UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*, Defendants, and CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK, Intervenor-Defendants.	)	Civil Action Case No. 2:13-cv-00234 (Consolidated with 2:13-cv-00362 and 2:13-cv-00413) Judge: Martin L. C. Feldman Magistrate Judge: Sally Shushan

PLAINTIFF MARKLE'S NOTICE OF SUPPLEMENTAL AUTHORITY

On June 23, 2014, the U.S. Supreme Court decided the case of *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U. S. ___ (2014). In that case, the petitioners challenged EPA's interpretation of the Clean Air Act, to regulate certain greenhouse gas emissions, as over broad. In determining the level of deference due, the Court held the agency interpretation was unreasonable and "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole' . . . does not merit deference." Slip opinion at 17 (citation omitted). That holding was based on the Court's conclusion that EPA's interpretation of the Act was too vast and would have enormous economic and political implications for the country. Accordingly, the Court stated that sudden, expansive interpretations of long-standing laws should be met with skepticism:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, 529 U.S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance." *Id*., at 160; see also *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994); *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645-646 (1980) (plurality opinion). The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text.

Slip opinion at 19-20.

We note that the Endangered Species Act of 1973, like the Clean Air Act, as amended in 1970, is also a "long-extant statute." We also note that the U.S. Fish and Wildlife Service's "unheralded" claim in this case that it can regulate nonhabitat as critical habitat—which could include *any* area of the United States—has just as much potential to "bring about an enormous and transformative expansion" of agency authority, with the "power to regulate 'a significant portion of the American economy,'" as the EPA's misinterpretation of the Clean Air Act. Therefore, we believe the attached decision will aid this Court in resolving this case.

DATED: June 26, 2014.

Respectfully submitted,

M. REED HOPPER, *Pro Hac Vice* (TA)
mrh@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

ANDREW J. HARRISON, JR.
(Louisiana Bar No. 20463)
ajh@ajharrisonlawllc.com
MADELINE AHLGREN
(Louisiana Bar No. 31009)
mahlgren@ajharrisonlawllc.com
Harrison Law, LLC
One American Plaza, Suite 820
Baton Rouge, Louisiana 70825
Telephone: (225) 388-0065
Facsimile: (225) 388-0501

/s/ *M. Reed Hopper*
M. REED HOPPER

Attorneys for Plaintiff, Markle Interests, LLC

DECLARATION OF SERVICE

I hereby certify that on June 26, 2014, I electronically filed the foregoing PLAINTIFF MARKLE'S NOTICE OF SUPPLEMENTAL AUTHORITY with the Clerk of the Court through the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ *M. Reed Hopper*
M. REED HOPPER