



Via electronic and certified mail

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RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act; Failure to Designate Critical Habitat for 12 Species of Coral Occurring in United States Waters

Dear Secretary Ross, Acting Administrator Jacobs, and Assistant Administrator Oliver:

This letter serves as a sixty-day notice of intent to sue the National Oceanic and Atmospheric Administration (“NOAA”), through the National Marine Fisheries Service (“NMFS”), over violations of Section 4 of the Endangered Species Act (the “Act,” or “ESA”), 16 U.S.C. § 1531 *et seq.*, on behalf of the Center for Biological Diversity. Specifically, NMFS has failed to designate critical habitat for five species of Florida and Caribbean corals,¹ and seven Pacific corals.² *See* 16 U.S.C. § 1533(a)(3)(A); *see also id.* at § 1533(b)(6)(C). This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the Act, to the extent that such notice is deemed necessary by a court. *See id.* at § 1540(g).

A. Factual Background

Corals worldwide face an extinction crisis due to the threats of climate change, ocean acidification, disease, and pollution, among others. In recent years global warming has caused

¹ *Dendrogyra cylindrus*, *Orbicella annularis*, *Orbicella faveolata*, *Orbicella franksi* and *Mycetophyllia ferox*

² *Acropora globiceps*, *Acropora jacquelineae*, *Acropora retusa*, *Acropora speciosa*, *Euphyllia paradivisa*, *Isopora crateriformis*, and *Seriatopora aculeate*

nearly every reef around the world to suffer declines, and NOAA recently recognized the loss of enormous areas of coral across the U.S., as well as internationally, by a worldwide coral bleaching event – the third global coral bleaching event ever on record. This event, “brought on by climate change,” is one of the largest and most pervasive threats to coral reefs around the world.³

In 2009, the Center petitioned NMFS to list 83 species of corals under the Endangered Species Act, primarily due to the effects of habitat destruction, pollution, disease, and climate change. *Endangered and Threatened Wildlife and Plants: Proposed Listing Determinations for 82 Reef-Building Coral Species; Proposed Reclassification of Acropora palmate*, 77 Fed. Reg. 73219 (Dec. 7, 2012). As detailed in the petition, nearly 30% of coral reefs have already been lost, and more are at risk. In recent years, the frequency of mass bleaching events and disease outbreaks have increased, and many areas are experiencing sluggish coral growth due to acidification. Anthropogenic climate change and ocean acidification pose the most serious short- and long-term threats to the survival of corals. According to coral scientists, “reefs are likely to be the first major planetary-scale ecosystem to collapse in the face of climate changes now in progress.”⁴

On September 10, 2014, NMFS published its final rule listing 20 of the petitioned coral species as threatened. *Endangered and Threatened Wildlife and Plants: Final Listing Determinations on Proposal To List 66 Reef-Building Coral Species and To Reclassify Elkhorn and Staghorn Corals*, 79 Fed. Reg. 53851 (Sep. 10, 2014). In its final rule, NMFS listed the nine most significant threats to the coral species: ocean warming, disease, ocean acidification, fishing, sedimentation, nutrients, sea-level rise, predation, and collection and trade. NMFS recognized that cumulative and synergistic threats “predict the irreversible disappearance of coral reefs on a global scale in the next few decades.”

The final rule did not include critical habitat designations for any of the newly listed species, as required by the Act. Instead, NMFS determined that “critical habitat is not currently determinable for the species being newly listed through this final rule,” and stated that it would “publish a proposed designation of critical habitat for the coral species in a separate rule.” *Id.* No timeline for the critical habitat designation was provided.

Of the 20 listed corals, fifteen of the listed species occur in the Indo-Pacific, and five in the Caribbean. *Advanced Notice of Proposed Rulemaking and Request for Information for the Issuance of Protective Regulations Under Section 4(d) of the Endangered Species Act for the Conservation of Threatened Corals*, 80 Fed. Reg. 1616. All 5 of the Florida and Caribbean corals have been confirmed in U.S. waters, and occur throughout Atlantic Florida, Puerto Rico, the U.S. Virgin Islands, and the Gulf of Mexico. *Id.* For the Indo-Pacific species, 7 of the 15 listed corals have been confirmed to occur throughout American Samoa, Guam, the Commonwealth of Northern Mariana Islands, and the Pacific Remote Island Areas. *Id.* The other 8 Indo-Pacific

³ NOAA website, *NOAA declares third ever global coral bleaching event*, October 8, 2015, <http://www.noaanews.noaa.gov/stories2015/100815-noaa-declares-third-ever-global-coral-bleaching-event.html> (last accessed Nov. 3, 2016).

⁴ Vernon et al. 2009. The coral reef crisis: the critical importance of <350 ppm CO₂. *Marin Pollution Bulletin* 58: 1428-1436,1433.

species have not yet been confirmed within U.S. territory, but NMFS readily acknowledges that may change as survey efforts increase. *Id.*

B. Legal Background

Congress enacted the Endangered Species Act to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). “The plain intent of Congress enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). A species is “endangered” when it is in danger of extinction through all or a significant portion of its range, and “threatened” when it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(6), (20).

NMFS and the U.S. Fish and Wildlife Service (“FWS”) are responsible for enforcing the ESA and must base all listing and critical habitat determinations “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A), b(2). The designation and protection of critical habitat is one of the primary ways in which the fundamental purpose of the Act, “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” is achieved. 16 U.S.C. § 1531(b). The legislative history of the Act show Congress clearly recognized the importance of critical habitat designation in conserving listed species:

[C]lassifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species’ continued existence. . . . If the protection of endangered and threatened species depends in large measure on the preservation of the species’ habitat, then *the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.*

H.R. Rep. No. 94-887 at 3 (1976) (emphasis added).

Critical habitat is defined by the ESA as “the specific areas within the geographic area occupied by the species . . . 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.” 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Critical habitat may also encompass unoccupied habitat if that habitat is “essential for the conservation of the species.” *Id.* § 1532(5)(A)(ii). The purpose of critical habitat is to “carve out territory that is not only necessary for the species’ survival but also essential for the species’ recovery.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.* (“FWS”), 378 F.3d 1059, 1070 (9th Cir. 2004).

When the Services list a species as endangered or threatened, they must also concurrently designate critical habitat for that species. Section 4(a)(3)(A)(i) of the Act states that, “to the maximum extent prudent and determinable,” the Services “shall, concurrently with making a determination . . . that a species is an endangered species or threatened species, designate any habitat of such species which is then considered to be critical habitat.” 16 U.S.C. § 1533(a)(3)(A); *see also id.* at § 1533(b)(6)(C).

The Act generally requires that critical habitat designation take place concurrently with listing because critical habitat provides important protection for imperiled species beyond that provided by listing alone. Pursuant to section 7(a)(2) of the Act, federal agencies must ensure through consultation with the Services that any action they authorize, fund, or carry out will not “jeopardize the continued existence of any [listed] species.” *Id.* at § 1536(a)(2). For species with critical habitat, each federal agency must *additionally* guarantee that its actions will not “result in the destruction or adverse modification” of that habitat. *Id.*

However, the Services may delay designation of critical habitat if it determines that the critical habitat is not determinable at the time of listing. In that case, the Services have one additional year to publish a final critical habitat regulation. 16 U.S.C. § 1533(b)(6)(C)(i-ii) (if critical habitat species is not determinable at time of final listing rule, the Services have “one additional year [to designate critical habitat], but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat”).

While the designation of critical habitat outside jurisdiction of the United States is not permitted, 50 C.F.R. § 424.12, the word “shall” makes it clear that the designation of critical habitat is required for all listed species that occur within jurisdiction of the United States. 16 U.S.C. § 1533(a)(3)(A); *see also id.* at § 1533(b)(6)(C). This duty is not discretionary.⁵ Of the 20 corals that NMFS listed in its final rule, 12 have been confirmed to be found in U.S. waters, and the Act demands that they receive critical habitat designation accordingly. 80 Fed. Reg. 1616.

C. Violation of the Act

NMFS’s failure to designate critical habitat for the newly listed species of Caribbean and Pacific coral constitutes a violation of the Act. 16 U.S.C. § 1533(a)(3)(A); *see also id.* at § 1533(b)(6)(C). NMFS published its final rule listing 20 of the petitioned coral species as threatened under the Act on September 10, 2014. *Endangered and Threatened Wildlife and Plants: Final Listing Determinations on Proposal To List 66 Reef-Building Coral Species and To Reclassify Elkhorn and Staghorn Corals*, 70 Fed. Reg. 53852. The rule did not include critical habitat designations for any of the newly listed species, but instead stated that critical habitat was not then determinable.

As described above, in cases where critical habitat is not readily determinable at the time of listing, the Act provides a one year buffer period for the Services to establish critical habitat. *See* 33 U.S.C. § 1533(b)(6)(C). The period has long since expired and NMFS is in clear violation of the Act. If corals are to survive, they must not be denied the strong protections of the Endangered Species Act which were intended to safeguard them from extinction.

⁵ The Services may only find that it is “not prudent” to designate critical habitat for a species where designating critical habitat would either increase the degree of threat to a species or would not be beneficial to the species. 50 C.F.R. § 424.12(a)(1)(i)-(ii) (2011). As Congress made clear when it passed the ESA, it only intended for agencies to invoke the “not prudent” exception to designating critical habitat in “rare circumstances.” H.R.Rep. No. 95-1625 at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467. *See Natural Res. Def. Council v. U.S. Dept. of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997).

According to an analysis of the effectiveness of the ESA, species with designated critical habitat are more than twice as likely to be moving towards recovery than those without protected habitat.⁶ Critical habitat provides key protections for listed species by prohibiting federal agencies from permitting, funding, or carrying out actions that “adversely modify” designated areas. 33 U.S.C. § 1536(a). Designating critical habitat also provides vital information to local governments and citizens about where important habitat for endangered species is located.

For coral species, critical habitat is particularly important because, although current statutes prohibiting take already exist in US waters, no appreciable recovery is occurring. Moreover, critical habitat designations would have immediate benefits extending far beyond the reefs themselves, including improved water quality throughout the coastal zone, limits on over-fishing, protections for spawning grounds, reduced impacts from development and dredging, and reduced human pressures on hundreds of thousands of reef-associated species. The habitats that critically impact the health of these corals must be immediately protected while additional research is conducted and resilience- and recovery-based management strategies are developed.

We are vitally concerned about and actively involved in the protection of the corals and their habitat. Our organizations’ members and staff engage in professional, recreational, aesthetic, and scientific activities involving this species and its habitat, including observing and attempting to observe the species. On their behalf, we urge you to take prompt action to protect the species under the Endangered Species Act. Accordingly, an acceptable remedy would be prompt issuance of the proposed rule identifying the critical habitat designation for the 12 species of coral and a date certain by which to finalize the critical habitat.

We are eager to address this violation and discuss with NMFS prospects for resolution at the earliest possible date. If NMFS does not act within 60 days to correct this violation of the Act, however, we may pursue litigation in federal court. We will seek injunctive and declaratory relief regarding this violation. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact us. Thank you for your concern.

Sincerely,

/s/ Emily Jeffers

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⁶ Taylor M, Suckling K, Rachlinski J. 2005. The effectiveness of the Endangered Species Act: A quantitative analysis. *BioScience* 55: 360–367.