



August 15, 2022

Via Electronic and Certified Mail

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Debra Haaland, Secretary
U.S. Department of the Interior
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RE: 60-day Notice of Intent to Sue for Violations of the Endangered Species Act in Failing to Designate Critical Habitat for the Barrens Topminnow

Dear Secretary Haaland and Director Williams:

The Center for Biological Diversity (“Center”) intends to sue the U.S. Fish and Wildlife Service (“Service”) for violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA” or “Act”). Specifically, the Service has violated the section 4 of the Act by failing to designate critical habitat for the critically endangered Barrens topminnow (*Fundulus julisia*).¹ *Id.* §§ 1533(a)(3)(A), 1533(b)(6)(C). The Service’s failure deprives the Barrens topminnow of important protections and puts it at further risk of extinction.

A. The Endangered Species Act’s Requirements

Section 4 of the ESA provides that when the Service lists a species as endangered or threatened, it must also concurrently designate critical habitat for that species. *Id.* § 1533(a)(3)(A) (“to the maximum extent prudent and determinable” the Service “shall, concurrently with making a determination . . . that a species is an endangered species or threatened species, designate any habitat of such species which is then considered to be critical habitat.”); *see also id.* § 1533(b)(6)(C).² The Act defines critical habitat as:

¹ The Center provides this letter pursuant to the 60-day notice requirement of the citizen suit provision of the Act, to the extent such notice is deemed necessary by a court. *Id.* § 1540(g).

² The Service may only find that it is “not prudent” to designate critical habitat for a species where designating critical habitat would either increase the degree of threat to a species or would not be

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the [Act], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it was listed . . . upon a determination by [the Service] that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). The Act defines “conservation” as the recovery of a species “to the point at which the [Act’s protective] measures . . . are no longer necessary.” *Id.* § 1532(3).

Critical habitat provides important protection for imperiled species beyond that provided by listing alone. For example, Section 7(a)(2) of the Act requires all federal agencies to ensure through consultation with the Service that any action they authorize, fund, or carry out will not “jeopardize the continued existence of any [listed] species,” and for species with designated critical habitat, each federal agency must additionally guarantee that its actions will not “result in the destruction or adverse modification” of the critical habitat. *Id.* § 1536(a)(2).

If the Service finds that designating critical habitat for a listed species is prudent but not determinable at the time of final listing, the Service may take one additional year to designate critical habitat for the species. *Id.* § 1533(b)(6)(C)(ii). The Act requires the Service to publish a final critical habitat rule “based on such data as may be available at that time.” *Id.*

B. The Service Violated the Act by Failing to Designate Critical Habitat.

The Service’s failure to designate critical habitat for the Barrens topminnow violates section 4 of the Act. *Id.* § 1533(a)(3)(A); *see also id.* § 1533(b)(6)(C).

When the Service proposed to list the Barrens topminnow as an endangered species, it found that designating critical habitat was prudent but not determinable. Endangered and Threatened Wildlife and Plants; Endangered Species Status for Barrens Topminnow, 83 Fed. Reg. 490, 497 (Jan. 4, 2018). Over a year and a half later, when it issued the final rule listing the Barrens topminnow as endangered, the Service again concluded that critical habitat was not determinable. Endangered and Threatened Wildlife and Plants; Endangered Species Status for Barrens Topminnow, 84 Fed. Reg. 56,131, 56,133 (Oct. 21, 2019). Accordingly, the Act afforded the Service one additional year from the date of its final listing rule to designate critical habitat for the species. 16 U.S.C. § 1533(b)(6)(C)(ii). Thus, the Act required the Service to make its final critical habitat determination for the Barrens topminnow by October 21, 2020.

beneficial to the species. 50 C.F.R. § 424.12(a)(1)(i)-(ii) (2011). As Congress made clear when it passed the ESA, it only intended the Service to invoke the “not prudent” exception to designating critical habitat in “rare circumstances.” H.R. Rep. No. 95-1625 at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467. *See* Natural Res. Def. Council v. U.S. Dept. of the Interior, 113 F.3d 1121, 1126 (9th Cir. 1997).

As of the date of this notice letter, the Service has not designated critical habitat for the Barrens topminnow. The Service's failure leaves the Barrens topminnow's habitat vulnerable to destruction, pushing the species even closer to extinction and preventing its recovery.

The Center is deeply concerned about and actively involved in protecting the Barrens topminnow and its habitat. Our members and staff engage in professional, recreational, aesthetic, and scientific activities involving the Barrens topminnow and its habitat, including observing and attempting to observe it. On its behalf, the Center urges you to take prompt action to protect the Barrens topminnow under the mandatory requirements of the ESA. Accordingly, it would be an appropriate remedy for the Service to promptly issue a rule designating critical habitat for the Barrens topminnow, or at a minimum, a binding commitment to a date certain by which the Service will finalize the critical habitat rule for the Barrens topminnow.

If the Service does not act within 60 days to correct these violations of the Act, the Center intends to pursue litigation in federal court and seek injunctive and declaratory relief.

The Center is eager for the Service to address these violations at the earliest possible date. If you wish to discuss prospects for resolution of this matter, or feel this notice is in error, please contact me. Thank you for your prompt attention.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret E. Townsend", with a stylized flourish at the end.

Margaret E. Townsend
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