductive Cycle*

68. Once Red Knot flocks arrive at their Arctic breeding grounds, and if conditions are favorable, males begin to spread out over the tundra and prepare nests.

69. The nest is prepared by the male's performance of three to five nest scrapes, creating cup-shaped depressions made up of leaves, grasses, and lichens.

70. Shortly after the males arrive and claim their territory, females search out mates and form pairs to begin the traditional monogamous mating system.

71. The average clutch size is four eggs, and the eggs have an incubation period of 21.5 to 22.4 days from the last egg laid to the last egg hatched. Red Knot pairs are not known to have more than one clutch per season.

72. Both the male and female take turns incubating the eggs, while the non-attending parent forages in nearby wetlands. During early incubation, adult Red Knots do little to protect the nest or eggs. Later in the term, however, they are much more protective.

73. Chicks are relatively mature and mobile from the moment of hatching, and soon leave the nest.

74. Families move quickly from higher nesting terrain to lower wetland habitats, where the male normally stays with the brood and the female abandons the nest and brood.



### *Red Knot Conservation Status*

75. The Red Knot is in imminent danger of extinction, as their numbers have declined to the point where extinction is thought to be possible by approximately 2010. This is an extremely short extinction trajectory.

76. Although the decline in Red Knot populations has been apparent for a decade, the Red Knot does not presently have Federal protection under the ESA.

77. The Red Knot receives only minimal protection under the Migratory Bird Treaty Act ("MBTA"), which protects against the direct taking of birds, nests, and bird eggs. 16 U.S.C. § 703-712.

78. The MBTA does not provide any authority for protection of Red Knot habitat or food sources. 16 U.S.C § 703.

79. Because of its documented significance to numerous shorebirds, the Delaware Bay is a Western Hemisphere Shorebird Reserve Network ("WHSRN") site.

80. WHSRN status brings international attention to the Red Knot and the Bay and encourages voluntary local conservation initiatives both in the United States and throughout the species' migratory range.

81. Although the Bay itself benefits from international interest and scientific study, these efforts do not provide any legal protection for the Red Knot.

82. Management efforts to protect the Red Knot on the Delaware Bay currently involve local, state, and federal agencies, but there is little consistency or coordination across state lines.

83. The States of New Jersey, Delaware, Maryland, and Virginia are active in Red Knot conservation to varying degrees, and New Jersey has listed it as a state threatened species.

84. FWS has been conducting a status review of the Red Knot for more than two years. Upon information and belief, the status review has been peer reviewed but has not yet been finalized.

### *Importance of the Horseshoe Crab*

85. The single most important cause of the Red Knot's decline appears to be the acceleration of harvesting of horseshoe crabs on the Delaware Bay that began in the 1990s.

86. The acceleration of the horseshoe crab harvest is due in large measure to demand for conch, or whelk, in Asian countries. Horseshoe crabs are frequently used as bait by conch and eel fishers.

87. In addition, the biomedical industry's discovery that horseshoe crab blood contains a valuable chemical has also contributed to declining numbers of horseshoe crabs.

88. Horseshoe crabs have a long life cycle, and it takes approximately nine to twelve years for the crab to reach sexual maturity and produce eggs. Therefore, actions to restore the horseshoe crab may not have an immediate impact on egg abundance.

89. Recent reports show that the horseshoe crabs, particularly the egg-producing females, are in decline.

90. The Atlantic seaboard states, in conjunction with the Atlantic States Marine Fisheries Commission ("ASMFC"), currently manage the horseshoe crab fishery, which has significant and direct consequences for the survival of the Red Knot.

91. In December 1998, the ASMFC adopted an interstate fishery management plan for the horseshoe crab.

92. Implementation of this management plan included reducing the coast-wide harvest of horseshoe crabs for use as eel and conch bait and placing a quota on the number of horseshoe crabs caught or taken.

93. In November 1999, FWS formed the Shorebird Technical Committee to advise FWS and ASMFC on the potential impact of horseshoe crab fishing on shorebirds.

94. The ASMFC horseshoe crab harvest quotas and the temporary short-term harvest moratoriums in New Jersey have slowed the decline in the horseshoe crab population, but not enough to produce the superabundance of horseshoe crab eggs needed by the Red Knot.

95. On February 6, 2006, New Jersey published a proposed rule establishing a two-year moratorium on horseshoe crab harvests in New Jersey only. The moratorium went into effect on May 15, 2006, nearly five months after FWS denied the emergency listing petition.

96. Delaware has not imposed a moratorium on horseshoe crab harvesting, and does not intend to do so, although the possibility of such a move was cited by FWS as a reason for its decision not to emergency list the Red Knot.

97. In February 2006, the Commonwealth of Virginia rejected a rule that would have implemented a two-year moratorium on horseshoe crab harvesting.

98. On May 9, 2006, the ASMFC rejected the proposed two-year moratorium cited by FWS in its decision not to emergency list the Red Knot. Instead, the ASMFC approved an addendum to the fishery management plan that would limit the horseshoe crab take to male crabs, but this limitation will not take effect in time to affect this year's harvest.

#### **THE EMERGENCY LISTING PETITIONS**

99. Alarmed by the swift decline of the Red Knot, on July 28, 2005, Plaintiffs ABC, CCE, Defenders, Delaware Audubon, Audubon and New Jersey Audubon petitioned the Service and the Interior to list the Red Knot as "endangered" on an emergency basis, and to designate "critical habitat" in the Delaware Bay ecosystem under the ESA.

100. On August 5, 2006, Plaintiffs ALS, DRN, New Jersey Audubon and Sierra Club filed a separate petition with the Service calling for Interior to list the Red Knot as "endangered"

on an emergency basis, and to designate “critical habitat” in the Delaware Bay ecosystem under the ESA.

101. In addition to Plaintiffs’ Petitions, FWS received a letter from a member of the Northeast Pennsylvania Audubon Society asking the Service to consider adding the shorebird to the list of endangered species.

102. In the Petitions, Plaintiffs provided substantial evidence that the Red Knot met all of the listing factors prescribed in Section 4(a) of the ESA and that emergent circumstances exist.

103. Four months later, in a letter dated December 22, 2005, Defendants denied the Petitions to list the Red Knot on an emergency basis and declined to determine at that time whether “the petition presents substantial information” that a listing is warranted.

104. In denying the Petitions, the Service listed a series of factors that it states “assist[ed] in making the determination that an emergency listing is not warranted at this time.” (See Exhibit C)

105. Many of the factors cited by FWS, such as the ASMFC’s formation of a Shorebird Technical Committee in 2001 and the Department of Commerce decision in 2001 to designate a 1,500-square-mile horseshoe crab sanctuary in federal waters to protect horseshoe crabs, either provide no actual protection for the Red Knot and its habitat or predate the listing petition and have not averted the Red Knot’s decline.

106. Other factors cited, such as New Jersey’s decision in 2005 to impose a *temporary* emergency moratorium on the harvest of horseshoe crabs until June 23, 2005, provide no current or future protection for the Red Knot or its habitat.

107. Still other factors cited by the Service are purely speculative, as they rely on proposed actions by the states and the ASMFC that may not come to pass. Although Defendants cited the possibility that New Jersey, Delaware and the ASMFC will adopt moratoriums on

horseshoe crab harvesting this season, none of these actions were certain to occur. ASMFC did not adopt a moratorium on all horseshoe crab fishing. Delaware did not propose any ban or moratorium on horseshoe crab fishing.

108. In relying on future and proposed actions related to the horseshoe crab fishery, failing to rely on the best scientific and commercial information available concerning the Red Knot's decline, and failing to base its decision on the ESA's five listing factors, Defendants acted arbitrarily and capriciously and violated the APA.

### **FIRST CLAIM**

#### **Defendants' Decision Denying Plaintiffs' Petition to Emergency List the Red Knot Was Arbitrary, Capricious, and Contrary to Law.**

109. Plaintiffs reallege the facts set forth in paragraphs 1 through 108.

110. Defendants' denial of Plaintiffs' emergency listing petitions was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A).

### **SECOND CLAIM**

#### **Defendants Violated the ESA by Failing to Make Mandatory 90-Day Finding**

111. Plaintiffs reallege the facts set forth in paragraphs 1 through 108.

112. Section 4(b)(3)(A) of the ESA requires the Secretary to make a finding as to whether "the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted" within 90 days of receipt of a petition to list a species, to the maximum extent practicable. 16 U.S.C. § 1533(b)(3)(A).

113. Section 4(b)(3)(B) of the ESA requires the Secretary, within 12 months after receiving a petition to make a determination as to whether listing is not warranted, warranted, or warranted but precluded. 16 U.S.C. § 1533(b)(3)(B).

114. More than one year has passed since Plaintiffs petitioned to list the Red Knot as “endangered.”

115. The Secretary violated the ESA and failed to perform his non-discretionary duty to make the 90-day finding.

### **THIRD CLAIM**

#### **In Refusing the Emergency List the Red Knot Defendants Violated the ESA by Considering Factors Other Than Those Prescribed by the Act**

116. Plaintiffs reallege the facts set forth in paragraphs 1 through 108.

117. Under Section 4(a) of the ESA, the Secretary is required to determine whether a species is endangered or threatened due to any of the following factors:

- a. the present or threatened destruction, modification, or curtailment of its habitat or range;
- b. overutilization for commercial, recreational, scientific, or educational purposes;
- c. disease or predation;
- d. the inadequacy of existing regulatory mechanisms; or
- e. other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a); 50 C.F.R. § 424.11(c).

118. On July 28, 2005, Plaintiffs filed a petition to emergency list the Red Knot, which provided evidence that the Red Knot met all of the listing factors prescribed in Section 4(a) of the ESA.

119. On December 22, 2005, Defendants denied Plaintiffs' petition to emergency list the Red Knot. In the denial letter, Defendants cited the proposed two-year moratoriums on horseshoe crab harvests that were pending before the ASMFC and the States of New Jersey and Delaware as reasons why an emergency listing was not warranted.

120. In relying on factors other than those prescribed by the ESA in making his determination not to emergency list the Red Knot, the Secretary violated Section 4 of the ESA and its implementing regulations. 16 U.S.C. § 1533(a); 50 C.F.R. § 424.11(c).

#### **FOURTH CLAIM**

##### **Defendants Violated the ESA by Failing to Rely on the Best Scientific and Commercial Data Available**

121. Plaintiffs reallege the facts set forth in paragraphs 1 through 108.

122. Under Section 4(b)(1)(A) of the ESA, the Secretary is required to make initial listing determinations using the best scientific and commercial data available. 16 U.S.C. 1533(b)(1)(A).

123. In their listing petitions, Plaintiffs cited various studies that followed the Red Knot for over a decade and that demonstrate the Red Knot's precipitous decline.

124. In their denial letter, Defendants only cited the fact that the Spring 2005 peak number of migrant Red Knots observed during aerial counts in the Delaware Bay stopover area increased slightly over 2004 peak counts as evidence that emergency listing was not warranted.

125. In failing to rely on the best scientific and commercial data available when deciding not to emergency list the Red Knot, the Secretary violated Section 4(b)(1)(A) of the ESA. 16 U.S.C. § 1533(b)(1)(A).

#### **RELIEF REQUESTED**

Plaintiffs seek a judgment from this Court against Defendants as follows:

- A. A declaration that the Secretary and the Director acted arbitrarily and capriciously pursuant to the APA in refusing to emergency list the Red Knot by failing to base their decisions solely on the listing factors prescribed by the ESA, and by failing to use best scientific information available;

- B. An order that Defendants immediately list the Red Knot as endangered under the ESA, or, in the alternative, an order that Defendants immediately reconsider listing the Red Knot as endangered on an emergency basis;
- C. A declaration that the Secretary and the Director violated the ESA by failing to base their decision to deny the Petitions solely on the listing factors prescribed by the ESA;
- D. A declaration that the Secretary and the Director violated the ESA by failing to use the best scientific information when making their decision to deny the Petitions;
- E. An order that Defendants immediately make the required 90-day finding under the ESA;
- F. An order that Plaintiffs recover their costs, including reasonable attorney fees, incurred in connection with this action, as provided for under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), the ESA, 16 U.S.C. § 1540(g)(4), and other applicable laws; and
- G. Such other and further relief as the Court may deem just and proper.

Dated: August 8, 2006

Respectfully Submitted,

s/ Carter H. Strickland, Jr.

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CERTIFICATION PURSUANT TO LOCAL RULE 11.2

The matter in controversy is not the subject of any other action pending in any court, or of any pending arbitration or administrative proceeding.

s/ Carter H. Strickland, Jr.  
CARTER H. STRICKLAND, JR.