February 14, 2023

**Notice of Intent to Sue**

***Via Email and Certified Mail***

The Honorable Shalanda D. Young
Director
Office of Management and Budget
725 17th Street N.W.
Washington, D.C. 20503

The Honorable Richard Revesz
Administrator
Office of Information and Regulatory Affairs
725 17th Street N.W.
Washington, D.C. 20503

**Re: Illegal Delays to the Red Knot Critical Habitat Final Rule, Systemic Undermining of Endangered Species Conservation, and Failure to Develop Proactive Conservation Programs Under Section 7(a)(1) of the Endangered Species Act**

Director Young, Administrator Revesz,

The Office of Information and Regulatory Affairs ("OIRA") has undermined and weakened vital environmental safeguards for people, endangered species and the environment for decades, a trend has continued unabated during the Biden Administration. Despite possessing no statutory authority, OIRA has unilaterally and with zero accountability delayed vital regulations and policies for months, even years, which has driven endangered species closer and closer to extinction. Its most-recent, egregious intervention has delayed finalization of critical habitat for the Red Knot for seven months, violating the clear and unambiguous deadlines set forth under the Endangered Species Act ("ESA" or "Act").

Accordingly, on behalf of the Center for Biological Diversity ("Center"), this letter provides notice of intent to sue the Office of Management and Budget, and its subsidiary Office of Information and Regulatory Affairs for their past and continuing violations of Section 7 of the Endangered Species Act, including unlawfully delaying protections for threatened and endangered species, and its ongoing and pervasive failure to develop a proactive program to promote the conservation and recovery of endangered species. This notice is provided pursuant to Section 11(g) of the Endangered Species Act, which requires that we provide you with 60-day notice prior to commencing any litigation against your agency.[1]

While not required by law, we also provide notice that the Office of Management and Budget's violations of the Endangered Species Act represent a clear violation of the Take Care Clause of the U.S. Constitution, which requires that the President "shall take Care that the Laws be faithfully executed."[2]

[1] 16 U.S.C. § 1540(g).
[2] U.S. Constitution, Article II, Section 3.

## LEGAL BACKGROUND

In enacting the Endangered Species Act Congress recognized that many species of wildlife and plants "have been so depleted in numbers that they are in danger of or threatened with extinction" and that these species are "of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[3] Accordingly, the law was passed "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[4]

Section 2(c) of the Endangered Species Act establishes "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this [Act]."[5] The Endangered Species Act defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[6]

As the Supreme Court has unequivocally stated, the Endangered Species Act's "language, history, and structure" make clear and "beyond doubt" that "Congress intended endangered species to be afforded the highest of priorities" and endangered species should be given "priority over the 'primary missions' of federal agencies."[7] Simply put, "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*."[8]

To fulfill the substantive purposes of the Endangered Species Act, each federal agency is required under Section 7 of the Act to engage in consultation with the U.S. Fish and Wildlife Service ("FWS") and/or the National Marine Fisheries Service ("NMFS") (collectively the "Services") to "insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species…determined…to be critical."[9] The obligation to "insure" against a likelihood of jeopardy or adverse modification requires the agency to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the agency taking the proposed action.[10]

A complementary component of the consultation requirements of the Act — found in Section 7(a)(1) — provides that all federal agencies "shall in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed] species."[11] Thus, the Act imposes on all federal

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[3] 16 U.S.C. § 1531(a)(2), (3).
[4] 16 U.S.C. §§ 1531-1544; *id*. § 1531(b).
[5] 16 U.S.C. § 1531(c)(1).
[6] 16 U.S.C. § 1532(3).
[7] *Tennessee Valley Auth.*, 437 U.S. at 174-75.
[8] *Tennessee Valley Auth.*, at 184 (emphasis added).
[9] 16 U.S.C. § 1536(a)(2).
[10] *See Sierra Club v. Marsh*, 816 F.2d 1376, 1385 (9th Cir. 1987).
[11] 16 U.S.C. § 1536(a)(1).

agencies an *affirmative obligation* to conserve threatened and endangered species that their activities harm.[12]

Section 4 of the Endangered Species Act requires the Service to review, within 90 days of receipt of a petition to list a species as threatened or endangered, whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If the Service makes a "may be warranted" finding, it must then determine within 12 months whether the listing is warranted, not warranted, or warranted but.[13]

If the Service determines that listing is warranted, the agency must publish that finding in the Federal Register along with the text of a proposed regulation to list the species as endangered or threatened and take public comments on the proposed listing rule.[14] Within one year of publication of the proposed listing rule, the Service must publish in the Federal Register the final rule implementing its determination to list the species.[15]

Section 4 also provides that when the Service lists a species as endangered or threatened, it must concurrently designate critical habitat for that species to the maximum extend prudent and determinable.[16] At most, the Endangered Species Act provides an additional year beyond the final listing of a species to finalize critical habitat.

Recognizing the important role habitat plays in species recovery, Congress stated that:

> [C]lassifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species' continued existence . . . . If the protection of endangered and threatened species depends in large measure on the preservation of the species' habitat, then the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.[17]

Critical habitat provides important protections for imperiled species beyond that provided by listing alone, including: (1) facilitating implementation of Section 7(a)(1) of the Endangered Species Act by identifying areas where federal agencies can focus proactive conservation programs to benefit listed species; (2) furthering and focusing the conservation efforts of States and local governments, nongovernmental organizations, and individuals; (3) providing early conservation planning guidance including fostering recovery planning and development of special management actions; (4) serving as a notification tool for federal agencies and (5) providing significant regulatory protection through the Section 7(a)(2) consultation process.[18]

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[12] *Pyramid Lake Paiute Tribe v. U.S. Dept of Navy*, 898 F.2d 1410, 1416-17 (9th Cir.1990); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261-62 & n. 3 (9th Cir.1984).
[13] 16 U.S.C. § 1533(b)(3)(A), (B).
[14] 16 U.S.C. § 1533(b)(3)(B)(ii).
[15] 16 U.S.C. § 1533(b)(6)(A).
[16] 16 U.S.C. § 1533(a)(3)(A)
[17] H.R. Rep. No. 94-887, at 3 (1976)
[18] 79 Fed. Reg. 27066, 27067 (May 12, 2014).

## FACTUAL BACKGROUND

### I. The Office of Information and Regulatory Affairs Possesses No Statutory Authority To Delay Vital Safeguards to Protect the Environment.

Congress established the Office of Information and Regulatory Affairs *solely* to implement, and provide oversight of, federal agency compliance with the Paperwork Reduction Act of 1980.[19] While the informal review of agency regulations by the White House occurred as far back as the Nixon administration, President Reagan's Executive Order 12291 officially deemed that OIRA would centralize and review agency regulations "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process."[20] Despite having numerous opportunities to do, Congress has never sanctioned OIRA to take on this expanded role. To this day, OIRA continues to review, change and even halt key regulatory safeguards continues to expand without any grant of authority to do so.

Executive Order 12866 issued by President Clinton further expanded upon the Reagan executive order and to this day, generally provides the purported authority whereby OIRA can review regulatory proposals by federal agencies. Under this Executive Order, OIRA can review regulatory and policy actions, when such actions could:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities
(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency
(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, or
(4) Raise novel legal or policy issues arising out of legal mandates.[21]

Of the thousands of regulations and other policy proposals routinely reviewed by OIRA, only a small fraction *actually* have an economically significant impact on the United States economy,[22] meaning that the vast majority of agency actions reviewed by OIRA are done so in contravention even of the Executive Orders it claims to base its authority upon. Indeed, based on OIRA's own data, since 2014 only 44 of 143 agency actions (30 percent) proposed by the Department of Interior that were reviewed by OIRA qualified as "economically significant" actions.[23]

Indeed, with respect to virtually all critical habitat designations, none of them have ever legitimately fell within the scope of Executive Order 12866. Few, if any, critical habitat

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[19] Public law: 96–511 (Dec. 11, 1980).
[20] *Executive Order 12291*, 46 Fed. Reg. 13193 (Feb. 17, 1981).
[21] *Executive Order 12866*, 58 Fed. Reg. 51735 (Oct. 4, 1993).
[22] Congressional Research Service, Curtis W. Copeland. 2009. Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs. Available at: https://sgp.fas.org/crs/misc/RL32397.pdf
[23] See https://www.reginfo.gov/public/do/eoCountsSearchInit?action=init

designations have ever had a $100 million annual impact on the economy of the United States in the last 40 years. Critical habitat designations virtually never create any serious inconsistency or otherwise interfere with an action taken or planned by another agency, as indeed Congress intended that all federal agencies give the recovery of endangered species the highest priority — even above that of the "primary missions" of those agencies. Critical habitat designations do not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. And critical habitat designation — a routine process that has existed since 1978 — almost never raise novel legal or policy issues arising out of such designations.

Since 2012, OIRA has reviewed critical habitat designations for the Southwestern Willow Flycatcher, Tidewater Goby, Bi-State Greater Sage Grouse, Gunnison Sage Grouse, Bearded Seal, Ringed Seal, Loggerhead Sea Turtle, Jaguar, Yellow-billed Cuckoo, North Atlantic Right Whale, False Killer Whale, Atlantic Sturgeon, Humpback Whale, Southern Resident Killer Whale, Northern Spotted Owl, Caribbean and Pacific corals, and the Red Knot.[24]

OIRA's perversion of the regulatory process has only grown more expansive with time, as subsequent presidents enacted ever more statutorily untethered mandates upon OIRA, including President George W. Bush's signed Executive Order 13422, President Barack Obama's Executive Order 13563, and President Trump's Executive Order 13771. During the Trump Administration, OIRA was the unabashed tip of the spear in dismantling key environmental safeguards throughout the federal government with its 2-for-1 deregulatory agenda.

Cumulatively OIRA's despotic wielding of power has gutted protections for clean air and clean water, contributing to the premature deaths of thousands of Americans over the past three decades. For example, in 2011, OIRA killed the EPA's effort to set the national ambient air quality standards for ozone at 60 parts per billion despite the Clean Air Act's unambiguous mandate to set such standards *solely* on what is scientifically required to protect human health. Had the EPA been allowed to do its job, tens of thousands of premature deaths would have been avoided every year.[25]

During both the Bush and Obama administrations, OIRA delayed critical safeguards to protect the North Atlantic right whale, pushing it to the brink of extinction — actions that have cumulatively pushed the population of right whales down to 340 individuals today, and have vastly complicated the recovery of this species, making it far longer and far more costly.[26]

Simply put, OIRA has *never* strengthened a single rulemaking to protect the environment, but rather continues to inject spurious economic conjecture into the rulemaking process, all to benefit of the largest corporations, polluters and species interests.

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[24] https://www.reginfo.gov/public/do/XMLReportList

[25] J.D. Berman et al., *Health Benefits from Large-Scale Ozone Reduction in the United States*, 120(10) Environ. Health Perspec. 1404-10 (October 2012).

[26] *See* Sam Kim, *White House Delays Whale Protection Rule*, Center for Effective Government (July 24, 2007), *available at*: https://www.foreffectivegov.org/node/3366.

## II. Efforts to Protect the Red Knot Under the Endangered Species Act

Weighing in at less than 200 grams, Red Knots are robin-sized shorebirds that make a 9000-mile migration between southern South America and the Canadian Arctic every year from their wintering to breeding grounds. During their migration, one of their most critical stop-over locations is the eastern coast of the United States between Delaware and North Carolina, where they feed on the eggs of horseshoe crabs to provide necessary energy to finish their migration and successfully nest in the Arctic. Red Knots have declined by over 80% since the 1980s, and that decline has only intensified in the last few years as horseshoe crabs are harvested in ever-more unsustainable ways.[27] Red knots are also threatened by habitat loss, and sea-level rise driven by climate change.

In 2005, ten environmental organizations submitted a petition to the Fish and Wildlife Service for emergency listing of the red knot.[28] A year later the Service determined the birds warranted protection, but was precluded due to a purported lack of resources to complete the listing process at that time. Under a settlement with the Center and other parties, the U.S. Fish and Wildlife Service proposed to protect the Red Knot as a "threatened" species in 2013 and finalized protections for the bird at the end of 2014.

At the time of listing, the Service did not claim the designation of critical habitat was not prudent or determinable. Instead the Service only vaguely alluded in its final rule that it would complete the critical habitat designation at a later time.[29] Despite the Endangered Species Act only providing one additional year after listing to designate critical habitat, it was not until the summer of 2021 — seven years later — that the U.S. Fish and Wildlife Service proposed to designate critical habitat for the Red Knot.[30]

On July 8, 2022 OIRA began its review of the Red Knot critical habitat final rule. Seven months later, OIRA is still reviewing this rule. Executive Order 12866 states that all reviews shall be completed within "90 calendar days" and can be extended by 30 days upon the "written approval of the Director and at the request of the agency head."

## LEGAL VIOLATIONS

1. Delay of Final Critical Habitat Designation

The Office of Management and Budget and Office of Information and Regulatory Affairs have now delayed critical habitat protections for the Red Knot by seven months, and in doing so are exacerbating an already extremely clear and unambiguous statutory deadline for doing so provided by the Endangered Species Act. Such action is *ultra vires* and violates Section 4 of the Endangered Species Act.

[27] https://www.nytimes.com/2021/06/05/science/threatened-red-knot-shorebird-decline.html
[28] https://defenders.org/sites/default/files/publications/red_knot_listing_petition.pdf
[29] *Threatened Species Status for the Rufa Red Knot*, 79 Fed. Reg. 73706. (Dec. 11, 2014).
[30] *Designation of Critical Habitat for Rufa Red Knot*, 86 Fed. Reg. 37410 (July 15, 2021).

2. Failure to Develop Programs for the Conservation of Listed Species

The Office of Management and Budget has an independent obligation under Section 7(a)(1) to utilize its authorities by "carrying out programs for the conservation of endangered species and threatened species."[31] To the best of our knowledge, the Office of Management and Budget has enacted ***zero*** programs for the conservation of endangered and threatened species, thereby failing to abide by this clear, non-discretionary, statutory mandate.

The Fifth Circuit explained the nature and extent of the Section 7(a)(1) duty in *Sierra Club v. Glickman*:

> By imposing a duty on all federal agencies to use "all methods and procedures which are necessary to bring *any* endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary," 16 U.S.C. § 1532(2) (emphasis added), Congress was clearly concerned with the conservation of *each* endangered and threatened species. To read the command of § 7(a)(1) to mean that the agencies have only a generalized duty would ignore the plain language of the statute.[32]

Thus, Section 7(a)(1) requires all agencies of the federal government to develop specific programs to conserve endangered species — and in particular those listed species that an agency's activities cause harm.[33] While there is little logic towards which species OIRA has reviewed the critical habitat of — other than likely political controversy — if OIRA's actions result in weaker or delayed protections for those species, then those are the species where the mandates of Section 7(a)(1) are most relevant.

Here, given OIRA's unnecessary delays of the final critical habitat designations for the Red Knot, it is clear that OIRA now has a duty under Section 7(a)(1) to develop a positive conservation program for the Red Knot to address the harms caused by these needless delays.

Although courts have disagreed about the level of discretion an agency has in how they go about implementing Section 7(a)(1) programs,[34] it is well settled that "total inaction is not allowed."[35] For example, an action agency may adopt a program developed by another agency, but "[t]his does not mean [the agency] can simply 'rubberstamp' a conservation program…."[36] Similarly, courts have also found that an "'insignificant' measure that does not, or is not reasonably likely to, conserve endangered or threatened species," is not sufficient to satisfy 7(a)(1) requirements.[37] By failing to institute *any* programs that protect climate-imperiled endangered and threatened species, the OMB is in direct violation of section 7(a)(1)'s non-discretionary mandate.

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[31] 16 U.S.C. § 1536(a)(1).
[32] 156 F.3d 606, 618 (5th Cir. 1998) (emphasis added).
[33] *See Northwest Envtl Advocates v. EPA* 268 F. Supp. 2d 1255 (D. Ore. 2003); *see also Cal. Native Plant Soc'y v. Norton* , U.S. Dist. LEXIS 9414 (D. Cal. 2004); *see also Strahan v. Linnon*, 967 F. Supp. 581 (D. Mass. 1997).
[34] *Pyramid Lake Paiute Tribe v. United States Dept. of the Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990).
[35] *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1145, 1146 (11th Cir. 2008).
[36] *Defs. of Wildlife v. United States Fish & Wildlife*, 797 F. Supp. 2d 949, 959 (D. Ariz. 2011).
[37] *Id.*

3. Violation of the Take Care Clause

The Take Care Clause of the U.S. Constitution requires that the President "shall take Care that the Laws be faithfully executed." As courts have noted, the reach and purpose of the Take Care clause are informed by the separation-of-powers doctrine, and the history that influenced its design.[38] Congress delegated its authority to the U.S. Fish and Wildlife Service (and National Marine Fisheries Service) to conserve and recover endangered species under the Endangered Species Act. Congress set forth clear and unambiguous deadlines for these two agencies to complete each step of the process in protecting species under federal law.

With respect to critical habitat, Congress only provided the Services with one additional year to complete the designation of critical habitat if a separate rulemaking is undertaken — e.g. critical habitat and listing are not done concurrently in the same rule. At seven months, the OIRA review of the Red Knot's critical habitat has now consumed the *majority* of the one year permitted under the Endangered Species Act to complete a critical habitat designation.

Similarly, when OIRA reviews a critical habtiat designation at both the proposed rule stage and the final rule stage, Executive Order 12866 itself could allow for 240 days — 8 months — of review at the White House, which as a practical matter would almost guarantee that critical habitat designations could never be completed within the one year provided for under the law. Thus, Executive Order 12866 almost precludes the ability of the Services to faithfully execute the Endangered Species Act.

## CONCLUSION

For the reasons set forth above, the Center intends to bring litigation against the Office of Management and Budget. Should the OMB or Office of Information and Regulatory Affairs wish to discuss the issues set forth above, please feel free to contact us.

Sincerely,

Brett Hartl
Government Affairs Director
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cc:

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[38] *Center for Biological Diversity v. Bernhardt*, 946 F. 3d 553 (9th Cir. 2019).

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