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Wilbur Ross, Secretary of Commerce
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Re: Notice of Intent to Sue for Failure to Make a 12-Month Finding on the Petition to List Cauliflower Coral under the Endangered Species Act

This letter serves as a sixty-day notice that the Center for Biological Diversity (the “Center”) intends to sue the Secretary of Commerce and the National Marine Fisheries Service (the “Service”) for violating Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, by failing to issue a 12-month finding regarding the Center’s petition to list cauliflower coral (*Pocillopora meandrina*) as “threatened” or “endangered” under the ESA.

Cauliflower corals — which are typically bushy green, pink or cream-colored animals —have declined significantly, including a 36 percent drop in coverage across Hawaii from 1999 to 2012. These sensitive corals are threatened by ocean warming and acidification. Between 2014 and 2017, a massive coral bleaching event swept across the planet killing millions of corals on hundreds of reefs from Hawaii to the Great Barrier Reefs. Cauliflower coral has substantially declined over the past few years due to these mass bleaching events, and it is further locally threatened by land-based pollution, sedimentation, overfishing, and physical damage from human activities.

The delay in ESA protection denies cauliflower coral conservation measures that will minimize these key threats. The ESA has a 99 percent success rate in preventing extinction for species under its care. Yet, time is of the essence in conserving endangered species, and the Service must act immediately to propose threatened or endangered status for cauliflower coral.

A. The Endangered Species Act

Congress enacted the ESA 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). Even if a species is on the brink of extinction, it will not receive federal protection under the ESA until it is officially listed as “threatened” or “endangered.” *See, e.g., id.* §§ 1533(f) (requiring recovery plan for ESA-listed species), 1536 (requiring all federal agencies to ensure their actions do not jeopardize the continued existence of ESA-listed species). Congress described the listing process as “[t]he cornerstone of effective implementation of the Endangered Species Act.” S. Rep. No. 418, 97th Cong., 2d Sess. at 10; see also H. Rep. No. 567, 97th Cong., 2d Sess. at 10 (describing section 4 of the ESA, 16 U.S.C. § 1533).

Section 4 sets forth a detailed process by which the Secretary of Commerce, through the Service, may add species to the list of threatened or endangered species. 16 U.S.C. § 1533. Any interested person may petition the Service to list a species, or the Service may start the listing process itself. *Id.* § 1533(b)(3)(A).

When the Service receives a petition to list a species, it must determine whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* Whenever practicable, the Service must make this initial finding within ninety days after it receives a petition. *Id.* If the Service determines that the petition presents substantial information that a listing may be warranted, it must make a determination whether listing is warranted within twelve months after receiving the petition (a “12-month finding”). 16 U.S.C. § 1533(b)(3)(B). This is a hard deadline; the Service has no discretion to delay its finding past 12 months. *Id.*

If the 12-month finding concludes that listing is warranted, the Service must publish a proposed rule to list the species in the Federal Register. *Id.* § 1533(b)(3)(B)(ii). Within one year of publishing the proposed rule, the Service must make a final listing determination for the species. *Id.* § 1533(b)(6)(A)(i).

B. Cauliflower Coral Listing Process

On March 14, 2018, the Center submitted a petition to list the cauliflower coral in Hawaii as an endangered or threatened species. The petition described how cauliflower coral is imperiled by climate change and other threats, which warrant listing.

The cauliflower coral (*Pocillopora meandrina*) is found in shallow reefs throughout the Indo-Pacific and East Pacific. In Hawaii, *P. meandrina* has experienced high bleaching prevalence and subsequent mortality due to recent warming and bleaching events. Because the frequency and severity of thermal stress events in the Pacific is predicted to increase and it is likely to cause stronger mass coral bleaching, cauliflower coral is at high extinction risk in the foreseeable future in a significant portion of its range. In addition, localized sedimentation and pollution from inadequate land-use practices and overfishing of herbivorous fishes have contributed to the decline of shallow water corals in areas of the Main Hawaiian Islands. Thus, the Center

petitioned the Service to list the cauliflower coral as endangered or threatened under the ESA, and to further determine whether it is threatened or endangered throughout a significant portion of its range, the Hawaiian Islands.

On September 18, 2018, the Service published a “positive” ninety-day finding, deciding that listing cauliflower coral as threatened or endangered may be warranted. National Marine Fisheries Service, Endangered and Threatened Wildlife; Positive 90-Day Finding on a Petition to List the Cauliflower Coral, *Pocillopora Meandrina*, 83 Fed. Reg. 47592 (Sept. 18, 2018). The notice stated:

We find that the petition and other readily available information in our files indicates that *P. meandrina* may warrant listing as a threatened species or an endangered species throughout its range. Thus, we will initiate a global status review of *P. meandrina* to determine whether listing it throughout its range is warranted. If not, we will determine if Hawaii constitutes [a significant portion of its range] and proceed accordingly.

In its finding, the Service noted that between 1999 to 2012, all observations of cauliflower coral decreased in live coral cover by a combined 36.1 percent, and that the decline is accelerating.

C. The Service Failed to Make its 12-Month Finding on the Petition by the ESA’s Deadline

The ESA required the Service to respond to the Center’s petition by March 14, 2019. To date, the Service has failed to do so, even though the ESA offers it no discretion to delay past the one-year mark. Accordingly, the Service is in violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

Cauliflower coral desperately needs federal protection to reverse its slip towards extinction. Without timely and effective protection and conservation, populations will continue to become scarcer due to ocean acidification, rising ocean temperatures, and bleaching events. Any further delay of ESA protection for the cauliflower coral decreases its chances of survival and frustrates the purpose of the ESA.

The 12-month deadline is statutorily mandated, and an expedient finding serves the purpose of the ESA to better protect species like cauliflower coral. The ESA provides tools to conserve corals in U.S. waters, especially by ensuring that federal government activities minimize harm to corals. Coral protections can result in ecosystem-wide benefits by improving water quality, reducing pollution, overfishing, and restoring degraded reefs through coral nursery programs. All federal agencies must consult with the Service to minimize the harm of federally-approved or funded activities on listed corals. The consultation process also applies to government actions that harm corals through significant greenhouse gas emissions that increase global warming. This could result in reduction of these harmful emissions.

To remedy its ongoing, unlawful delay, the Center requests that the Service promptly publish its 12-month finding for Cauliflower coral. If the Service does not act within 60 days to correct this violation of the ESA, the Center will bring suit against the Secretary of Commerce and the

Service in federal court. If you have any questions or would like to discuss this matter, please contact us.

Sincerely,

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