

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. _____

COLORADO PRAIRIE INITIATIVE, a Colorado nonprofit corporation,

Plaintiff,

v.

MARTIN LOWNEY, in his official capacity as the Colorado State Director for USDA-APHIS
Wildlife Services, and

JASON SUCKOW, in his official capacity as the Western Regional Director for USDA-APHIS
Wildlife services, and

ANIMAL AND PLANT HEALTH INSPECTION SERVICE - WILDLIFE SERVICES, a federal
agency of the United States Department of Agriculture,

Federal Defendants.

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PETITION FOR REVIEW SEEKING DECLARATORY AND INJUNCTIVE RELIEF

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a Judge.

1. Plaintiff Colorado Prairie Initiative respectfully files this suit challenging the actions of Defendants Martin Lowney, *et al*, to authorize prairie dog extermination operations in Colorado. This is a civil action for declaratory and injunctive relief, arising under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*, and alleging violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*
2. Plaintiff seeks a declaration that Defendants’ authorization of prairie dog extermination under Categorical Exclusions (“CE”) violates federal law and is otherwise arbitrary and capricious.
3. Plaintiffs additionally seek injunctive relief to redress the injuries caused by these violations of the law.
4. Should Plaintiff prevail, Plaintiff will seek an award of costs, attorneys’ fees, and other expenses pursuant to the Equal Access to Justice Act, 22 U.S.C. § 2412.

JURISDICTION AND VENUE

5. Plaintiff brings this action under the APA, 5 U.S.C. § 551 *et seq.*
6. This Court has jurisdiction pursuant 28 U.S.C. §§ 1331 (federal question), 1346 (United States as a defendant), 2201 (injunctive relief), and 2202 (declaratory relief). The current cause of action arises under the laws of the United States, including the APA and NEPA. An actual, justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 75 & 706.

7. Venue is proper in this court under 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district. The lead Defendant's office is located within this district. The extermination operations at issue in this litigation take place within this district.

PARTIES

8. Plaintiff COLORADO PRAIRIE INITIATIVE ("CPI") is a nonprofit corporation founded in 2014 with members and supporters throughout the State of Colorado. CPI advocates for the conservation and restoration of prairie ecosystems throughout eastern Colorado. CPI's mission is to work toward thriving, contiguous, natural prairies across eastern Colorado sufficient to allow the reintroduction and survival of charismatic species such as bison, elk, and wolves. CPI strives to create prairies reminiscent of the pre-Homestead era, when the state was an untamed ocean of grass. CPI's supporters regularly recreate throughout eastern Colorado, including in areas populated by prairie dogs. CPI members are especially active along the Front Range, where many of Defendants' activities take place. CPI's supporters and staff enjoy watching and studying prairie dogs and the wildlife that depends on them. These animals include burrowing owls, foxes and coyotes, reptiles, and birds of prey. Whether prairie dogs are found in suburban settings or in more rural locations, their burrows and colonies provide food and support for entire ecosystems, and provide aesthetic, biological, and recreational resources for CPI and its supporters. Even Defendants' operations that take place on private lands impact CPI. Wildlife is a public resource with no awareness or understanding of property

boundaries, and animals come and go between private and public properties constantly. This means the the overall populations across the state are impacted by Defendants' operations on private and public lands, thereby impacting CPI. Many birds such as mountain plovers and burrowing owls rely on prairie dog colonies for breeding, making prairie dogs an important factor in enjoying many birds in Colorado for years to come. Their migratory nature means that these birds can be found moving throughout Colorado at different times of the year. CPI's supporters and staff have a procedural interest in ensuring that all of defendants' activities comply with applicable federal statutes and regulations. The interests of CPI's supporters and staff have been, and will continue to be, harmed by the extermination operations of Defendants. The interests of CPI's members have been, and will continue to be, injured by Defendants' failure to comply with NEPA in authorizing its prairie dog extermination operations. Without proper analysis, these operations risk the populations of not only prairie dogs, but also the myriad grassland species that rely on and associate with the prairie dog colonies. The relief requested by Plaintiff in this complaint would redress the injuries of CPI's members.

9. Defendant MARTIN LOWNEY is named in his official capacity as the Colorado State Director for USDA-APHIS Wildlife Services. As the Colorado State Director for USDA-APHIS Wildlife Services, Mr. Lowney is the federal official with responsibility for all of the Wildlife Services officials' actions and inactions challenged in this complaint.
10. Defendant JASON SUCKOW is named in his official capacity as the Western Regional Director for USDA-APHIS Wildlife Services. As the Western Regional Director for

USDA-APHIS Wildlife Services, Mr. Suckow is the federal official with responsibility for authorizing all of the prairie dog extermination actions germane to this litigation.

11. Defendant ANIMAL AND PLANT HEALTH INSPECTION SERVICE – WILDLIFE SERVICES (“Wildlife Services”) is a division of the United States Department of Agriculture’s Animal and Plant Health Inspection Service (“APHIS”). Wildlife Services is responsible for applying and implementing the federal laws and regulations at issue in this complaint. Wildlife Services receives federal, state, and private funding to undertake prairie dog management activities and conducts operations within Colorado, including the extermination and control of prairie dogs.

LEGAL FRAMEWORK

12. NEPA was enacted to require federal agencies to review the potential environmental impacts of their actions before such actions are taken.
13. NEPA requires agencies to prepare an EIS when a proposed major federal action may significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C).
14. APHIS regulations require the agency to complete an environmental impact statement (“EIS”) to evaluate its program of management and approaches to animal and plant health issues. 7 C.F.R. § 372.5(a).
15. APHIS regulations require the agency to complete an EA for discrete program components, which are characterized by a limited scope. 7 C.F.R. § 372.5(b).
16. NEPA regulations allow agencies to create categorical exclusions (“CE”) from environmental review for activities that “do not individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4.

17. APHIS regulations allow categorical exclusions for routine measures, which are activities which meet all of the following criteria: (A) Use is localized; (B) Use will not cause contaminants to enter bodies of water; (C) Use does not adversely affect any federally protected species or critical habitat; (D) Use does not cause bioaccumulation. 7 C.F.R. § 372.5(c).
18. APHIS regulations do not allow categorical exclusions for any routine measure if the incremental impact of the activity, when added to other past, present, and foreseeable future actions, can potentially significantly affect the environment. 7 C.F.R. § 372.5(d).
19. Agencies cannot avoid calling an action significant by dividing it into discrete actions. 40 C.F.R. § 1508.27(b)(7).
20. The APA allows a party aggrieved by agency action to seek judicial review thereof. 5 U.S.C. § 702.
21. A court shall overturn or overrule an agency or administrative action if it is arbitrary or capricious. 5 U.S.C. § 706(2)(A).
22. Administrative actions that expire before the conclusion of litigation can still be litigated if their duration is too short to be fully litigated and there is a reasonable expectation that the complaining party would be subjected to the same action in the future. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).
23. There is a reasonable expectation that CPI will be subject to the same injury from CE documents again.

FACTS

24. APHIS conducts operations throughout Colorado that involve exterminating prairie dogs through the use of poisons and firearms.
25. These operations range in location from airports to prisons to private agricultural property.
26. The targets of APHIS operations in eastern Colorado consist of black-tailed prairie dogs.
27. According to annual summaries of operations and wildlife kill totals, APHIS fumigated a total of 125,395 prairie dog dens across Colorado from the years 2010-2014 inclusive using zinc phosphide, aluminum phosphide, and other fumigants.
28. According to those same summaries, APHIS killed an additional 39,174 prairie dogs with firearms in that same time.
29. Prairie dog colonies provide habitat for a wide variety of other wildlife on the prairies, and are considered an essential part of the prairie ecosystem.
30. On November, 4, 2016, CPI submitted a request to APHIS under the Freedom of Information Act ("FOIA") requesting production of any and all documents prepared under NEPA for the year 2016 relating to the fumigation of prairie dogs in Colorado.
31. APHIS provided CPI with 91 pages of documentation, consisting largely of CE documents.
32. None of the documents included a substantive analysis of indirect cumulative effects of APHIS prairie dog operations within the State of Colorado.
33. Many of the documents produced did not analyze, or even mention, the four required elements of a valid CE.

34. On April 30, 2016, CPI submitted a petition to APHIS under the APA requesting the agency perform an environmental assessment of the agency's prairie dog program.

35. On May 31, 2016, Defendants sent CPI a letter denying the request. The letter claimed the CEs were proper and justified, but did not mention any cumulative impacts analysis having ever been done.

36. The documents issued by APHIS are valid for approximately one year.

37. On October 5, 2016, APHIS issued a CE that is valid until February 28, 2017 attached as Exhibit 1.

38. Exhibit 1 contains no cumulative impacts analysis of the prairie dog operations in the State of Colorado.

39. Exhibit 1 does not analyze the potential impacts of removing prairie dogs from certain areas of the state.

40. Exhibit 1 does not analyze the four factors required for a valid CE.

41. On April 11, 2016, APHIS issued a CE that is valid until April 14, 2017, attached as Exhibit 2.

42. Exhibit 2 contains no cumulative impacts analysis of the prairie dog operations in the State of Colorado.

43. Exhibit 2 does not analyze the potential impacts of removing prairie dogs from certain areas of the state.

44. Exhibit 2 does not analyze the four factors required for a valid CE.

45. One year is too short a period to fully litigate the content prior to cessation or expiration

46. In 2015, APHIS issued more than 15 CE documents for prairie dog management, all of which have since expired.

47. In 2014, APHIS issued more than 25 CE documents for prairie dog management, all of which have since expired.

48. In 2013, APHIS issued more than 20 CE documents for prairie dog management, all of which have since expired.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Defendants Acted Arbitrarily and Capriciously in Granting Categorical Exclusions to Prairie Dog Management Activities in Colorado

49. Plaintiff incorporates and restates each of the above paragraphs as if fully set forth herein.

50. Defendants have not complied with the analysis required by NEPA to properly claim their prairie dog activities in Exhibits 1 and 2 as categorical exclusions.

51. Defendants have not evaluated the environmental effects of the APHIS prairie dog program.

52. Defendants have not analyzed the four factors required by 7 C.F.R. § 372.5(c).

53. Defendants have not conducted the cumulative impacts analysis required by 40 C.F.R. § 1508.4 to determine whether the sum of their prairie dog operations will have a significant impact on the environment.

54. Without this analysis, the Defendants' actions have been arbitrary and capricious.

55. By not performing the required cumulative impacts analysis, defendant poses a risk to the ecosystems of the prairie by causing unknown consequences to the wildlife that relies on prairie dogs for food and habitat.

56. The failure to analyze potential impacts presented by the management activities of Exhibits 1 and 2 poses a direct threat to the resources that the members of CPI value and enjoy on a regular basis.

SECOND CLAIM FOR RELIEF

Failure to Prepare an Environmental Impact Statement

57. Plaintiff incorporates and restates each of the above paragraphs as if fully set forth herein.

58. Defendants have attempted to avoid calling their prairie dog management activities significant by dividing them into discrete operations, such as those found in Exhibits 1 and 2.

59. Defendants' prairie dog operations pose potentially significant impacts to the environment.

60. Defendants must prepare an EIS to comply with NEPA requirements.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court enter judgment against Defendant providing the following relief:

- a) Declare that Defendants violated NEPA, its implementing regulations, and the Administrative Procedure Act in developing, analyzing, and implementing Exhibit 1.

- b) Order Defendants to conduct an environmental impact statement for the APHIS prairie dog program as required by NEPA;
- c) In the alternative, order Defendants to conduct an environmental assessment for the APHIS prairie dog program as required by NEPA;
- d) In the alternative, order Defendants to conduct cumulative impacts analysis for the APHIS prairie dog program as required by 7 C.F.R. § 372.5(d).
- e) An award of court costs and reasonable attorney's fees;
- f) Any such other and further relief as the Court deems appropriate.

COLORADO PRAIRIE INITIATIVE

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