



May 25, 2022

*Via Electronic and Certified Mail*

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**RE: Sixty-day Notice of Intent to Sue for Violations of the Endangered Species Act Relating to the U.S. Fish and Wildlife Service’s Failure to Designate Critical Habitat for 49 Species from the Hawaiian Islands**

Aloha Secretary Haaland and Deputy Director Williams:

In accordance with section 11(g) of the Endangered Species Act (“ESA”),<sup>1</sup> 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 Service’s failure to designate critical habitat for 49 endangered species from the Hawaiian Islands.<sup>2</sup> The Service violated and continues to violate section 4 of the ESA, which requires the Service to designate critical habitat concurrently with or, under limited circumstances, within one year of its listing determination.<sup>3</sup>

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 1.7 million members and online activists dedicated to the protection of endangered species and wild places. The Center and its members are concerned with the conservation of imperiled species,

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<sup>1</sup> 16 U.S.C. § 1540(g).

<sup>2</sup> U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Endangered Status for 49 Species from the Hawaiian Islands, 81 Fed. Reg. 67,786 (Sept. 30, 2016).

<sup>3</sup> 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(A); 16 U.S.C. § 1533(f)(1). The Service’s failure to designate critical habitat also constitutes agency action unlawfully withheld or unreasonably delayed or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of the Administrative Procedure Act (“APA”). 5 U.S.C. §§ 706(1) & 706(2)(A).

including these incredibly rare species of the Hawaiian Islands, and the effective implementation of the ESA.

On September 30, 2016, the Service listed 49 species from the Hawaiian Islands as endangered.<sup>4</sup> The Act directs the Service to make endangered species determinations based on any of five factors. Here, the Service found that all five factors threaten the continued existence of these 49 species, including the present or threatened destruction, modification, or curtailment of their habitat or range.

As noted by the Service, these plants and animals are vulnerable to irreversible extinction due to habitat destruction and modification compounded by numerous threats posed from predation, disease, human activities, manmade structures, stochastic events, and climate change. Further, overarching these threats is the absence of adequate regulatory mechanisms and conservation efforts.

Yet, the Service declined at the time of the final rule publication to designate critical habitat and has not done so in the 6 years since.<sup>5</sup> As long as the Service evades its nondiscretionary duty to designate critical habitat and withholds adequate regulatory protections to minimize the many identified threats, these species will continue down an unacceptable path towards extinction.

## **BACKGROUND**

The Hawaiian Islands are home to an extraordinary number of endemic species.<sup>6</sup> Forty-eight of the listed species are endemic to the Hawaiian Islands and the band-rumped storm-petrel is a valid distinct population segment found solely within the Hawaiian Islands.<sup>7</sup> Each species is highly restricted in their range and face threats to their long-term survival throughout their ranges.<sup>8</sup> The following tables, adapted from the Service's final rule, lists the 49 endangered species in need of critical habitat designation.

<b>Table 1A - Endangered Plants Listed Under 2016 Final Rule</b>	
<b>Scientific Name</b>	<b>Common Name</b>
<i>Asplenium diellaciniatum</i>	No common name (NCN)
<i>Calamagrostis expansa</i>	Maui reedgrass
<i>Cyanea kauaulaensis</i>	NCN
<i>Cyclosorus boydiae</i>	kupukupu makali'i
<i>Cyperus neokunthianus</i>	NCN
<i>Cyrtandra hematos</i>	ha'iwale

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<sup>4</sup> 81 Fed. Reg. 67,786.

<sup>5</sup> *Id.*

<sup>6</sup> *See id.* at 67,730.

<sup>7</sup> *Id.* at 67,854.

<sup>8</sup> *Id.*

<i>Deparia kaalaana</i>	NCN
<i>Dryopteris glabra</i> var. <i>pusilla</i>	hohiu
<i>Exocarpos menziesii</i>	heau
<i>Festuca hawaiiensis</i>	NCN
<i>Gardenia remyi</i>	nānū
<i>Huperzia stemmermanniae</i>	NCN
<i>Hypolepis hawaiiensis</i> var. <i>mauiensis</i>	olua
<i>Joinvillea ascendens</i> ssp. <i>ascendens</i>	‘ohe
<i>Kadua fluviatilis</i>	kamapua‘a
<i>Kadua haupuensis</i>	NCN
<i>Labordia lorenciana</i>	NCN
<i>Lepidium orbiculare</i>	‘ānaunau
<i>Microlepia strigosa</i> var. <i>mauiensis</i>	NCN
<i>Myrsine fosbergii</i>	kōlea
<i>Nothoctrum latifolium</i>	‘aiea
<i>Ochrosia haleakalae</i>	hōlei
<i>Phyllostegia brevidens</i>	NCN
<i>Phyllostegia helleri</i>	NCN
<i>Phyllostegia stachyoides</i>	NCN
<i>Portulaca villosa</i>	‘ihi
<i>Pritchardia bakeri</i>	Baker’s loulu
<i>Pseudognaphalium sandwicense</i> var. <i>molokaiense</i>	‘ena‘ena
<i>Ranunculus hawaiiensis</i>	makou
<i>Ranunculus mauiensis</i>	makou
<i>Sanicula sandwicensis</i>	NCN
<i>Santalum involutum</i>	‘iliahi
<i>Schiedea diffusa</i> ssp. <i>diffusa</i>	NCN
<i>Schiedea pubescens</i>	ma‘oli‘oli
<i>Sicyos lanceoloideus</i>	‘ānunu
<i>Sicyos macrophyllus</i>	‘ānunu
<i>Solanum nelsonii</i>	pōpolo
<i>Stenogyne kaalae</i> ssp. <i>sherffii</i>	NCN
<i>Wikstroemia skottsbergiana</i>	‘ākia

<b>Table 1B – Endangered Animals Listed Under 2016 Final Rule</b>	
<b>Scientific Name</b>	<b>Common Name</b>
<i>Oceanodroma castro</i>	Band-rumped storm-petrel
<i>Hylaeus anthracinus</i>	Yellow-faced bee
<i>Hylaeus assimulans</i>	Yellow-faced bee
<i>Hylaeus facilis</i>	Yellow-faced bee
<i>Hylaeus hiliaris</i>	Yellow-faced bee
<i>Hylaeus kuakea</i>	Yellow-faced bee
<i>Hylaeus longiceps</i>	Yellow-faced bee
<i>Hylaeus mana</i>	Yellow-faced bee
<i>Megalagrion xanthomelas</i>	Orangeblack Hawaiian damselfly
<i>Procaris hawaiiiana</i>	Anchialine pool shrimp

Many of these species perform important ecosystem services. Native flora, especially understory plants such as ferns, are essential to healthy watersheds and forests.<sup>9</sup> Habitat destruction and predation from ungulates threaten the ability of these plants to fulfill these functions by causing severe erosion and altering soil nutrients.<sup>10</sup> There are six species of ferns alone in the 2016 listing. Similarly, *Hylaeus* bees are important native pollinators, notably in highly threatened coastal habitats (see Figure 1.). The 7 listed *Hylaeus* species are not only at risk themselves from the threats summarized by the Service, but their vulnerability to extinction in turn places other species at risk through the loss of pollinator services.

The Service specifies the threats compelling the 2016 listing as habitat loss and degradation due to urbanization, nonnative species, and environmental changes; competition and predation by nonnative species; stochastic events such as natural disasters; human activities and structures; and vulnerability to extinction due to small numbers of individuals and occurrences and lack of regeneration. All of these threats are exacerbated further by climate change.

Not only does the failure to designate critical habitat violate a non-discretionary duty imposed on the Service by the ESA, this violation is all the more egregious given that habitat loss and degradation were thoroughly cited by the Service as threats to the longevity of these incredible species.<sup>11</sup> In fact, the limited habitat available to these species is threatened by loss and degradation “due to urbanization; nonnative feral ungulates (hoofed mammals, e.g., pigs, goats, axis deer, black-tailed deer, mouflon,

<sup>9</sup> Sérgio L. G. Nogueira-Filho et al., *Ecological Impacts of Feral Pigs in the Hawaiian Islands*, 18 BIODIVERSITY & CONSERVATION 3677, 3680–81 (2009).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 67,786, 67,792–67,823.

and cattle); nonnative plants; wildfire; and water extraction.”<sup>12</sup> Further, habitat loss and degradation are expected to be exacerbated by climate change through sea level rise and coastal inundation.<sup>13</sup>

Due to the threat of significant habitat and loss degradation, the Service’s listed these 49 species as endangered on September 30, 2016.<sup>14</sup> Therefore, conservation of remaining habitat is of utmost importance for the continued survival of these endangered species. However, to date, the Service has failed to designate critical habitat for any these species.

### **THE ENDANGERED SPECIES ACT**

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>15</sup> 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.”<sup>16</sup> Species listed as “endangered” or “threatened” are entitled to substantive protections under the ESA, and federal agencies have a duty to conserve listed species.<sup>17</sup> Indeed, “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”<sup>18</sup>

#### **A. The Service’s Legal Duty to Designate Critical Habitat**

Recognizing the important role habitat plays in species recovery, Congress stated that:

[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).

Through designating and protecting critical habitat the Service works to achieve one of the ESA’s fundamental goals: to conserve “the ecosystems upon which endangered species and threatened species depend.”<sup>19</sup>

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<sup>12</sup> *Id.* at 67,786.

<sup>13</sup> *Id.* at 67,787.

<sup>14</sup> *Id.* at 67,786.

<sup>15</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

<sup>16</sup> 16 U.S.C. § 1531(b).

<sup>17</sup> *Id.* § 1531(c).

<sup>18</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

<sup>19</sup> 16 U.S.C. § 1531(b).

Thus, Congress imposed a duty on the Service to designate critical habitat “concurrently with” listing.<sup>20</sup> The Service may, however, delay designating critical habitat if it determines that the critical habitat is not determinable at the time of listing.<sup>21</sup> Regardless, in that case the agency must designate critical habitat within one year.<sup>22</sup> Like listing determinations, critical habitat determinations must be made “on the basis of the best scientific data available.”<sup>23</sup>

The ESA defines critical habitat as “the specific areas within the geographical 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.”<sup>24</sup> Critical habitat may also encompass unoccupied habitat that is “essential for the conservation of the species.”<sup>25</sup>

As the definition plainly states, critical habitat is essential for species’ survival and recovery. Species without designated critical habitat are half as likely to move towards recovery than species with critical habitat.<sup>26</sup> Therefore, listed status alone does not adequately protect endangered and threatened species as critical habitat designations provide additional needed protections. For example, during section 7 consultation between federal agencies and the Service, the federal agency must guarantee that its actions will not “result in the destruction or adverse modification of” a species’ critical habitat.<sup>27</sup>

## **ENDANGERED SPECIES ACT VIOLATIONS**

### **A. The Service’s Ongoing Failure to Designate Critical Habitat for 49 Hawaiian Species Violates the Endangered Species Act**

The Service is in violation of the ESA by failing to designate critical habitat for these 49 species, which received “endangered” status under the ESA throughout their ranges on September 30, 2016. Because the Service found critical habitat was not determinable at that time, the Service had until September 30, 2017, to designate critical habitat for these 49 species<sup>28</sup> To date, the Service has failed to propose critical habitat for these 49 species. Without protections for its critical habitat, these species will continue to lose what little suitable habitat remains.

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<sup>20</sup> *Id.* § 1533(a)(3)(A).

<sup>21</sup> *Id.* § 1533(b)(6)(C)(ii).

<sup>22</sup> *Id.* § 1533(b)(6)(C)(i-ii) (if a species’ critical habitat is not determinable at the 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”).

<sup>23</sup> *Id.* § 1533(b)(2).

<sup>24</sup> *Id.* § 1532(5)(A)(i).

<sup>25</sup> *Id.* § 1532(5)(A)(ii).

<sup>26</sup> Martin F. J. Taylor, Kieran F. Suckling & Jeffrey J. Rachlinski, *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 *BIOSCIENCE* 360, 362 (2005).

<sup>27</sup> *Id.* § 1536(a)(2).

<sup>28</sup> *See* 16 U.S.C. § 1533(b)(6)(C)(ii).

## **CONCLUSION**

In sum, the Service's failure to timely designate critical habitat for the 49 species listed in 2016 violates section 4 of the ESA. Until the Service publishes a final rule designating critical habitat, the Service will continue to be in violation of the ESA. If the Service does not act to correct these violations within 60 days, the Center will pursue litigation in federal court. Please contact us should you have any questions or if you would like to discuss this matter.

Sincerely,

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