



January 5, 2020

VIA EMAIL AND CERTIFIED MAIL

David Bernhardt  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Aurelia Skipwith  
Director  
U.S. Fish and Wildlife Service  
1849 C Street, N.W.  
Washington, D.C. 20240

RE: Sixty-day notice of violations of the Endangered Species Act over continued delay of protection for eleven species

Dear Secretary Bernhardt:

This letter serves as a 60-day notice of intent to sue the Secretary, the U.S. Fish and Wildlife Service (“Service”), and its Director from the Center for Biological Diversity, Noah Greenwald and other interested parties for continuing to delay protection for eleven species currently considered warranted but precluded for listing (“candidate species”) despite failing to demonstrate that the species are precluded by higher priority listings and failing to make expeditious progress in listing of species (Table 1) as required by 16 U.S.C. § 1533(b)(3)(B)(iii). 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).

**Table 1.** Eleven species for which the Service has unlawfully delayed protection.

Species Name	Scientific	Listing Priority Number	Range
Peñasco least chipmunk	<i>Tamias minimus atristriatus</i>	6	NM
gopher tortoise (eastern population)	<i>Gopherus polyphemus</i>	8	AL, FL, GA, SC
longfin smelt (San Francisco Bay-Delta population)	<i>Spirinchus thaleichthys</i>	6	CA
Colorado Delta clam	<i>Mulinia modesta</i>	8	Mx

Texas pimpleback	<i>Quadrula petrina</i>	2	TX
Texas fawnsfoot	<i>Truncilla macrodon</i>	2	TX
Texas fatmucket	<i>Astragalus microcymbus</i>	2	TX
magnificent ramshorn	<i>Planorbella magnifica</i>	2	NC
bracted twistflower	<i>Streptanthus bracteatus</i>	8	TX
northern spotted owl	<i>Strix occidentalis caurina</i>	3	CA, OR, WA
Monarch butterfly	<i>Danaus plexippus plexippus</i>	8	Multiple

The ESA allows the Secretary to find that listing of a species is warranted but precluded only if certain criteria are met, including:

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action . . . is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of the Act are no longer necessary *Id.* § 1533(b)(3)(B)(iii).

To date, the Trump administration has listed only 25 species or just six species per year, the lowest rate of any administration since the Act was passed. Such a low rate of listing clearly does not constitute expeditious progress and undermines any claim by the administration that the eleven species included in this notice are precluded by higher priority listing actions.

In 2016, the Service developed a workplan to address a backlog of more than 500 species awaiting listing determinations, including the candidate species included in this notice. In each year since, the Service has failed to make dozens of findings from the workplan, including findings for 30 species in fiscal year 2017, 78 species in fiscal year 2018, 46 species in fiscal year 2019 and 58 species in fiscal year 2020. The Service's failure to implement their own workplan, including candidates in this notice such as the longfin smelt, is further evidence for lack of preclusion of the eleven candidates and lack of expeditious progress.

Each year, the Service must make a new determination for all candidate species as if they were the subject of a resubmitted petition. *Id.* at § 1533(b)(3)(C)(i). The Service makes these annual findings in a single rule called a "candidate notice of review" or "CNOR." In the CNOR, the Service provides a justification for why listing of included candidates continues to be precluded and demonstrates that expeditious progress is being made.

The Service issued their most recent CNOR on November 16, 2020 ("2020 CNOR"). 85 Fed. Reg. 73,164. The Service claims in the 2020 CNOR to be making expeditious progress, but identifies only seven species listed in both fiscal years 2019 and 2020.

For comparison, an average of 45 and 65 species per year were listed by the Obama and Clinton administrations, respectively. Given there are hundreds, perhaps even thousands, of imperiled species in the U.S. that need protection under the ESA to avoid extinction, including more than 500 petitioned species awaiting 12-month findings from the Service, there is no explanation for the very small number of species that received protection in the last two years.

To justify preclusion and expeditious progress, the Service points to a Congressionally imposed spending cap on listing and by work identified in the workplan. These justifications fall flat because the Service has listed far more species with less resources in the past and is not implementing their workplan. The Service's budget for listing has remained consistently between \$18-22 million since 2008 and has remained so under the Trump administration, yet in the last four years the Service has listed a fraction (seven percent) of the species listed during the previous eight years under the Obama administration.

In sum, the progress reported in the 2020 CNOR neither justifies preclusion of the eleven candidate species in this notice nor demonstrates expeditious progress. 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 determinations for these eleven species 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,

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