



January 8, 2019

VIA EMAIL AND CERTIFIED MAIL

David Bernhardt
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RE: Sixty-day notice of violations of the Endangered Species Act, relating to multiple late determinations to list species as threatened or endangered species or designate critical habitat

Dear Acting Secretary Bernhardt:

This letter serves as a 60-day notice of intent to sue the Secretary and U.S. Fish and Wildlife Service ("Service") from the Center for Biological Diversity, Noah Greenwald and other interested parties of intent to sue you pursuant to the Endangered Species Act ("ESA") for failing to make required 12-month findings on petitions to list 16 species as threatened or endangered species under the Endangered Species Act. 16 U.S.C. § 1533(b)(3)(B), to designate critical habitat for six species and to finalize listing for three species. All of these findings were included in a [workplan](#) developed by the Service to address a backlog of species waiting for protection and were scheduled to occur in fiscal years 2017 or 2018, but were not completed. This letter is being provided to you pursuant to the 60-day notice requirement of the citizen suit provision of the ESA. *Id.* § 1540(g)(2)(C).

The Service's failure to make timely findings to list species and designate critical habitat is a persistent problem with real world consequences for species' survival, allowing further decline and increasing extinction risk and the cost of recovery. Most currently listed species experienced long delays on the path to protection. A recent peer reviewed study, for

example, found that between 1973-2014 it took the Service more than 12 years on average to list species despite the fact that under the Act, the process is supposed to take only two years.¹ Since passage of the Act in 1973, at least 47 species have gone extinct while waiting for protection.²

The Trump administration has only worsened problems with delays in life-saving protections for species. In 2016, the Service developed a workplan to address a backlog of more than 500 species awaiting 12-month findings, but under the Trump administration, the agency has failed to make many of the findings scheduled under the workplan, including the 26 findings in this notice. To date, the Trump administration has listed just 16 species for an average of eight per year. This is the fewest number of listings in the first two years of an administration since the Reagan administration (Table 1). By comparison, the Obama administration listed a total of 72 species during the first two years and a total of 357 species for both terms for an average of 36 species per year and the Clinton administration listed 196 species during the first two years and a total of 522 species for an average of 65 species per year. The administration's poor rate of species listings despite an extensive backlog and an agency workplan to address this backlog is creating real jeopardy for species.

Table 1. Number of species listed during the first two years and the full-term average by administration.

Administration	Listed First Two Years	Average listings per year entire
Trump	16	8
Obama	72	36
Bush W.	22	8
Clinton	196	65
Bush H.W.	80	58
Reagan	13	32
Carter	61	40

In response to a petition to list a species as threatened or endangered, the ESA requires the Secretary to within 90 days determine whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted ("90-day finding"), and within 12 months to determine whether listing is warranted, not warranted, or warranted but precluded ("12-month finding"). *Id.* § 1533(b)(3)(A)&(B). If listing of a species is found to be warranted, the Secretary is required to publish a final regulation listing the species or a withdrawal of such listing within 12 months. *Id.* § 1533(b)(6)(A). The Secretary is further required to publish a rule designating critical habitat concurrent with listing unless it is found that critical habitat is not determinable, in which case, the Secretary must publish a designation within one year of a final regulation listing a species. *Id.* § 1533(b)(6)(C).

For the 17 species awaiting 12-month findings, the Center and other interested parties filed petitions seeking Endangered Species Act protections and the Service has subsequently

¹ Puckett, E.E., D.C. Kesler, D.N. Greenwald. 2016. Taxa, petitioning agency, and lawsuits affect time spent awaiting listing under the US Endangered Species Act. *Biological Conservation* 201 (2016) 220–229.

² <http://www.biologicaldiversity.org/publications/papers/ExtinctAndESA.pdf>

issued 90-day findings determining listing may be warranted under the Endangered Species Act (Table 2). The Service, however, has failed to issue timely 12-month findings for any of the species, which are now anywhere from 2-8 years late.

For the American wolverine, western glacier stonefly and Lednian meltwater stonefly, the Service issued proposed listing rules more than two years prior to this notice, but has failed to finalize listing. These actions were scheduled in a fiscal year 2018 workload developed by the Service to address other findings besides the 12-month findings included in the workplan.

For the Miami tiger beetle, Suwannee moccasinshell mussel and Florida bristle fern, the Service finalized listing in October, 2016, but has yet to propose critical habitat either concurrently with listing or within 12 months based on a determination that it was not determinable.

Finally for the elfin woods warbler, black pine snake and slickspot peppergrass, the Service proposed critical habitat more than two years ago, but has failed to finalize the designations. All of these actions to designate critical habitat were scheduled in workloads for fiscal years 2017 or 2018 developed by the Service to address other findings besides the 12-month findings included in the workplan.


Accordingly, the Secretary and Service are in violation of the law and have abrogated their 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 Secretary does not make the required 12-month findings, critical habitats or final listings, 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,

Noah Greenwald

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Table 2. Listing and critical habitat findings scheduled for completion during fiscal years 2017 or 2018 and not completed.

Species Name	Scientific	Action Type	Workplan Year	Petitioner	Petition Date	Listing Priority	Range	Last Finding	Date
Arkansas mudalia	Leptoxis arkansensis	12M	FY18	Center for Biological Diversity	4/20/2010	1	AR, MO	90-day	9/27/2011
Bartram stonecrop	Graptopetalum bartramii	12M	FY18	Center for Biological Diversity	7/7/2010	2	AZ	90-day	8/8/2012
beardless chinch weed	Pectis imberbis	12M	FY18	Center for Biological Diversity	7/7/2010	2	AZ	90-day	8/8/2012
Big Cypress epidendrum	Epidendrum strobiliferum	12M	FY18	Center for Biological Diversity	4/20/2010	1	FL	90-day	9/27/2011
brook floater	Alasmidonta varicosa	12M	FY18	Center for Biological Diversity	4/20/2010	2	CT, DC, GA, MA, MD, ME, NC, NH, NJ, NY, PA, RI, SC, VA, VT, WV, Canada	90-day	9/27/2011
Cape Sable orchid	Oncidium undulatum	12M	FY18	Center for Biological Diversity	4/20/2010	1	FL	90-day	9/27/2011
clam-shell orchid	Encyclia cochleata var. triandra	12M	FY18	Center for Biological Diversity	4/20/2010	1	FL	90-day	9/27/2011

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Elk River crayfish	Cambarus elkensis	12M	FY18	Center for Biological Diversity	4/20/2010	2	WV	90-day	9/27/2011
Franklin's bumblebee	Bombus franklini	12M	FY18	Xerces Society	6/28/2010	2	OR	90-day	9/13/2011
longsolid	Fusconaia subrotunda	12M	FY18	Center for Biological Diversity	4/20/2010	2	AL, AR, GA, IL, IN, KY, NC, OH, PA, TN, VA, WV	90-day	9/27/2011
Panamint alligator lizard	Elgaria panamintina	12M	FY18	Center for Biological Diversity	7/11/2012	2	CA	90-day	9/18/2015
pink pigtoe	Pleurobema rubrum	12M	FY18	Center for Biological Diversity	4/20/2010	2	AL, AR, KY, LA, MS, NE, OH, OK, TN, VA	90-day	9/27/2011
purple lilliput	Toxolasma lividus	12M	FY19	Center for Biological Diversity	4/20/2010	2	AL, AR, IL, MI, MO, IN, TN, VA	90-day	9/27/2011
round hickorynut	Obovaria subrotunda	12M	FY18	Center for Biological Diversity	4/20/2010	2	AL, AR, GA, IL, IN, KY, MI, MS, OH, PA, TN, WV, Canada	90-day	9/27/2011
seaside alder	Alnus maritima	12M	FY18	Center for Biological Diversity	4/20/2010	2	DE, GA, MD, OK	90-day	9/27/2011

tricolor blackbird	<i>Agelaius tricolor</i>	12M	FY18	Center for Biological Diversity	2/3/2015	2	CA, OR, WA, NV	90-day	9/18/2015
yellow-banded bumblebee	<i>Bombus terricola</i>	12M	FY18	Defenders of Wildlife	9/15/2015	2	CT, IL, KY, MA, MD, ME, MI, MN, MT, NC, ND, NH, NJ, NY, OH, PA, RI, SD, TN, VA, VT, WV, WI	90-day	3/16/2016
black pine snake	<i>Pituophis melanoleucus lodingi</i>	FCH	FY18 Workload	Center for Biological Diversity	5/4/2011	N/A	AL, MS	PCH	3/11/2015
elfin woods warbler	<i>Setophaga angelae</i>	FCH	FY17 Workload	Center for Biological Diversity	5/4/2011	N/A	PR	PCH	6/22/2016
slickspot peppergrass	<i>Lepidium papilliferum</i>	FCH	FY17 Workload	Committee for Idaho's High Desert	4/9/2001	N/A	ID	PCH	8/17/2016
American wolverine	<i>Gulo gulo</i>	FL	FY18	Biodiversity Legal Foundation	7/14/2000	N/A	CA, CO, ID, MT, NV, NM, OR, UT, WA, WY	PL	2/13/2014
Meltwater lednian stonefly	<i>Lednia tumana</i>	FL	FY17 Workload			N/A	MT	PL	10/4/2016

Western glacier stonefly	Zapada glacier	FL	FY17 Workload	Xerces Society and Center for Biological Diversity	12/30/2010	N/A	MT, WY	PL	10/4/2016
Florida bristle fern	Trichomanes punctatum ssp. Floridanum	PCH	FY18 Workload			N/A	FL	FL	10/6/2015
Miami tiger beetle	Cicindelidia floridana	PCH	FY17 Workload	Center for Biological Diversity	12/11/2014	N/A	FL	FL	10/5/2016
Suwannee moccasinshell	Medionidus walkeri	PCH	FY18 Workload	Center for Biological Diversity	4/20/2010	N/A	FL	FL	10/6/2016

12M: 12-month finding determining whether listing is warranted.

PCH: proposed critical habitat

FCH: final critical habitat

FL: final listing