



March 3, 2021

Via Electronic and Certified Mail

Scott de la Vega, Acting Secretary of the Interior
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RE: Sixty-day Notice of Intent to Sue for violations of the Endangered Species Act relating to the Service's determination that designating critical habitat for the eastern black rail (*Laterallus jamaicensis jamaicensis*) was not prudent.

Dear Secretary de la Vega and Director Williams,

In accordance with Section 11(g) of the Endangered Species Act ("ESA"), the Center for Biological Diversity ("Center") and Heathy Gulf provides this 60-day notice of its intent to sue the Secretary and the U.S. Fish and Wildlife Service ("Service") for violations of the ESA in connection with the Service's determination that designation of critical habitat for the eastern black rail would not be prudent.¹

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 1.7 million members and online activists dedicated to the protection of species hovering on the brink of extinction, including the eastern black rail.

Healthy Gulf is a nonprofit organization based out of Louisiana. Healthy Gulf's purpose is to collaborate with and serve communities who love the Gulf of Mexico by providing research, communications, and coalition-building tools needed to reverse the long-pattern of over-exploitation of the Gulf's natural resources. They are committed to protecting and restoring the national resources of the Gulf of Mexico Region, including protecting the eastern black rail and its habitat.

¹ U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Threatened Species Status for Eastern Black Rail with a Section 4(d) Rule, 85 Fed. Reg 63,764 (October 8, 2020).

BACKGROUND

The eastern black rail is a small and elusive marsh bird with speckled black plumage, a rufous nape and eyes that change from red to black with age.² The bird is found in a variety of salt, brackish, and freshwater marsh habitats in the eastern United States, Mexico, Central America, and the Caribbean.³ In the United States, eastern black rails occur in both coastal and inland areas with most detections at coastal sites. It is a wetland dependent bird requiring dense overhead cover, moist soils interspersed with or adjacent to very shallow water.⁴ The eastern black rail is unique in that they are extremely secretive and walk or run under dense vegetation and are rarely seen in flight.⁵

While the eastern black rail once occurred across much of the eastern United States, the population has dramatically declined over the last century. In some areas, the population has declined by over 90 percent in less than 25 years.⁶ The eastern black rail has likely been extirpated in New England, the Appalachians, and the central lowlands of the Midwest.⁷ It still occurs from New Jersey to Florida and across the Gulf Coast to Texas, as well as in freshwater wetlands of Kansas and Colorado on the Great Plains. Throughout this range, however, the species is irregular and rare.

The Service determined that the population of eastern black rails in the Great Plains will likely be extirpated in just 15 to 25 years, and the sole remaining coastal populations of eastern black rails have a high probability of complete extinction by 2068.

The greatest threat to the continued existence of the eastern black rail is the loss, degradation and fragmentation of wetland habitat. Over 100 million acres—or approximately 50 percent—of the wetlands in the conterminous United States have been lost over the past two centuries, primarily due to the conversion of wetlands to agricultural lands or urban areas.⁸ Several states that comprise a substantial portion of the eastern black rail's historical range have lost 70 percent or more of their wetlands, and there are no indications that loss of habitat for the eastern black rail has ceased or that extensive areas have been restored.⁹

In addition to urban and agricultural sprawl, the eastern black rail is increasingly threatened by sea level rise caused by climate change.¹⁰ Increased temperatures decreased precipitation, and an increase in severe weather events will likely significantly affect the future resiliency of the eastern black rail.¹¹ The Service concluded that climate change will exacerbate the effects from past and ongoing habitat loss.¹² These threats will be compounded by other threats caused by increasing

² U.S. Fish & Wildlife Serv. 2019, Species Status Assessment Report for the eastern black rail (*Laterallus jamaicensis jamaicensis*) at 5-6 (“SSA”).

³ SSA at 22.

⁴ *Id.* at vi.

⁵ U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Threatened Species Status for Eastern Black Rail with a Section 4(d) Rule, Proposed Rule 83 Fed. Reg 50,610, 50,627 (October 9, 2018).

⁶ SSA at 27

⁷ *Id.* at 95

⁸ *Id.* at 36.

⁹ *Id.* at 36.

¹⁰ *Id.* at 65.

¹¹ *Id.* at 63.

¹² *Id.*

demand for ground water, grazing, haying, mowing, and impoundments that further contribute to wetland habitat loss.¹³

Despite these continued threats to eastern black rail habitat, the Service determined that designating critical habitat for the bird was “not prudent” because doing so would cause the species to “face a threat to overzealous birders, and designation can reasonably be expected to increase the degree of these threats. . . by making location information more readily available.”¹⁴ As further explained below, this “not prudent” determination is contrary to best available science, arbitrary and capricious, and in violation of the Endangered Species Act.

THE ENDANGERED SPECIES ACT

Congress enacted the Endangered Species Act “to halt and reverse the trend toward species extinction, whatever the cost.”¹⁵ The ESA does so by conserving endangered and threatened species and the ecosystems upon which they depend.¹⁶ Protection of habitat is central to species conservation under the ESA. For all endangered or threatened species, Section 4 directs the Service to designate “critical habitat,” meaning areas that species require to survive or recover, such that their protection under the Act is no longer required.¹⁷ The ESA further requires the Service to make critical habitat determinations “solely on the basis of the best scientific and commercial data available.”¹⁸

The Service is required to designate critical habitat for a listed species at the time the species is listed, subject to limited exceptions.¹⁹ One narrow exception is that the Service may find that designation of critical habitat is “not prudent” if “the species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threats.”²⁰

Congress intended the “not prudent” exemption to be narrow, reserved only for instances in which protecting critical habitat would not benefit the species. Section 4 directs the Service to designate critical habitat “to the maximum extent prudent.”²¹ Section 4(b)(2) specifically states that the Secretary may only exclude portions of habitat from critical habitat designation “if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.”²²

Congress explained that the “not prudent” exemption was reserved for “rare circumstances where the specification of critical habitat . . . would not be beneficial to the species.” See H.R. Rep. No. 95-1625 at 17. In other words, it is to be applied where designation “would not be in the best

¹³ *Id.* at 81.

¹⁴ 83 Fed. Reg at 50,628.

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

¹⁶ 16 U.S.C. § 1531(b).

¹⁷ 16 U.S.C. §§ 1533(a)(3), 1532(3),(5)(A).

¹⁸ 16 U.S.C. § 1533(b)(2).

¹⁹ *Id.* § 1533(a)(3)(A).

²⁰ 50 C.F.R. § 424.12(a)(1).

²¹ 16 U.S.C. § 1533(a)(3)(A).

²² 16 U.S.C. § 1533(b)(2).

interests of the species.” *Id.* at 16-17; see also *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 443 (5th Cir. 2001) (rejecting interpretation of statute that expanded narrow “not prudent” exception); *NRDC v. DOI*, 113 F.3d 1121 (9th Cir. 1997) (same); accord *Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir. 1985) (“The legislative history does indicate that the Secretary may only fail to designate a critical habitat under rare circumstances.”), *abrogated on other grounds by Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989). Thus, the Service must analyze the benefits of designating critical habitat when issuing a not prudent determination

ENDANGERED SPECIES ACT VIOLATIONS

The Service’s “not prudent” determination for eastern black rail critical habitat constitutes a violation of the Act.

As explained above, when issuing a “not prudent” determination, the Service is required to analyze the benefits of designating critical habitat with the alleged negative effects of designating critical habitat. However, the Service failed to provide a rational explanation for why designating critical habitat would not be prudent given the significant benefit of such determination as recognized by best available science.

The Service has made similar “not prudent” determinations based on an alleged increase in threats because the publication of critical habitat descriptions and maps would enable more people to identify the species’ sites. However, courts have routinely overturned such decisions. *See NRDC v. DOI*, 113 F.3d 1121 (9th Cir. 1997).

Best available science identifies the direct loss of habitat, primarily through wetland modification for urban development and agricultural use, is the primary cause of the decline of the eastern black rail. Further, the loss, degradation and fragmentation of wetland habitats and incompatible land management are current and ongoing threats to the species.²³ Designating critical habitat would substantially benefit the conservation of the eastern black rail by providing adequate protection to its habitat.

Best available science does not recognize “overzealous birders” as a threat to the continued survival of the eastern black rail. However, the Service entirely based its decision on the unsupported and arbitrary conclusion that designating critical habitat for the eastern black rail would “more widely announce the exact location of eastern black rails” and thus increase the likelihood of habitat destruction through “overzealous birders.”

The Service fails to provide any historical incidents of birders destroying eastern black rail habitat or otherwise harming the species. Second, the Service’s conclusion is based on the false premise that birders will know “the exact location” of eastern black rails if critical habitat is designated. This rationale ignores the fact that the Service’s listing decision and supporting Species Status Assessment identifies, in detail, the locations of previously identified breeding pairs of eastern black rails and that the course-scale maps published with critical habitat designations don’t include exact locations. Additionally, eBird- the primary tool used by birders- does not publish information

²³ SSA at 82.

regarding exact locations of the eastern black rail.²⁴ Therefore, the Service violated Section 4 of the ESA, which requires the Service to make critical habitat determinations “solely on the basis of the best scientific and commercial data available.”²⁵

Lastly, the Service entirely failed to consider any benefits of designating critical habitat for the eastern black rail. Habitat loss is a threat to the eastern black rail, yet the Service fails to explain why alleviating that threat would not be beneficial to the species and therefore fails to adequately consider relevant factors and articulate a rational connection between the facts found and the choice made.²⁶

Thus, the Service’s determination that designating critical habitat for the eastern black rail is “not prudent” fails to consider best available science, is arbitrary and capricious, and in violation of the ESA.

CONCLUSION

In sum, the Service’s determination that designating critical habitat is “not prudent” for the eastern black rail because it could cause an increase in “overzealous birders” is arbitrary and capricious, contrary to the best available science, and violates the ESA. If the Service does not act to correct this violation within 60 days, the Center and Healthy Gulf will pursue litigation in federal court. Please contact us should you have any questions or if you would like to discuss this matter.

Sincerely,



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²⁴ 83 Fed. Reg. at 50,628.

²⁵ 16 U.S.C. § 1533(b)(2).

²⁶ *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300,1304 (9th Cir. 1993).