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Via Electronic and Certified Mail

David Bernhardt, Secretary of the Interior
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Aurelia Skipwith, Director
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RE: Sixty-day Notice of Intent to Sue for Violations of the Endangered Species Act

Dear Secretary Bernhardt and Director Skipwith,

In accordance with Section 11(g) of the Endangered Species Act (“ESA”), the Center for Biological Diversity (“Center”) provides this 60-day notice of its intent to sue the U.S. Fish and Wildlife Service (“Service”) for violations of the ESA in connection with the U.S. Department of Interior and U.S. Fish and Wildlife Service (“the Service”) failure to issue 12-month findings on the petitions to list the Mojave poppy bee (*Perdita meconis*), Las Vegas bearpoppy (*Arctomecon californica*), Gulf Coast solitary bee (*Hesperapis oraria*), and the Bethany Beach firefly (*Photuris bethaniensis*). Additionally, we are notifying the Service’s failure to finalize listing for the Franklin’s bumble bee (*Bombus franklini*). These findings for these species are already past the deadlines established by the Endangered Species Act.

Lawsuits from conservation groups and other interested parties have played a key role in speeding protection for imperiled species. Indeed, a recent peer reviewed study found that lawsuits both targeted species that were stuck in the process and sped listing of those species.¹ A separate study in the journal *Science* found that species petitioned and litigated for listing faced a higher degree of biological threat than species solely identified by the Service, indicating that citizens also identified species truly in need of protection.²

¹ Puckett et al., 2016. Taxa, petitioning agency, and lawsuits affect time spent awaiting listing under the US Endangered Species Act. *Biological Conservation* 201, 220-220

² Brosi, B.J., Biber, E.G.N., 2012. Citizen involvement in the U.S. Endangered Species Act. *Science* 337, 802–803.

We file this notice in an effort to ensure these species receive timely consideration for protection needed for their very survival and to ensure that the Service's listing program continues to improve and move forward in its efforts to protect imperiled species in the United States.

A. The Endangered Species Act

Congress enacted the ESA in 1973, responding to growing concern over the loss of biodiversity from “economic growth and development untempered by adequate concern and conservation.”³ To that end, the ESA establishes a comprehensive statutory program to conserve imperiled species and their habitats. The ESA sets forth a process to identify species that are “endangered” or “threatened” with extinction.⁴ The statute then generally bars the “take” of endangered species and further requires agencies to “utilize their authorities” to carry out “programs for the conservation” of listed species and ensure their actions do not jeopardize listed species’ continued existence.⁵ Congress described the listing process as “[t]he cornerstone of effective implementation” of the ESA.⁶

“Any interested person” may submit a petition to list a species under the ESA, which triggers a series of mandatory deadlines for the Service, pursuant to ESA Section 4(b).⁷ Within 90 days of receiving a petition, the Service must determine whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.”⁸ If the Service makes a positive 90-day finding, the Service must conduct a full scientific review of the species’ status.⁹ Then, within 12 months of the date it receives the petition, the Service “shall” make one of three findings: (1) listing is not warranted; (2) listing is warranted; or (3) listing is warranted but presently precluded by other pending listing proposals, provided other circumstances are met.¹⁰ This is a hard deadline and the Service has no discretion to delay its finding past 12 months.¹¹ If the Service finds listing is warranted, the Service must promptly publish a proposed rule to list the species.¹² The Service is required to issue a final rule within one year of the publication of the proposed rule¹³. The Service is further required to designate critical habitat concurrently with issuance of a final rule determining a species to warrant listing.¹⁴

The ESA allows the Secretary to find that listing of a species is warranted but precluded only if certain criteria are met, including: (1) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action...is precluded by pending proposals to determine

³ 16 U.S.C. § 1531(a).

⁴ *Id.* § 1533(a), (b), and (c).

⁵ *Id.* §§ 1538(a); 1536(a).

⁶ 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).

⁷ 50 C.F.R. § 424.14(a)(2016); 16 U.S.C. § 1533(b); *Friends of Animals v. Ashe*, 808 F.3d 900, 903 (D.C. Cir. 2015).

⁸ 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(h)(1).

⁹ 16 U.S.C. § 1533(b)(3)(A).

¹⁰ *Id.* § 1533(b)(3)(B); 50 C.F.R. § 424.14(h)(2).

¹¹ *Id.*

¹² 16 U.S.C. § 1533(b)(3)(B).

¹³ *Id.* § 1533(b)(6).

¹⁴ *Id.* § 1533(a)(3)(A)(i), (b)(6)(A).

whether any species is an endangered species or a threatened species; and (2) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of the Act are no longer necessary.¹⁵

B. Species Awaiting Protections:

The Center filed petitions seeking ESA protections for the Mojave poppy bee (*Perdita meconis*), Las Vegas bearpoppy (*Arctomecon californica*), Gulf Coast solitary bee (*Hesperapis oraria*), and the Bethany Beach firefly (*Photuris bethaniensis*). The Service subsequently issued positive 90-days findings determining that listing may be warranted under the ESA for those four species. (See Table 1). Additionally, after the Center filed suit against the Service for failing to make protection decisions for 24 different species under the ESA in April of 2019, the Service proposed the Franklin’s bumble bee (*Bombus franklini*) for endangered status on August 13, 2019.

Table 1: Species awaiting 12-month findings

Common Name	Scientific Name	Petition Date	90-Day Finding Date
Mojave poppy bee	<i>Perdita meconis</i>	10/17/2018	9/6/2019
Las Vegas bearpoppy	<i>Arctomecon californica</i>	8/14/2019	7/22/2020
Gulf Coast solitary bee	<i>Hesperapis oraria</i>	4/2/2019	12/19/2019
Bethany Beach firefly	<i>Photuris bethaniensis</i>	5/15/2019	12/19/2019

The Mojave poppy bee (*Perdita meconis*) once thrived across much of the Mojave Desert but is now found in only seven locations in Clark County, Nevada. The Mojave poppy bee only collects and feeds its offspring pollen from two rare desert poppy flowers, the Las Vegas bearpoppy and the dwarf bearpoppy. Thus, the bee’s survival is tightly linked to that of the decline of the Las Vegas bearpoppy (see below) and the dwarf bearpoppy’s, despite the bearpoppy’s current “endangered” ESA status. On September 6, 2019, the Service found that due to ongoing threats from grazing, recreation, gypsum mining, competition from non-native honey bees and insufficient regulatory mechanisms, the Mojave poppy bee may warrant protection under the ESA.

The Las Vegas bearpoppy (*Arctomecon californica*) once lived in the gypsum-rich soils and valley bottoms across the Mojave Desert of Nevada and northern Arizona. This species is one of the few species that thrives in gypsic soils with crypto-biotic soil crusts. The Las Vegas bearpoppy aids in soil retention and is essential to native bee species like the Mojave poppy bee. However, like the Mojave poppy bee, urban sprawl from Las Vegas, gypsum mining, cattle grazing, motorized recreation, and insufficient regulatory mechanisms has caused a significant decline in the species. Over the past 20 years, this rare flower has disappeared across more than half of its range in Nevada’s Clark County, and dramatically decreased across nearly 90% of its remaining habitat. On July 22, 2020, the Service found that due to these threats, the Las Vegas bearpoppy may warrant the protection under the ESA.

¹⁵ *Id* § 1533(b)(3)(B).

The Gulf Coast solitary bee (*Hesperapis oraria*) is an extremely rare and declining bee that is on the very edge of extinction. It has been documented at only six locations along Florida’s northern Gulf Coast and the last Florida-wide count documented only 47 individuals. The Gulf Coast solitary bee specializes in pollinating just one plant, the Coastal Plain honeycomb head. The bees deposit pollen balls and their eggs in burrows in the open areas of soft sand- which must remain undisturbed until the next generation emerges. Thus, this species needs areas of dense patches of the honeycomb head next to open areas of sand. On December 19, 2019 the Service found that due to threats from urban expansion, climate change, recreation, pesticides, and insufficient regulatory mechanisms, the Gulf Coast solitary bee may warrant protection under the ESA.

The Bethany Beach firefly (*Photuris bethaniensis*) is an extremely rare and critically imperiled beetle that has been documented only at seven locations along the Delaware coast. This species is found only within 1,500 feet of the ocean shore and because of this, it is extremely vulnerable to rising sea levels, storm surges caused by climate change and urban development. Currently, the wetland area that was home to the largest remaining population of the Bethany Beach firefly is being developed for housing which is causing a direct elimination of that population’s habitat and significantly reducing the already small number of individuals. On December 19, 2019, the Service found that due threats from urban development, recreation, pesticides, climate change and insufficient regulatory mechanisms, the Bethany Beach firefly may warrant protection under the ESA.

Table 2: Species awaiting final rule:

Common Name	Scientific Name	Proposed for Listing as endangered
Franklin’s bumble bee	<i>Bombus franklini</i>	8/13/2019

Franklin’s bumble bee (*Bombus franklini*) is feared extinct. The entire historic distribution of this rare pollinator covers about 190 miles north and south and 70 miles east and west between the coast and the Sierra-Cascade ranges in southern Oregon and northern California. Until 1998, Franklin’s bumble bee was prevalent throughout its range. However, in the decades that followed, the abundance and distribution of the species drastically declined. The last known observation was of a single bee was in 2006. On August 13, 2019 the Service determined that the threat of pathogens, pesticides, and small population size creates a high risk of extinction and proposed to list the Franklin’s bumble bee as endangered.¹⁶ The Service declined to propose designated critical habitat.¹⁷

C. The Service’s Violations

The ESA offers no discretion to delay past the one-year mark for species awaiting 12-month findings.¹⁸ Yet the Service has failed to issue timely 12-month findings for the four species included in this notice awaiting determinations of whether listing is warranted.

¹⁶U.S. Fish & Wildlife Service, Endangered Status for the Franklin’s bumblebee (*Bombus franklini*) and Determination That Designation of Critical Habitat Is Not Prudent for Franklin’s Bumble Bee, Proposed Rule, 84 Fed Reg. 40,015 (August 13, 2019).

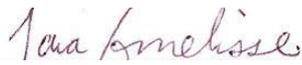
¹⁷ *Id.* at 40,018.

¹⁸ *Friend of Animals v. Ashe*, 808 F.3d 900, 903 (D.D. Cir. 2015).

The Service has similarly failed to issue required findings finalizing the listing for the Franklin's bumble bee (*Bombus franklini*). The ESA's mandate to finalize a listing rule one year after the publication of the proposed rule is clear and no exceptions apply.¹⁹ The final rule for the Franklin's bumble bee is past due.

The Service is in violation of the law and has abrogated its duty to ensure that protection of threatened and endangered species occurs in a timely manner to avoid further decline and increased risk of extinction. If the Service does not make the required 12-month findings for those species awaiting a listing determination (Table 1) and finalize the listing for Franklin's bumble bee (*Bombus franklini*) or contact us to develop a legally binding timeline for making these findings within the next sixty days, we intend to file suit. Please contact me if you have any questions or if you would like to discuss this matter.

Sincerely,



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¹⁹ 16 U.S.C. § 1533(b)(6).