Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009-1063

Katherine A. Meyer
Eric R. Glitzenstein
Howard M. Crystal
William S. Eubanks II
Rosemary Greene (Admitted in MT & IL)
Michelle D. Sinnott (Admitted in VA)
Caitlin Zittkowski (Admitted in CA)

Telephone (202) 588-5206
Fax (202) 588-5049
www.meyerglitz.com

September 22, 2014

By Electronic and Certified Mail

Sally Jewel, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
e-mail: exsec@ios.doi.gov

Dan Ashe, Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240
e-mail: dan_ashe@fws.gov

RE: Notice of Intent to Sue, Violations of Section 4 of the Endangered Species Act: negative 12-month finding on a petition to list the cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*) as a threatened or endangered species, and challenge to the "Final policy on interpretation of the phrase 'significant portion of its range' in the Endangered Species Act's definitions of 'endangered species' and 'threatened species.'"

Dear Secretary Jewell and Director Ashe:

On behalf of the Center for Biological Diversity ("Center"), Defenders of Wildlife ("Defenders"), and Noah Greenwald, I hereby formally notify you of their intent to sue you over violations of the Endangered Species Act ("ESA") in connection with a negative 12-month finding made by the U.S. Fish and Wildlife Service ("Service"), in response to a petition to list the cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*)(herein referred to as "pygmy-owl") as an endangered or threatened species. 76 Fed. Reg. 61,856 (October 5, 2011). We are also notifying you of our intent to challenge the "Final policy on interpretation of the phrase 'significant portion of its range' in the Endangered Species Act's definitions of 'endangered species' and 'threatened species.'" 79 Fed. Reg. 37578 (July 1, 2014). This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. 16 U.S.C. § 1540(g).

In making the negative 12-month finding in response to the Center's and Defenders' petition to list the pygmy-owl as an endangered or threatened species and in finalizing the policy on significant portion of its range, the Service failed to rely on the best available science and applied a definition of significant portion of range that is inconsistent with the plain language of the ESA and Ninth Circuit precedent.

I. The cactus ferruginous pygmy owl

Cactus ferruginous pygmy-owls are small (14-18 centimeters long) diurnal owls that feed on birds, lizards, insects, small mammals and frogs, and nest in cavities created by woodpeckers in large columnar cacti, such as saguaros, or large trees. In Arizona and Sonora, Mexico, the pygmy-owl is indisputably threatened by habitat degradation and destruction related to urban and agricultural sprawl, livestock grazing, wood cutting, invasive species and border issues (76 FR 61878). Fewer than 50 pygmy-owls are believed to occur in Arizona and the species' range has undergone a substantial contraction (76 FR 61864). Likewise, in Sonora the species is known to be uncommon and declining (*Id.*) Further south in Mexico into Sinaloa, pygmy-owls occur in a different habitat referred to as Sinaloan thorn scrub and are believed to be more common.

In addition to Arizona and Sonora, cactus ferruginous pygmy-owls occur south through Sinaloa to Colima and Michoacán and separately, from southern Texas down through the Mexican states of Tamaulipas and Nuevo Leon (76 FR 61567). Based on genetic analysis, a number of authors have suggested that the western population stretching from Sinaloa to Arizona is a separate subspecies from the eastern population found in Texas and the remainder of Mexico (see 76 FR 61857). The Service determined that there was considerable uncertainty about whether two subspecies should be recognized, but did determine that the western and eastern populations qualify as distinct population segments (76 FR 61682 and 61888).

II. The Center's and Defenders' Long Effort to Protect the Pygmy-owl Under the Endangered Species Act

The Center for Biological Diversity first petitioned for protection of the pygmy-owl in 1992. In response, the Service listed the pygmy-owl as endangered in Arizona in 1997 (62 FR 10730). Subsequently, the Service designated critical habitat (64 FR 37419), developed a recovery plan (68 FR 1189), and assisted Pima County in developing a habitat conservation plan designed largely to protect the pygmy-owl. In 2001, the National Association of Home Builders challenged listing of the pygmy owl and in 2003 convinced the court that the Service had not properly justified their recognition of the Arizona population as a distinct population segment (National Association of Home Builders v. Norton, 340 F.3d 835 (9th Cir. 2003)). The court, however, did not remove protections for the pygmy-owl, but rather remanded the decision to the Service to better explain their determination. The Service responded by proposing and finalizing delisting of the pygmy-owl in 2006 (70 FR 44547 and 71 FR 19452).

The decision to delist the pygmy owl was challenged by the Center and Defenders, who argued that the Service's determination that the Arizona population of the pygmy owl was not significant to the species as a whole was arbitrary and capricious and based on an improper interpretation of statute (National Association of Home Builders v. Norton, CV 00-0903 SRB District Court for the District of Arizona). Ultimately, the Ninth Circuit upheld the Service's decision that the Arizona population of the

pygmy-owl did not qualify as a listable entity under the Act, but clearly recognized that the Service could consider the significance of other populations in response to a petition. *See National Ass'n of Home Builders v. Norton*, 340 F.3d 835 (9th Cir. 2003).

In 2007, the Center and Defenders petitioned the Service to again consider listing of the pygmy-owl and expanded the request beyond considering the Arizona population to also consider listing of a Sonoran Desert population of the pygmy-owl or the newly described western subspecies found in Arizona, Sonora and Sinaloa (*Glaucidium ridgwayi cactorum*). In response, the Service again determined that the Arizona population did not qualify as a listable entity, determined that the Sonoran Desert population did not qualify as distinct because it was not discrete from pygmy-owls in Sinaloa and finally, that there was not sufficient information to recognize the new subspecies (76 FR 61856 and 61886). As noted above, the Service did recognize both the western and eastern portions of the pygmy-owl's range as distinct population segments ("DPSs") (76 FR 61888) and therefore potentially listable as such. Ultimately, however, the Service concluded that neither the cactus ferruginous pygmy-owl as a whole, nor either the western or eastern populations qualify for listing as an endangered species.

III. The Endangered Species Act

Congress enacted the ESA in 1973 to provide "a program for the conservation of ...endangered species and threatened species" and "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The ESA defines "species" to mean "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." *Id.* § 1532(16). A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range," *id.* § 1532(6), and is "threatened" if it is likely to become endangered within the foreseeable future. *Id.* § 1532(20).

The Service must make listing determinations under the ESA based "solely on ... the best scientific and commercial data available", *id.* § 1533(b)(1)(A), and the following five listing factors:

(A) the present or threatened destruction, modification, curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1).

The ESA provides two mechanisms for considering species for listing. First, the Act requires the Service to identify and propose for listing those species that require listing under the five criteria in Section 4(a)(1). 16 U.S.C. § 1533(a)(1). Second, an "interested person" can petition the Service to add a species to the endangered or threatened species lists.

When the Service receives a citizen petition to list a species, it must, "[t]o the maximum extent practicable," within 90 days determine whether "the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A).

If the Service concludes in its 90-day finding that the petition does present substantial information indicating listing may be warranted, the Service must publish a notice of its finding in the Federal Register. 16 U.S.C. § 1533(b)(3)(A). The Service must then commence a status review of the species and make a formal "warranted" or "not warranted" listing determination within 12 months of receipt of the petition. 40 C.F.R. § 424.14(b)(3). A warranted finding must be accompanied by a Proposed Rule to list the species. 16 U.S.C. § 1533(b)(5). Within 12 months after a proposed rule, the Service must either publish a final rule listing the species or withdrawing the proposal to list. Id. at § 1533(b)(6)(A)(i); 50 C.F.R. 424.17(a).

IV. The U.S. Fish and Wildlife Service's Policy on Significant Portion of Its Range Violates the ESA

The Service's final policy on interpretation of the phrase "significant portion of its range" does two things. First, it defines the threshold for a portion of range to be considered significant as follows:

> A portion of the range of a species is 'significant' if the species is not currently endangered or threatened throughout all of its range, but the portion's contribution to the viability of the species is so important that, *without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range*.

79 Fed. Reg. 37579 (emphasis added). Second, the policy clarifies that the term "range" in the phrase "significant portion of its range" applies only to "current" range. 79 Fed. Reg. 37583.

It is our contention that the above definition of significant in the phrase "significant portion of its range" is inconsistent with the language and purpose of the ESA, as well as judicial precedent construing the Act.

In its draft policy defining the phrase "significant portion of its range" ("SPOR"), the Service proposed that a portion of a range be deemed "significant" if "its contribution to the viability of the species is so important that, without that portion the species would be in danger of extinction." *See* 76 Fed. Reg. 76987 (Dec. 11, 2011). Many public commenters – including the Center and Defenders– strongly objected to this proposal on the grounds that the definition would, in effect, read the SPOR basis for listing out of the Act entirely because any rationale for listing under the proposed definition would also satisfy the alternative rationale for listing set forth in section 4, i.e., that a species is endangered or threatened throughout "all" of its range.

Purportedly in response to these objections, the final policy added the phrase "or likely to become so in the foreseeable future" to the definition, explaining that under this definition a portion of the range would be deemed "significant" if the "species would, without that portion, be either endangered or threatened." 79 Fed. Reg. 37579. The Service asserted that this "lower threshold will further the conservation purposes of the statute and more clearly avoid the *appearance* of similarity" to the Service's past interpretations, which have been rejected by the courts as rendering the SPOR language redundant, and the Service further asserted that "[u]sing this standard, *we may list a few more species with important populations that are facing substantial threats*." *Id.* (emphasis added).

In our view, however, the final policy makes a change that is no more than cosmetic at best and that does not in any way remedy the fundamental problem with the draft policy. This is demonstrated by the fact that, although multiple commenters urged the FWS to identify a single real-world species that would be listed under the new SPOR policy that would not otherwise be eligible for listing under

section 4 of the ESA, the agency was evidently unable to do so. It is also demonstrated by the fact that the Service rejected requests that it revisit refusals to list species that were predicated on the definition employed in the *draft* policy (such as the refusal to list the pygmy owl) because the approach in the draft policy differed only "slightly" from the final policy and would be unlikely to lead to any different results in the agency's decisionmaking. *Id.* at 37601.

Simply put, it is apparent that although the Service purported to respond to concerns that it was effectively reading the SPOR language out of the statute, its response was all form and no substance. If a SPOR is *presently* endangered or threatened and, without the portion, the entire species (however defined) would also be endangered *or* threatened, then the species in fact qualifies as endangered or threatened throughout "all" of its range and the final SPOR policy adds nothing to the bases for listing, notwithstanding the Service's claims to the contrary. The agency should go back to the drawing board and address the public and scientific criticisms in earnest rather than through a linguistic tweaking that the Service candidly concedes was intended merely to avoid the "appearance of similarity" with approaches that have been squarely and correctly rejected by the courts.

V. Violations of the Endangered Species Act In Connection With the Pygmy Owl Listing

The Service's 12-month finding for the pygmy-owl was not based on the best available information available and in reliance on what was then a draft policy, applied an improper definition of significant portion of range. The Service does not deny that the pygmy-owl is endangered in the Sonoran Desert, but argues that because loss of the species from this portion would not place the species as a whole (or any DPS) at risk of extinction, this portion does not qualify as a significant portion of range. 76 FR 61889. The Service, for example, stated:

> *We acknowledge that the Sonoran Desert Ecoregion represents an important portion of the western DPS, and of the taxon as a whole.* However, in order to find that the portion of the western DPS in the Sonoran Desert Ecoregion is significant under our SPR policy, our position is that its contribution to the viability of the species must be so important that, without that portion, the pygmy-owl would be in danger of extinction.

76 FR 61893 (emphasis added)

In a case over the flat-tailed horned lizard, the Ninth Circuit Court of Appeals specifically rejected a definition of significant portion of range that requires risk of extinction to the species as a whole, stating:

> If, however, the effect of extinction throughout 'a significant portion of its range' is the threat of extinction everywhere, then the threat of extinction throughout" a significant portion of its range" is equivalent to the threat of extinction throughout all its range. Because the statute already defines 'endangered species' as those that are 'in danger of extinction throughout all ... of [their] range,' the Secretary's interpretation of 'a significant portion of its range "has the effect of rendering the phrase superfluous. Such a redundant reading of a significant statutory phrase is unacceptable.

Defenders of Wildlife, et al. v. Norton, 258 F.3d 1136, 1145 (9th Cir. 2001).

The Service has clearly violated the plain language of the Endangered Species Act and Ninth Circuit precedent as established in *Defenders* by requiring that loss of the pygmy-owl in the Sonoran

Desert ecoregion threaten the extinction of the species as a whole and by creating a policy that specifies that a portion of range will only be considered significant if its loss would place the species as a whole at risk of extinction.

The Service identified a number of factors supporting the significance of pygmy-owls in the Sonoran Desert, including that they are adapted to hotter and drier conditions, which may make them better adapted to predicted climate change, occur in a unique habitat type, are genetically unique, and 33% of the western distinct population segment, but dismissed all of these factors solely based on that loss of the pygmy-owl from the Sonoran Desert ecoregion would not threaten the extinction of the species as a whole. 76 FR 61892.

As indicated previously, although the Service "slightly" altered the definition of SPOR in the final policy, the situation with the pygmy-owl illustrates that this alteration was not substantively meaningful, was designed merely to buttress the agency's position in litigation that it has not read the SPOR language out of the ESA, and will in fact have no real-world significance when it comes to the agency's approach to listing decisions. Consequently, since the pygmy-owl decision reflects an unlawful approach to the Service's listing responsibilities that is also embodied in the final SPOR policy, we intend to pursue litigation over both the refusal to list the pygmy-owl as an application of that unlawful policy, as well as the policy as a whole.[1]

Accordingly, this letter puts you on formal notice that the Center, Defenders and Noah Greenwald intend to file suit in U.S. District Court to enforce the violations of the Endangered Species Act explained above. The Center and Defenders will forego litigation should the Service immediately revoke both the negative 12-month finding for the pygmy-owl and the final policy on interpretation of "significant portion of its range." If you have any questions, wish to discuss this matter, or feel this notice is in error, please contact me at eglitzenstein@meyerglitz.com or at 202-588-5206.

Sincerely,

Eric R. Glitzenstein

[1] Alternatively, if the definition adopted in the final policy truly is intended by the Service to be substantively broader than the one embodied in the draft policy (and applied to the pygmy owl), then the refusal to list the pygmy owl was illegal because the Service relied on a definition in rejecting listing that the agency itself has now conceded is excessively restrictive. In either event, the pygmy owl decision should be revisited.