CENTER for BIOLOGICAL DIVERSITY

June 9, 2020

By Electronic and Certified Mail

President Donald J. Trump
The White House
1600 Pennsylvania Ave, NW
Washington, D.C. 20500

Re: Notice of Violations of the Endangered Species Act Regarding Executive Order 13927 ("Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities")

Dear President Trump,

On behalf of the Center for Biological Diversity, we hereby put you on formal notice of your violations of the Endangered Species Act ("ESA" or "Act") in connection with your Executive Order ("Executive Order") entitled "*Accelerating the Nation's Economic Recovery From the Covid-19 Emergency by Expediting Infrastructure Investments and Other Activities*."

The Endangered Species Act makes it unlawful "for any person subject to the jurisdiction of the United States" to "*solicit* another to commit, or cause to be committed" any prohibited act that harms endangered wildlife or plants.[1] Your Executive Order, however, cynically exploits the COVID-19 pandemic by instructing all federal agencies and employees to unlawfully approve infrastructure and other projects, even if this causes grievous harm to our nation's most imperiled wildlife and plants. In doing so, you are soliciting the executive branch to ignore or otherwise violate the critical safeguards that the Endangered Species Act affords our nation's endangered and threatened species.

By directing all federal agencies to invoke a narrow regulation—which is focused solely on real and concrete, short-term emergencies in which full compliance with the ESA's safeguards may be genuinely impossible—as a justification for wholesale circumvention of the ESA's prohibition on harming endangered or threatened species in order to facilitate *routine* economic activity, your Executive Order flagrantly violates the Endangered Species Act. In turn, you necessarily cause federal agency officials to egregiously violate the Endangered Species Act.

Consequently, you are in violation of the Endangered Species Act, which provides, in pertinent part, that litigation may be brought to "enjoin *any person* . . . who is alleged to be in violation of any provision of this Act."[2]

[1] 16 U.S.C. § 1538(g) (emphasis added).
[2] 16 U.S.C. § 1540(g)(1)(A) (emphasis added).

PERTINENT PROVISIONS OF THE ENDANGERED SPECIES ACT

The ESA is the "most comprehensive legislation for preservation of endangered species ever enacted by any nation."[3] In enacting the ESA, which was passed by Congress and signed into law by President Richard Nixon in 1973, Congress found that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation"; that "other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction"; and that "these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[4] As the Supreme Court has explained, Congress "intended endangered species to be afforded the highest of priorities" and therefore adopted a policy of "institutionaliz[ed] [] caution" in addressing the needs of such species.[5] Consequently, the stated "policy" of the Act is that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."[6]

The ESA therefore establishes crucial substantive, as well as procedural, safeguards for species that are listed as endangered or threatened, as well as for the formally designated "critical habitats" of such species. Section 9 of the Act makes it "unlawful for *any person* subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States."[7]

Of particular relevance here, the Act also specifically makes it "unlawful for any person subject to the jurisdiction of the United States to attempt to commit, *solicit another to commit, or cause to be committed*, any offense defined in this section."[8] "Person" is defined by the statute to include "any officer, employee, agent, department, or instrumentality of the Federal Government . . . or any other entity subject to the jurisdiction of the United States."[9]

"Take" is broadly defined to include "harass," "harm," and "kill," or to "attempt to engage in any such conduct."[10] In turn, "harass" is defined by regulation to include any action that "creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."[11] "Harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[12]

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[3] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).
[4] 16 U.S.C. §§ 1531(2)(a)(1)-(3).
[5] *Tennessee Valley Authority v. Hill*, 437 U.S. at 173, 178.
[6] 16 U.S.C. § 1531(b).
[7] 16 U.S.C. § 1538(a)(1)(B) (emphasis added).
[8] *Id*. § 1538(g) (emphasis added).
[9] *Id*. § 1532(13).
[10] *Id*. § 1532(19).
[11] 50 C.F.R. § 17.3.
[12] *Id*.

Also of particular pertinence to the June 4 Executive Order, section 7 of the Act provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the [Fish and Wildlife Service ("FWS") and/or National Marine Fisheries Service ("NMFS")] insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which" has been designated as "critical."[13]

The Act and implementing regulations delineate a detailed consultation process between the "action agency" and the FWS/NMFS. For any agency action that "may affect" a listed species or critical habitat, a process of "formal consultation" must ordinarily be followed that culminates in a "Biological Opinion" issued by FWS and/or NMFS that determines whether the agency action under review will jeopardize a listed species or destroy or adversely modify its critical habitat.

If the Biological Opinion concludes that the agency action will not result in jeopardy or adverse modification, or if it offers reasonable and prudent alternatives to avoid that consequence, the FWS or NMFS must provide the agency with an "Incidental Take Statement" ("ITS") that "specifies the impact of such incidental taking on the species" and prescribes "reasonable and prudent measures" and "terms and conditions" that are "necessary or appropriate to minimize such impact" on the species.[14] The ITS "alter[s] the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions" in the ITS.[15] Thus, the ITS "constitutes a permit authorizing the action agency to 'take' the endangered or threatened species so long as it respects the Service's 'terms and conditions'"; in the absence of such an ITS, any action by an agency that harms, harasses, kills, or otherwise "takes" a listed species violates section 9 of the Act and exposes the agency and its personnel to "substantial civil and criminal penalties."[16]

In the aftermath of the Supreme Court's landmark ruling in *Tennessee Valley Authority v. Hill*, Congress created a detailed process whereby a Cabinet-level committee may approve an agency action that would otherwise violate the strictures of section 7.[17] This "Endangered Species Committee" is authorized to determine whether to "grant an exemption" from the Act's requirements, but only after a hearing is held and other procedural safeguards are followed and, as a general matter, only if certain stringent criteria are satisfied, including that "there are no reasonable and prudent alternatives to the agency action," the "benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest," and the "action is of regional or national significance."[18]

In addition to these general criteria, the Endangered Species Committee "shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security," and must also "accept the determinations of the

[13] 16 U.S.C. § 1536(a)(2).
[14] 16 U.S.C. § 1536(b)(4)(C).
[15] *Bennett v. Spear*, 520 U.S. 154, 178 (1997).
[16] *Id*. (citing 16 U.S.C. § 1540).
[17] *See* 16 U.S.C. § 1536(e)(1).
[18] *Id*. §§ 1536(g), (h).

President" with regard to decisions on the need for the "repair or replacement" of certain "public [facilities]" in any area "declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act."[19]

IMPACT OF EXECUTIVE ORDER 13927 ON ENDANGERED SPECIES

Invoking Proclamation 9994 of March 13, 2020, which declared the "COVID-19 outbreak" a "national emergency," your Executive Order directs all federal agencies to take certain actions in order to address what it characterizes as a "dramatic downturn in our economy" and the "likelihood of a potentially protracted economic recovery."[20] At the same time, your Executive Order states that the actions it directs are in keeping with your Administration's preexisting efforts to "reform[] and streamlin[e]" a purportedly "outdated regulatory system that has held back our economy with needless paperwork and costly delays."[21] Without providing any factual substantiation, your Executive Order asserts that "[u]nnecessary regulatory delays will deny our citizens opportunities for jobs and economic security" and will "hinder[] our economic recovery from the national emergency."[22]

Of particular relevance to this Notice, the Executive Order requires, within 30 days of the date of the Order, that "the heads of all agencies . . . shall identify planned or potential actions to facilitate the Nation's economic recovery that may be subject to the regulation on [section 7] consultations in emergencies, *see* 50 C.F.R. 402.05." The Executive Order also requires four cabinet level agencies — the Department of Transportation, Department of Defense, Department of Agriculture and Department of the Interior — to approve projects during this 30 day period, and provide a report including a list of projects that "have been expedited" along with additional projects that will be approved in the future under their emergency authorities.[23]

The Executive Order further provides that the "heads of all agencies are directed to use, to the fullest extent possible and consistent with applicable law, the ESA regulation on consultations in emergencies, to facilitate the Nation's economic recovery."[24] In addition, the Secretaries of the Interior and Commerce "shall ensure" that the Director of the FWS and the Assistant Administrator for Fisheries for NMFS, respectively, "shall be available to consult promptly with agencies and to take other prompt and appropriate action concerning the application of the ESA's emergency regulations."[25]

The single Endangered Species Act implementing regulation cited by your Executive Order as the basis for this exercise of "emergency" authority — 50 C.F.R. § 402.05 — says *nothing* about short-circuiting the requirements of any provision of the Act merely in order to facilitate

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[19] 16 U.S.C. § 1536(j), (p).
[20] *EO on Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities*, (June 4, 2020) available at: https://www.whitehouse.gov/presidential-actions/eo-accelerating-nations-economic-recovery-covid-19-emergency-expediting-infrastructure-investments-activities/
[21] *Id*., Sec. 1.
[22] *Id*.
[23] *Id*., Sec. 7(a)(i), (ii).
[24] *Id*., Sec. 7(b).
[25] *Id*., Sec. 7(d).

economic activity. Rather, it provides that, *"[w]here emergency circumstances mandate the need to consult in an expedited manner*, consultation may be conducted informally through alternative procedures" and that "[t]his provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc."[26] Reinforcing the short-term, circumscribed nature of the bases on which this "emergency" authority may be invoked, the regulation provides that "[f]ormal consultation shall be initiated as soon as practicable after the emergency is under control" and that the "Federal agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats."[27] Indeed, the preamble to the Federal Register notice in which the regulation was published reinforces that it was intended solely for situations involving "bona fide" emergencies in which invocation of the standard consultation process is practically impossible.[28] Likewise, the Services' section 7 Consultation Handbook underscores the very narrow nature of the provision, stating that it encompasses "response activities that must be taken to prevent imminent loss of human life or property."[29]

VIOLATIONS OF THE ENDANGERED SPECIES ACT

As explained, in creating the section 7 prohibition on jeopardy and adverse modification of critical habitat, Congress made the deliberate decision *not* to elevate general economic activity and ordinary infrastructure projects above the interests of imperiled species but, rather, to "afford" listed species "the highest of priorities," even above the "primary missions" of federal agencies.[30] In clear contravention of that design, your Executive Order directs agencies, for an indefinite time, to treat every single infrastructure (or other) project as "emergencies" that can be justified in any manner as promoting economic activity.

This directive flies in the face of: (1) the Endangered Species Act's overarching purpose; (2) the plain language of section 7(a)(2)'s mandate that agencies "insure" against the likelihood of jeopardy and adverse modification of critical habitat *before* taking action; (3) the directive in ESA section 7(d) that agencies (and private parties) not engage in actions that involve an "irreversible commitment of resources" during consultation; (4) Congress's creation of the Endangered Species Committee as the legally permissible mechanism for allowing actions that would otherwise be prohibited by section 7(a)(2); and (5) the specific "emergency" regulation invoked in the Executive Order which cannot reasonably be construed and applied to create a gaping loophole in the Act's protective scheme.[31] The Executive Order also contravenes a separate obligation imposed on all federal agencies by section 7(a)(1) of the Act to "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation [i.e., recovery] of endangered species and threatened species . . . ."[32]

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[26] 50 C.F.R. § 402.05(a) (emphasis added).
[27] *Id*.
[28] *See* 51 Fed. Reg. at 19,938 (1986).
[29] U.S. Fish & Wildlife Serv. and Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook at § 8-1 (Mar. 1998).
[30] *Tennessee Valley Authority v. Hill*, 437 U.S. at 174.
[31] Indeed, if the regulation were to be construed so as to allow routine, non-emergency economic activity to be treated as an "emergency," then the regulation itself would violate the ESA.
[32] 16 U.S.C. § 1536(a)(1).

Moreover, your Executive Order violates section 9 of the Endangered Species Act. By directing all federal agencies to rely on a legally impermissible "emergency" rationale as an excuse for failing to obtain incidental take authorization *before* infrastructure projects are built and other actions are undertaken, you are "solicit[ing]" agency officials and others to "commit" the unlawful taking of listed species.[33] By the same token, you are potentially "caus[ing] to be committed" the unlawful taking of listed species. Because the President is unquestionably a "person" as defined by the Act, *you* are in violation of the ESA, as is any federal agency that complies with the Executive Order.[34]

CONCLUSION

Your Executive Order contravenes the letter and purpose of Endangered Species Act, and therefore should be rescinded immediately. If corrective action is not taken, the Center for Biological Diversity will pursue litigation to ensure your compliance with the Act.[35]

Sincerely,

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[33] 16 U.S.C. § 1539(g).
[34] *See also Bennett*, 520 U.S. at 165 (explaining that the phrase "any person" in the ESA's citizen suit provision should be taken at "face value" and be afforded its plain meaning).
[35] The Executive Order is unlawful for reasons other than the issues raised in this letter, which is designed only to put you on notice of your ESA violations.