



May 2, 2019

Via Email and Certified Mail

Secretary David Bernhardt
U.S. Department of the Interior
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Ms. Margaret Everson
Principal Deputy Director Exercising the
Authority of the Director
U.S. Fish and Wildlife Service
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Re: Notice of Intent to Sue for Failure to Issue a 12-Month Finding on Petition to List the Emperor Penguin (*Aptenodytes forsteri*) under the Endangered Species Act

Dear Secretary Bernhardt and Principal Deputy Director Everson,

The Center for Biological Diversity (“the Center”) hereby provides this 60-day notice of intent to sue the U.S. Department of the Interior and the U.S. Fish and Wildlife Service (collectively, “the Service”) for violating the Endangered Species Act (“ESA”). Specifically, the Service is in violation of Section 4 of the ESA for failing to issue a 12-month finding on the Center’s November 28, 2011 petition to list the emperor penguin (*Aptenodytes forsteri*) as an endangered or threatened species. 16 U.S.C. § 1533(b)(3)(B). This notice is provided in fulfillment of the requirements of the ESA’s citizen suit provision. *Id.* § 1540(g).

The Center for Biological Diversity is a non-profit conservation organization supported by more than 1.4 million members and online activists. The Center and its members have a long-standing interest in the conservation of emperor penguins and their Antarctic habitat.

A. Endangered Species Act

Congress enacted the ESA in 1973 amid growing concern over the loss of biodiversity stemming from “economic growth and development untempered by adequate concern and conservation.” 16 U.S.C. § 1531(a). The ESA establishes a comprehensive statutory program to protect and conserve imperiled species and their ecosystems. The ESA sets forth a process to

identify species that are “endangered” or “threatened” with extinction and designate their critical habitat. It further directs the Service to develop recovery plans for such species and bars the take of endangered species except as authorized under the Act. As the Supreme Court has emphasized, the “plain intent of Congress in passing the statute was to halt and reverse the trend toward extinction whatever the cost.” *Babbitt v. Sweet Home Chapter of Comm. for a Great Oregon*, 515 U.S. 687, 699 (1995) (citing *TVA v. Hill*, 437 U.S. 153, 184 (1978)).

The Service is required to “list” species as endangered or threatened if it determines that the species is facing extinction due to, *inter alia*, “present or threatened destruction, modification or curtailment of a species’ habitat or range,” “the inadequacy of existing regulatory mechanisms,” or “other manmade or natural factors.” 16 U.S.C. § 1533(a)(1). Under the ESA, a species is “endangered” if it is “in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6); 50 C.F.R. § 424.02(e). A species is “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20); 50 C.F.R. § 424.02(m). In making listing decisions, the Service must rely “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b).

Section 4 of the ESA establishes a detailed process by which the Service must add to or modify the list of threatened and endangered species through notice and comment rulemaking. 16 U.S.C. § 1533(b). Within 90 days of receiving a petition to list a species, the Service must make a finding as to whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). If the Service makes a positive 90-day finding, the Service must conduct a full scientific review of the species’ status. 16 U.S.C. § 1533(b)(3)(A). Then, within 12 months of the date it receives the petition, the Service “shall” make one of three findings: (1) listing is not warranted, (2) listing is warranted, or (3) listing is warranted but presently precluded by other pending proposals for listing species, provided other circumstances are met. *Id.* § 1533(b)(3)(B). If the Service determines that listing a species, it must then promptly publish a proposed rule to list the species. *Id.* § 1533(b)(5). Within one year of publication of the proposed rule, the ESA requires the Service to render its final determination on the proposal. *Id.* § 1533(b)(6). These deadlines are mandatory. *Friends of Animals v. Ashe*, 808 F.3d 900, 903 (D.C. Cir. 2015).

B. The Imperiled Emperor Penguin

As described in the Center’s petition, the emperor penguin (*Aptenodytes forsteri*) is in danger of extinction in the wild within this century. Global warming is the greatest threat to the species’ survival, as emperor penguins depend on sea ice for both breeding and foraging. The effects of global warming—including surface and ocean warming, sea ice loss and early sea ice breakup, and the collapse of ice sheets and ice shelves—are already degrading the penguins’ Antarctic habitat, with some emperor penguin populations disappearing and others suffering large-scale declines. A new 2019 study documented the catastrophic breeding failure of the world’s second largest emperor penguin colony during the past three years, following record-low sea ice extent and early sea ice breakup,¹ both well-known effects of global warming.

¹ Fretwell, Peter T. & Philip N. Trathan, Emperors on thin ice: Three years of breeding failure at Halley Bay, *Antarctic Science*, 1-6. doi:10.1017/S0954102019000099 (2019).

Global warming is accelerating, resulting in escalating sea ice loss, surface and ocean warming, and the collapse of Antarctic ice shelves. These global warming impacts will cause serious harms to emperor penguin habitat. As a result of these changes, a 2017 study projects that, by the end of the century, emperor penguins could experience a global population decline of 40 percent to 99 percent over three generations, absent large-scale cuts in carbon pollution.² Yet existing regulatory mechanisms are inadequate in mitigating global warming.

Adding to these harms, rising ocean temperatures and melting sea ice in the Southern Ocean encircling Antarctica have also diminished the availability of krill, a key food source for emperor penguins. Industrial krill fisheries and ocean acidification resulting from the ocean's absorption of carbon dioxide further threaten the penguins' food supply. Immediate and bold action must be taken to preserve this iconic and much-beloved penguin species.

C. The Center's Petition and Procedural History

In 2006, the Center submitted a petition to list 12 penguin species, including the emperor penguin, under the ESA. In its 12-month finding for four penguin species, issued in 2008, the Service found that the emperor penguin was "not currently threatened or endangered in any portion of its range or likely to become so in the foreseeable future." 73 Fed. Reg. 77,300 (Dec. 18, 2008). The Service concluded that, at the time, evidence did not indicate the emperor penguin's habitat had been affected by climate change through changes in temperature or sea-ice extent or that those effects were likely to threaten the species in the foreseeable future.

On November 28, 2011, the Center submitted a new petition to list the emperor penguin under the ESA. The petition presented new data and research demonstrating the substantial effect global warming has had on the penguin's Antarctic habitat; projecting future effects including increasing sea temperatures, changes in sea-ice extent and duration, and declines in prey availability; and documenting the observed and projected population declines that threaten the species' survival. Accordingly, the petition demonstrates that the emperor penguin warrants listing as threatened or endangered under the ESA.

On January 22, 2014, the Service issued its belated but positive 90-day finding on the Center's 2011 petition, finding the petition "presents substantial scientific or commercial information indicating that [listing] may be warranted for the emperor penguin." 79 Fed. Reg. 3559 (Jan. 22, 2014). However, the Service has not yet issued a 12-month finding on the petition.

D. ESA Violation

As described above, Section 4 of ESA requires that, "[w]ithin 12 months after receiving a petition" for which a positive 90-day finding has been made, the Service "shall" make a finding that the petition is warranted, is not warranted, or is warranted but precluded. 16 U.S.C. § 1533(b)(3)(B).

² Jenouvrier, Stéphanie et al., Influence of dispersal processes on the global dynamics of Emperor penguin, a species threatened by climate change, 212 *Biological Conservation* 63 (2017).

The Center filed its petition seeking to list the emperor penguin under the ESA on November 28, 2011, and the Service has issued a positive 90-day finding on the petition. Accordingly, pursuant to the ESA, the Service's 12-month finding was due on or around November 28, 2012. *Id.* § 1533(b)(3)(B). The Service's 12-month finding is now more than 6 years overdue, and the Service is violating Section 4 of the ESA. *Id.* As such, the Service is abrogating its duty under Section 4 of the ESA to ensure that the listing and protection of endangered and threatened species occurs in a timely manner, to avoid further population declines. For these reasons, we seek to compel the Service to act on our petition.

CONCLUSION

Within 60 days, if the Service does not act to correct the violations described in this letter or agree to discuss a schedule for completing the overdue finding, we will pursue litigation against the agency. If you have any questions, or would like to discuss this matter, our contact information is below. Thank you for your attention to this matter.

Sincerely,



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