



June 15, 2022

Via Electronic and Certified Mail

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**RE: 60-Day Notice of Intent to Sue Regarding Violations of the Endangered Species Act;
Failure to Finalize Critical Habitat Designations for 12 Species of Threatened Coral**

Dear Secretary Raimondo,

This letter serves as a sixty-day notice of intent to sue the National Oceanic and Atmospheric Administration, through the National Marine Fisheries Service (Service), over violations of Section 4 of the Endangered Species Act (the Act, or ESA), 16 U.S.C. § 1531 *et seq.*, on behalf of the Center for Biological Diversity (Center). Specifically, the Service has failed to finalize critical habitat designations for five species of Florida and Caribbean corals,¹ and seven Pacific corals,² all listed as threatened under the ESA.³ The Service's failures deprive these imperiled species of important protections and put them at further risk of extinction. This

¹ *Dendrogyra cylindrus*, *Orbicella annularis*, *Orbicella faveolata*, *Orbicella franksi* and *Mycetophyllia ferox*

² *Acropora globiceps*, *Acropora jacquelineae*, *Acropora retusa*, *Acropora speciosa*, *Euphyllia paradivisa*, *Isopora crateriformis*, and *Seriatopora aculeate*

³ See 16 U.S.C. § 1533(a)(3)(A); see also *id.* at § 1533(b)(6)(C).

letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the Act, to the extent that such notice is deemed necessary by a court.⁴

Listed Corals in U.S. Waters

Corals worldwide face an extinction crisis due to the threats of climate change, ocean acidification, disease, trade, and pollution, among others. In recent years global warming has caused nearly every reef around the world to suffer declines.

In 2009, the Center petitioned the Service to list 83 species of corals under the Endangered Species Act.⁵ As detailed in the petition, nearly 30% of coral reefs have already been lost, and more are at risk. In recent years, the frequency of mass bleaching events and disease outbreaks have increased, and many areas are experiencing sluggish coral growth due to acidification. Anthropogenic climate change and ocean acidification pose the most serious short- and long-term threats to the survival of corals. According to coral scientists, “reefs are likely to be the first major planetary-scale ecosystem to collapse in the face of climate changes now in progress.”⁶

On September 10, 2014, the Service published its final rule listing 20 of the petitioned coral species as threatened.⁷ In its final rule, the Service listed the nine most significant threats to the coral species: ocean warming, disease, ocean acidification, fishing, sedimentation, nutrients, sea-level rise, predation, and collection and trade. The Service recognized that cumulative and synergistic threats “predict the irreversible disappearance of coral reefs on a global scale in the next few decades.”⁸

Of the 20 listed corals, 15 of the listed species occur in the Indo-Pacific, and five in the Caribbean.⁹ All five (5) of the Florida and Caribbean corals have been confirmed in U.S. waters, and occur throughout Atlantic Florida, Puerto Rico, the U.S. Virgin Islands, and the Gulf of Mexico.¹⁰ For the Indo-Pacific species, seven (7) of the 15 listed corals have been confirmed to occur throughout American Samoa, Guam, the Commonwealth of Northern Mariana Islands, and

⁴ See *id.* at § 1540(g).

⁵ *Endangered and Threatened Wildlife and Plants: Proposed Listing Determinations for 82 Reef-Building Coral Species; Proposed Reclassification of Acropora palmate*, 77 Fed. Reg. 73219 (Dec. 7, 2012).

⁶ Vernon et al. 2009. The coral reef crisis: the critical importance of <350 ppm CO₂. *Marin Pollution Bulletin* 58: 1428-1436, 1433.

⁷ *Endangered and Threatened Wildlife and Plants: Final Listing Determinations on Proposal To List 66 Reef-Building Coral Species and To Reclassify Elkhorn and Staghorn Corals*, 70 Fed. Reg. 53851 (Sep. 10, 2014).

⁸ *Id.*

⁹ *Advanced Notice of Proposed Rulemaking and Request for Information for the Issuance of Protective Regulations Under Section 4(d) of the Endangered Species Act for the Conservation of Threatened Corals*, 80 Fed. Reg. 1616.

¹⁰ *Id.*

the Pacific Remote Island Areas.¹¹ The other eight (8) Indo-Pacific species have not yet been confirmed within U.S. territory, but the Service readily acknowledges that may change as survey efforts increase.

The final rule did not include critical habitat designations for any of the newly listed species, as required by the Act. Instead, the Service determined that “critical habitat is not currently determinable for the species being newly listed through this final rule,” and stated that it would publish a proposed designation of critical habitat for the coral species in a separate rule.¹² No timeline for the critical habitat designation was provided despite the requirement that non-determinable critical habitat allows the agency only one additional year to propose habitat protections.

In August 2019, nearly five years after the Service published its final rule listing 20 coral species as threatened, the Center filed a lawsuit against the Service for failing to designate critical habitat as required under the Act. In February 2020, the parties entered into a legal agreement by which the Service would submit to the Federal Register for publication proposed determinations concerning the designation of critical habitat for 12 listed species of coral found in U.S. waters by July 31, 2020. On November 27, 2020, the Service published two proposed rules; one to designate critical habitat for the seven threatened corals in U.S. waters in the Indo-Pacific, and one to designate critical habitat for the five threatened corals in U.S. Caribbean waters.¹³ Eighteen months later, the Service has failed to publish rules finalizing these proposed designations.

The ESA Requires the Service to Finalize Critical Habitat Designation for 12 Listed Corals in U.S. Waters

Congress enacted the Endangered Species Act “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” is achieved.¹⁴ As the U.S. Supreme Court has recognized, “[t]he plain intent of Congress enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”¹⁵ The designation and protection of critical habitat is one of the primary ways in which the fundamental purpose of the Act is achieved.

When the Service lists a species as endangered or threatened, the Service generally must also concurrently designate critical habitat for that species. Section 4(a)(3)(A)(i) of the Act states

¹¹ *Id.*

¹² 70 Fed. Reg. 53874.

¹³ Endangered and Threatened Species; Critical Habitat for the Threatened Indo-Pacific Corals, 85 Fed. Reg. 76262 (Nov. 27, 2020); Endangered and Threatened Species; Critical Habitat for the Threatened Caribbean Corals, 85 Fed. Reg. 76302 (Nov. 27, 2020).

¹⁴ 16 U.S.C. § 1531(b).

¹⁵ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978)

that, “to the maximum extent prudent and determinable,” the Service “shall, concurrently with making a determination . . . that a species is an endangered species or threatened species, designate any habitat of such species which is then considered to be critical habitat.”¹⁶

The 1978 amendments to the Act defined critical habitat as:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the [Act], 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; and (ii) specific areas outside the geographical area occupied by the species at the time it was listed . . . upon a determination by [FWS] that such areas are essential for the conservation of the species.”¹⁷

While the designation of critical habitat outside United States jurisdiction is not required,¹⁸ the word “shall” makes clear that the designation of critical habitat is required for all listed species that occur within United States territory.¹⁹

Critical habitat designation is essential to the conservation of endangered species, providing important protections for imperiled species beyond that provided by listing alone.²⁰ Species with designated critical habitat are more than twice as likely to have improving population trends than species without designated critical habitat.²¹ Federal agencies must ensure through consultation with the Service that any action they authorize, fund, or carry out will not “jeopardize the continued existence of any [listed] species.”²² For species with critical habitat, each federal agency must additionally guarantee that its actions will not “result in the destruction or adverse modification” of the critical habitat.²³

Additionally, as the Service has recognized, critical habitat designations provide other benefits, including opportunities for public education and involvement, which help make the public, state agencies, and local governments more aware of the plight of listed species and conservation actions needed to aid in species recovery.²⁴ And, as courts have acknowledged,

¹⁶ *Id.* § 1533(a)(3)(A).

¹⁷ Pub. L. 95-632 §§ 2, 11 (1978); 16 U.S.C. § 1532(5)(A).

¹⁸ 50 C.F.R. § 424.12.

¹⁹ 16 U.S.C. § 1533(a)(3)(A); *see also id.* at § 1533(b)(6)(C).

²⁰ *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1185-86 (10th Cir. 1999) (holding “critical habitat designations serve to protect species vulnerable to extinction”).

²¹ Taylor, M.F.J., K.F. Suckling, and J.J. Rachlinski. 2009. The Effectiveness of the Endangered Species Act: A Quantitative Analysis, BioScience.

²² 16 U.S.C. § 1536(a)(2).

²³ *Id.*

²⁴ *See, e.g.*, 76 Fed. Reg. 20,180, 20,191 (April 11, 2011) (discussing benefits of designating critical habitat for Cook Inlet beluga whales).

critical habitat also provides benefits by identifying the geographical areas most vital to the species; without a critical habitat designation, the process of identifying the most important habitat features “will be made piecemeal, as individual federal projects arise.”²⁵

Once the Service has issued a proposed rule to designate critical habitat, they have one year to promulgate either a final regulation implementing the designation, or a notice “that such one-year period is being extended.”²⁶

Violations of the Act

The Service’s failure to finalize critical habitat for 12 coral species within U.S. waters constitutes a violation of the ESA and deprives these imperiled species of important habitat protections to which they are legally entitled and desperately need. Despite its knowledge of both the dire situation for corals and the strategies to recover them, the Service has sat idle on finalizing one of the most effective conservation measures available: designating critical habitat. The Service’s failure to designate critical habitat deprives these highly imperiled corals of habitat protections that are necessary for their conservation and recovery. Additional delay only places these corals at further risk of extinction.

As described above, once the Service has proposed critical habitat designation for listed species, the Act requires the Service to publish a rule finalizing those protections within one year.²⁷ At the time of this Notice, over 18 months after publication of its proposed rules, the Service has not promulgated final critical habitat determinations, nor otherwise taken any further action on its proposed rules. This constitutes a violation of both the ESA and the Service’s controlling regulations. The Service must promptly finalize the revised critical habitat designations to ensure robust habitat protections for these imperiled corals. If corals are to survive, they must not be denied the strong protections of the Endangered Species Act which were intended to safeguard them from extinction.

For coral species, critical habitat is particularly important because NMFS has not issued a Section 4(d) rule applying the take and import prohibitions of Section 9 of the Act, and because no appreciable recovery is occurring. Moreover, critical habitat designations would have immediate benefits extending far beyond the reefs themselves, including improved water quality throughout the coastal zone, limits on over-fishing, protections for spawning grounds, reduced impacts from development and dredging, and reduced human pressures on hundreds of thousands of reef-associated species. The habitats that critically impact the health of these corals must be immediately protected while additional research is conducted and resilience- and recovery-based management strategies are developed.

²⁵ *Conservation Council v. Babbitt*, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998).

²⁶ 16 U.S.C. § 1533(b)(6)(A)(ii); *see also* 50 C.F.R. § 424.17 (the Service’s implementing regulations requiring final critical habitat determinations within one year of a proposed rule).

²⁷ *Id.*

We are vitally concerned about and actively involved in the protection of the corals and their habitat. Our organizations' members and staff engage in professional, recreational, aesthetic, and scientific activities involving this species and its habitat, including observing and attempting to observe the species. On their behalf, we urge you to take prompt action to protect the species under the Endangered Species Act. Accordingly, an acceptable remedy would be promulgation of final rules designating critical habitat for the 12 species of coral.

We are eager to address this violation and discuss with the Service prospects for resolution at the earliest possible date. If the Service does not act within 60 days to correct this violation of the Act, however, we may pursue litigation in federal court. We will seek injunctive and declaratory relief regarding this violation. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact us. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Emily Jeffers". The signature is fluid and cursive, with the first name "Emily" written in a larger, more prominent script than the last name "Jeffers".

Emily Jeffers
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