Via electronic and certified mail

February 3, 2021

Scott de la Vega                      Director                      Don Morgan
Acting Secretary                     U.S. Fish and Wildlife Service
U.S. Department of the Interior      1849 C Street, NW
1849 C Street, NW                    Washington, DC 20240
Washington, DC 20240                Chief, Branch of Delisting and Foreign
exsec@ios.doi.gov                    Species, Ecological Services

Martha Williams                      Director
Principal Deputy Director
U.S. Fish and Wildlife Service
1849 C Street, NW                    Don Morgan
1849 C Street, NW                    5275 Leesburg Pike
Washington, DC 20240                Falls Church, VA 22041-3808
don_morgan@fws.gov

Re: Sixty-Day Notice of Intent to Sue for Failing to Make Timely 12-Month Findings on Foreign Candidate Species in Violation of the Endangered Species Act

Dear Acting Secretary de la Vega, Director of U.S. Fish and Wildlife Service, Principal Deputy Director Williams, and Chief Morgan,

On behalf of the Center for Biological Diversity (Center), we write to notify you that the U.S. Department of the Interior and U.S. Fish and Wildlife Service (together, the Service) are currently in violation of Section 4 of the Endangered Species Act (ESA) for failing to make required 12-month findings on 19 foreign candidate species (Table 1). Section 4(b)(3) of the ESA requires the Service to determine if ESA protections are warranted for a species within 12 months of previously finding that listing was precluded by other pending proposals.1

Here, the Service found listing of 19 foreign species was warranted but precluded on October 10, 2019, and thus new listing determinations were due by October 10, 2020—nearly four months ago. Overall, the previous administration made very little progress on listing foreign species under the ESA, even though we are currently in a global extinction crisis. The Center urges the Service to immediately act to correct its violations. Within 60 days, if the Service does not correct the violations described in this letter or agree to a reasonable schedule for making the required findings, we intend to pursue litigation against the agency.2

---

2 16 U.S.C. § 1540(g).
While the Service is months overdue on issuing new findings, it has deferred protections for these species far longer, continually recycling its “warranted but precluded” findings for many years—and in most cases, for decades. Indeed, six foreign bird species were first added to the candidate list in response to a petition that was filed in November 1980—more than forty years ago. When adding the birds to the candidate list, the Service stated, “[p]ublication of a proposal to list these species is planned during the present fiscal year (ending September 30, 1984).” No proposal was published for any of the six species then or in any of the 36 fiscal years that followed.

Similarly, seven other foreign birds were first added to the candidate list following a 1991 listing petition. The Service claimed at the time that “[c]ompilation of [published and unpublished] data is in progress and a listing proposal will be completed as soon as allowed by the Service’s other listing responsibilities.” However, no proposals for the seven birds have been published to date. The candidate list also includes five butterflies that were part of a petition that was filed in January 1994 and one clam species the Service added on its own initiative in 2013.

Unfortunately, the Trump administration made little progress in listing species, despite an increasingly alarming extinction crisis. In the past four years, the Service issued final rules for just 12 foreign species/subspecies—listing six species/subspecies as endangered and two as threatened; delisting two; downgrading the status of one from endangered to threatened; and updating the taxonomic information for one. The Service is also overdue in making 12-month findings on several other foreign species aside from the candidates.

I. Legal Background

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

8 The Service also issued final rules to list several foreign marine species in the last four years, but these rules were based on the work and final determinations of the National Marine Fisheries Service, which has jurisdiction over the species. 84 Fed. Reg. 13,809 (Apr. 9, 2019). The Service has made little progress on domestic species, listing an average of just six domestic species each year under the Trump administration—the fewest of any administration since the ESA was enacted.
To that end, the ESA establishes a comprehensive statutory program to conserve imperiled species. The ESA sets forth a process to identify species that are “endangered” or “threatened” with extinction. The statute then generally bars “import,” “export,” and “sale” of endangered species, and it requires agencies to “utilize their authorities” to carry out “programs for the conservation” of listed species. Congress described the listing process as “[t]he cornerstone of effective implementation” of the ESA.

Congress amended the ESA in 1982 to establish strict, mandatory timelines to address ESA listing petitions, finding the timelines are necessary “to expedite the decisionmaking process and to ensure prompt action in determining the status of the many species which may require the protections of the Act.” Specifically, the Service must determine if ESA protections may be warranted for a species within 90 days of receiving a petition to list it as threatened or endangered. If the Service determines listing may be warranted, it must take one of three actions within 12 months of receiving the petition: (1) deny the petition, (2) find listing “is warranted” and promptly prepare a proposed rule to protect the species, or (3) find listing “is warranted” but the “immediate proposal and timely promulgation of a final regulation implementing the petitioned action . . . is precluded by pending proposals.”

The Service may only make a “warranted but precluded” determination if “expeditious progress is being made to add qualified species” to the threatened or endangered species lists. When the Service makes such a finding, the Service must treat the petition as if it had been resubmitted, issuing a new determination as to whether protection is warranted within 12 months of publishing each warranted but precluded determination.

Congress allows the Service to make warranted but precluded findings so the Service may prioritize listings given budgetary constraints. But the candidate list was never intended to allow the Service to indefinitely shun its duty to make listing determinations, putting the listing process in a perpetual state of legal limbo. In fact, the mandatory deadlines were established to “assure that species tagged for protection are not forgotten in an administrative quagmire,” with Congress emphasizing that warranted but precluded determinations were not designed to justify “the foot-dragging efforts of a delinquent agency.”

---

11 Id. § 1533(a)–(c).
12 Id. §§ 1538(a), 1536(a).
16 Id. § 1533(b)(3)(B).
17 Id. § 1533(b)(3)(B)(iii).
18 Id. § 1533(b)(3)(C)(i); 50 C.F.R. § 424.14(h)(3).
19 Ctr. for Biological Diversity v. Norton, 254 F.3d 833, 841 (9th Cir. 2001).
II. **Violation of the Endangered Species Act**

The Service is in violation of the ESA by failing to make timely 12-month listing determinations on the following 19 foreign candidate species.

**Table 1.** Foreign species for which the Service has failed to make timely 12-month findings.

<table>
<thead>
<tr>
<th>Scientific Name</th>
<th>Common Name</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Pauxi koepckeae</em></td>
<td>Sira curassow</td>
<td>Peru</td>
</tr>
<tr>
<td><em>Pauxi unicornis</em></td>
<td>Southern helmeted curassow</td>
<td>Bolivia</td>
</tr>
<tr>
<td><em>Strepera graculina crissalis</em></td>
<td>Lord Howe Island pied currawong</td>
<td>Lord Howe Island, New South Wales</td>
</tr>
<tr>
<td><em>Haematopus chathamensis</em></td>
<td>Chatham oystercatcher</td>
<td>Chatham Islands, New Zealand</td>
</tr>
<tr>
<td><em>Cyanoramphus malherbi</em></td>
<td>Orange-fronted parakeet</td>
<td>New Zealand</td>
</tr>
<tr>
<td><em>Rallus semiplumbeus</em></td>
<td>Bogota rail</td>
<td>Colombia</td>
</tr>
<tr>
<td><em>Porphyrio hochstetteri</em></td>
<td>Takahe</td>
<td>New Zealand</td>
</tr>
<tr>
<td><em>Tangara peruviana</em></td>
<td>Black-backed tanager</td>
<td>Brazil</td>
</tr>
<tr>
<td><em>Scytalopus novacapitalis</em></td>
<td>Brasilia tapaculo</td>
<td>Brazil</td>
</tr>
<tr>
<td><em>Aulacorhynchus huallagae</em></td>
<td>Yellow-browed toucanet</td>
<td>Peru</td>
</tr>
<tr>
<td><em>Zosterops luteirostris</em></td>
<td>Ghizo white-eye</td>
<td>Solomon Islands</td>
</tr>
<tr>
<td><em>Dryocopus galeatus</em></td>
<td>Helmeted woodpecker</td>
<td>Argentina, Brazil, Paraguay</td>
</tr>
<tr>
<td><em>Dendrocopos noguchii</em></td>
<td>Okinawa woodpecker</td>
<td>Okinawa Island, Japan</td>
</tr>
<tr>
<td><em>Mulinia modesta</em></td>
<td>Colorado Delta clam</td>
<td>Mexico</td>
</tr>
<tr>
<td><em>Parides ascanius</em></td>
<td>Fluminense swallowtail</td>
<td>Brazil</td>
</tr>
<tr>
<td><em>Parides hahneli</em></td>
<td>Hahnel’s Amazonian swallowtail</td>
<td>Brazil</td>
</tr>
<tr>
<td><em>Mimoides (= Eurytides or Graphium) lysithous harrisionus</em></td>
<td>Harris’ mimic swallowtail</td>
<td>Brazil</td>
</tr>
</tbody>
</table>
The Service will continue to be in violation of the ESA until it publishes new findings that listing is not warranted or is precluded for the species, or until it publishes a proposed rule to finally list the species under the ESA.

III. Conclusion

The Center urges the Service to remedy its ongoing, unlawful delay by issuing a new Candidate Notice of Review for foreign species and proposing protections for those species in need. We welcome discussion of this important conservation issue and are hopeful this administration will correct the failures and slow pace of its predecessor. However, we intend to pursue litigation against the Service if within 60 days it does not act to correct these violations or agree to a reasonable schedule for making the required findings. Please contact us if you have any questions or would like to discuss this matter.

Sincerely,

Sarah Uhlemann
International Program Director and Senior Attorney
(206) 327-2344
suhlemann@biologicaldiversity.org

Tanya Sanerib
International Legal Director and Senior Attorney
(206) 379-7363
tsanerib@biologicaldiversity.org

Cynthia Elkins
Paralegal
(707) 986-2600
celkins@biologicaldiversity.org

CENTER FOR BIOLOGICAL DIVERSITY
2400 NW 80th Street, #146
Seattle, WA 98117