



Sent via Electronic and Certified Mail

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Re: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act from Activities Associated with Construction and Operation of Toyota-Mazda Automobile Plant in Huntsville, Alabama

Dear Sirs,

On behalf of the Center for Biological Diversity (“Center”), we hereby provide notice in accordance with Section 11(g) of the Endangered Species Act (“ESA”), of the Center’s intent to sue Mazda Toyota Manufacturing, U.S.A., Inc. (“MTMUS”) and the City of Huntsville (“City”) for violations of the ESA and its implementing regulations through the ongoing and imminent take of the spring pygmy sunfish from the construction and operation of the Toyota-Mazda automobile plant (“Auto Plant” or “Project”) in Huntsville, Alabama, in violation of Section 9 of the ESA. 16 U.S.C. §§ 1538(a)(1)(B), 1540(g).¹

The Auto Plant will be constructed and operated directly adjacent to occupied habitat for the spring pygmy sunfish in the Beaverdam Spring and Creek Complex. One of the primary causes of harm and death to the spring pygmy sunfish—and a principal reason why the sunfish is protected under the ESA—is development in and around its spring and spring-fed habitat.² The construction of the Auto Plant involves removal of vegetation, clearing of land, and construction of a massive facility with associated parking lots, all of which are likely to negatively impact water quality, water quantity, and aquatic vegetation in the sunfish’s occupied habitat.

Construction of hundreds of thousands of square feet of impervious surfaces (roofs, pavements, and roads) will impair water quality and both reduce water quantity and increase storm-water runoff. Operation of the Auto Plant within the watershed of the Beaverdam Spring and Creek Complex will contaminate surface water and groundwater supplying the springs, spring runs, and spring-fed wetlands that the sunfish depends on for survival and recovery. Maintenance of landscaping associated with the project will add fertilizers and other chemicals to the storm-water, thereby contributing even more pollution to the species’ habitat.

In sum, the Plant will cause “take” of the spring pygmy sunfish—an irreplaceable symbol of northern Alabama’s natural heritage—by killing, wounding, harassing, and/or harming sunfish. 50 C.F.R. § 17.3. The mitigation measures MTMUS and the City have developed cannot avoid this take entirely, and in any event, the spring pygmy sunfish is so highly endangered that take must be minimized to the greatest extent possible to avoid jeopardy to the species’ continued existence. Moreover, any mitigation measures MTMUS and the City have developed must be included in a “habitat conservation plan” and a binding incidental take permit issued by the U.S. Fish and Wildlife Service (“Service”). Only by adhering to the ESA’s substantive and procedural requirements can any mitigation measures be subjected to review by the Service to assess whether they are adequate, and why stronger conservation measures could not be implemented.

¹ The Center for Biological Diversity is a national, non-profit organization dedicated to protecting native species and their habitats through science, policy, and environmental law. The Center has more than a million members and e-activists from Alabama and throughout the United States who are concerned with protecting species like the spring pygmy sunfish from extinction.

² When the Service proposed listing the spring pygmy sunfish as threatened, it acknowledged that the species “is currently facing threats from planned, large-scale . . . industrial projects and ongoing development within the vicinity of the Beaverdam Spring/Creek watershed.” 77 Fed. Reg. 60,180, 60,184 (Oct. 2, 2012).

MTMUS and the City must apply for an ESA Section 10 incidental take permit by preparing a habitat conservation plan that is subject to review by the Service.³

If MTMUS and the City continue to move forward with construction of the Project as it is currently proposed, the Center intends to commence a civil action against MTMUS and the City for violations of Section 9 of the ESA and will seek declaratory and injunctive relief as well as reasonable litigation costs and attorneys' fees.

I. The Endangered Species Act

Congress enacted the ESA to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and to implement] a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). Primary among the ESA’s protections is the prohibition against the “take” of a listed species, set forth in Section 9 of the Act. *Id.* § 1538(a)(1)(B). Take means “to harass, harm, pursue, hunt, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). The term “harass” means “an intentional or negligent omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm” means “an act which actually kills or injures wildlife,” including “significant habitat modification or degradation where it actually kills or injures wildlife by impairing essential behavioral patterns including breeding, feeding, or sheltering.” *Id.* The ESA’s legislative history supports “the broadest possible” reading of take. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704–05 (1995). “Take” includes direct as well as indirect harm and need not be purposeful. *Id.* at 704; *see also Nat’l Wildlife Fed’n v. Burlington No. R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994).

A person who knowingly carries out activities that take endangered or threatened species are liable for take and subject to civil and criminal penalties, including fines and imprisonment.⁴ 16 U.S.C. § 1540(a), (b) (authorizing civil fines of up to \$25,000 per violation and criminal penalties of up to \$50,000 and imprisonment for one year); *Bennett v. Spear*, 520 U.S. 154, 170 (1997) (“[A]ny person’ who knowingly ‘takes’ an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.”); *Babbitt*, 515 U.S. at 697 (upholding interpretation of the term “take” to include significant habitat degradation). In addition, courts have repeatedly held that government actions authorizing third parties to engage in harmful activities can constitute an illegal taking under Section 9 of the ESA. *See Strahan v. Coxe*, 127 F.3d 155, 158, 163–64 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998) (holding state agency caused takings of the endangered right whale because it “licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result

³ This letter is provided to MTMUS and the City of Huntsville in accordance with the 60-day notice requirement of the ESA’s citizen-suit provision and to the extent such notice is deemed necessary by a court. 16 U.S.C. § 1540(g)(2).

⁴ “Person” is defined in the ESA to include “an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.” 16 U.S.C. § 1533(13).

in violation of [the ESA]”); *Defenders of Wildlife v. Admin’r, Env’tl. Prot. Agency*, 882 F.2d 1294, 1300–01 (8th Cir. 1989) (holding federal agency caused takes of endangered black-footed ferret through its “decision to register pesticides” even though other persons actually distributed or used the pesticides); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008) (holding state agency liable for take under the ESA for its licensing and regulation of trapping that resulted in the incidental take of Canada lynx); *Loggerhead Turtle v. Cnty. Council of Volusia Cnty.*, 148 F.3d 1231, 1253 (11th Cir. 1998) (holding county’s inadequate regulation of beachfront artificial light sources may constitute a taking of turtles in violation of the ESA).

Section 10 of the ESA provides an exception to the take prohibition, allowing the take of a listed species where the Service, which receives delegated authority from the Secretary of the Department of Interior, issues a permit authorizing the take. 16 U.S.C. § 1539. If the “taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,” such as take associated with construction, development, or operation of an industrial site, the person intending to cause the take must first apply to the Service for an incidental take permit. *Id.* § 1539(a)(1)(B). To receive a permit, the applicant must submit a habitat conservation plan to the Service that specifies the “impact which will likely result from such taking” and provides “steps the applicant will take to minimize and mitigate such impacts,” “to the maximum extent practicable,” to ensure the project will not “appreciably reduce the likelihood of the survival and recovery of the species in the wild.” *Id.* § 1539(a)(2)(A)(i)–(iv), (B). In addition, an applicant must satisfy the Service that there is adequate funding available to implement the proposed minimization and mitigation measures, alternatives to the planned activities that would minimize or avoid take and why they are not being utilized, *id.* § 1539(a)(1)(B)(2)(iii), and any other assurances deemed necessary to minimize and avoid take of sunfish, *id.* § 1539(a)(1)(B)(2)(iv). Once an applicant receives an incidental take permit, the applicant is protected from take liability so long as it complies with the minimization and mitigation measures set forth in the habitat conservation plan.

The ESA authorizes private enforcement of unpermitted take in violation of the take prohibition through a broad citizen-suit provision. “[A]ny person may commence a civil suit on his own behalf to enjoin any person . . . who is alleged to be in violation of any provision of [the ESA]” *Id.* § 1540(g). Citizens may seek to enjoin both present activities that result in take as well as future activities that are reasonably likely to result in take. *National Wildlife Fed’n v. Burlington Northern Railroad*, 23 F.3d 1508, 1511 (9th Cir. 1994). The ESA’s citizen suit provision also provides for the award of costs of litigation, including reasonable attorney and expert witness’ fees. 16 U.S.C. § 1540(g)(4).

Furthermore, Section 7(d) of the ESA provides that any applicant for a federal permit “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” *Id.* § 1536(d). The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of the ESA Section 7 consultation requirements that federal agencies must comply with when they authorize, fund, or carry out a federal action such as issuing a permit. The Section 7(d) prohibition remains in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) to ensure that the action will not result in jeopardy to listed species or adverse modification of critical habitat.

II. The Spring Pygmy Sunfish

The spring pygmy sunfish (*Elassoma alabamae*) is a tiny, striped fish that rarely grows longer than one inch. It lives exclusively in dense, underwater plants surrounding springs, spring runs, and spring-fed wetlands in a small area of the Tennessee River Watershed in northwest Alabama. Male spring pygmy sunfish are striking dark to black, with iridescent blue-green sides, cheeks, and gill covers. During mating season, they are known for their dance-like courtship, which involves intricate fin undulations, vertical bobbing, weaving, and “dashing.”

The spring pygmy sunfish relies on springs and spring-fed ecosystems to survive. Free-flowing springs support the dense underwater plants that the fish uses for shelter and where it forages for small, macroinvertebrate prey. Consistent, natural spring flows allow the sunfish to migrate between spring pools, which ensures genetic diversity necessary for the species to persist. To support all these important habitat features for feeding, breeding, and sheltering, the spring pygmy sunfish requires naturally flowing, relatively cool, clear (low turbidity), chemically neutral water with sufficient levels of dissolved oxygen.⁵

Since the spring pygmy sunfish’s discovery in 1937, its populations have been in decline. Habitat degradation caused by human development and agriculture extirpated the sunfish from two of the three natural spring systems it once inhabited, leaving one of the only remaining native populations in a single spring system around the Beaverdam Spring and Creek. Efforts to reintroduce the fish to the degraded springs it once inhabited have failed. While another population of spring pygmy sunfish was recently discovered near Wheeler National Wildlife Refuge, its size and status are unknown.

Due to the spring pygmy sunfish’s precipitous decline and the looming threat of urban sprawl from the City of Huntsville in the Beaverdam Spring and Creek watershed, on November 24, 2009, the Center formally submitted a petition asking the Service to protect the spring pygmy sunfish under the Endangered Species Act.⁶ On October 2, 2013, the Service listed the spring pygmy sunfish as threatened. 78 Fed. Reg. 60,766, 60,667 (Oct. 2, 2013). At the time, the Service highlighted a significant and imminent threat from the conversion of rural lands to urban and industrial development in the Beaverdam Spring and Creek Complex watershed, characterizing development of this area as “detrimental to the spring pygmy sunfish” because it would change water quality, quantity, and velocity to such an extent that it would harm—*i.e.*, cause take of—sunfish. 77 Fed. Reg. 60,180, 60,184 (Oct. 2, 2012).

III. The Toyota-Mazda Auto Plant

In January 2018, Toyota Motor North America and Mazda Motor, Co. (now the joint venture MTMUS) announced that they would jointly build a 1.6-billion-dollar automobile assembly plant on 2,500 acres of Tennessee Valley Authority-certified land outside Huntsville, Alabama, known

⁵ The Service provides specific habitat and water quality necessary to support the spring pygmy sunfish at 77 Fed. Reg. at 60,194–95.

⁶ Center for Biological Diversity, Petition to List the Spring Pygmy Sunfish as Endangered under the Endangered Species Act (Nov. 2009), https://www.biologicaldiversity.org/species/fish/spring_pygmy_sunfish/pdfs/CBD_Spring_Pygmy_Sunfish_ESA_petition.pdf.

as the “Huntsville Mega Site.”⁷ The Auto Plant will require approximately 4,000 employees and will have the capacity to produce 300,000 vehicles per year.⁸ The site for the proposed Project is directly adjacent to and within the watershed of the Beaverdam Spring and Creek Complex, which the Service identified and proposed to protect as occupied “critical habitat” in 2012.⁹ 77 Fed. Reg. at 60,196–97. The Beaverdam Spring and Creek Complex encompasses Beaverdam, Horton, Moss, and Thorsen springs. 77 Fed. Reg. at 60,196. The Project is directly adjacent to Moss Spring, and in close proximity to Beaverdam and Horton springs and their spring runs and wetlands.

The City of Huntsville has started vegetation removal, site grading, and earth moving at the Project site at MTMUS’s direction. MTMUS intends to commence construction of the Auto Plant facility in October 2018.¹⁰

Upon information and belief, neither the City of Huntsville nor MTMUS have prepared an ESA Section 10 habitat conservation plan for the Auto Plant to avoid, minimize, and, mitigate impacts to the threatened spring pygmy sunfish, and have not applied for or received an incidental take permit for the ongoing, imminent, and future take that the construction and operation of the Auto Plant will cause—indeed, is already causing.

The City of Huntsville has indicated its plan to transfer two candidate conservation agreements with assurances (“CCAAs”) and associated permits, which the Service initially granted to landowners “Sewell and McDonald,” to the City, and then transfer both CCAAs and associated permits to Mazda-Toyota, under the mistaken belief the CCAA and permits—which were authorized to cover take of sunfish caused by agricultural activities—may also cover Mazda-Toyota’s plans to develop and operate the Auto Plant.¹¹ The “Candidate Conservation Agreement with Assurances for the Spring Pygmy Sunfish Between the Belle Mina Farm, Ltd. and the U.S. Fish and Wildlife Service” (“Belle Mina Farm CCAA”), dated June 7, 2012, and the “Candidate Conservation Agreement with Assurances for the Spring Pygmy Sunfish Between Greenbriar Enterprises, L.L.C. et al. and the U.S. Fish and Wildlife Service” (“McDonald Farm CCAA”), dated November 13, 2013, and these CCAAs’ associated ESA Section 10(a)(1)(A) enhancement of survival permits, are tailored to agricultural activities associated with two farms on the Project site.¹² Thus, these CCAAs and permits issued under Section 10(a)(1)(A) are substantively and legally insufficient to cover “incidental take” from activities associated with constructing and operating an industrial auto plant, which may only be permitted under the

⁷ City of Huntsville, Huntsville Lands \$1.6 Billion Toyota-Mazda Manufacturing Plant (Jan. 10, 2018), <https://www.huntsvilleal.gov/huntsville-lands-1-6-billion-toyota-mazda-manufacturing-plant/>. The site is located north of the intersection of Old Highway 20 and Powell Road in Huntsville.

⁸ *Id.*

⁹ Critical habitat is habitat that is “essential to the conservation of the species” and which “may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A).

¹⁰ William Thornton, Construction of \$1.6 billion Mazda-Toyota plant to begin by Oct. 1, Ivey Says (Apr. 26, 2018) https://www.al.com/business/index.ssf/2018/04/construction_of_mazda-toyota_p.html.

¹¹ Joshua Gauntt, *Could a Small Fish Impact Construction of the Toyota Mazda Site in Huntsville?* WBRC Fox 6 News, Apr. 10, 2018, <http://www.wbrc.com/story/37927624/could-a-small-fish-impact-construction-of-the-toyota-mazda-site-in-huntsville>.

¹² Copy of Belle Mina Farms CCAA available at: https://ecos.fws.gov/docs/plan_documents/tcca/tcca_972.pdf; Copy of McDonald Farm CCAA available at: https://ecos.fws.gov/docs/plan_documents/ccaa/ccaa_1045.pdf.

incidental take permitting authority following development of a sufficient habitat conservation plan.¹³ *Id.* § 1539(a)(1)(B).

IV. Take of the Spring Pygmy Sunfish from Construction and Operation of the Toyota-Mazda Automobile Plant

Construction activities at the Project site, including vegetation removal, land clearing, and earth moving, are causing increased sedimentation and turbidity in the spring pygmy sunfish's adjacent spring ecosystems, one of the only places the species still persists. *See* 77 Fed. Reg. at 60,183. As the Service has previously emphasized, construction harms the spring pygmy sunfish because land clearing causes more storm-water runoff and sediment to enter waterways than otherwise would occur, thereby harming spring pygmy sunfish and the submerged vegetation it needs to survive. *Id.* at 60,185. Because submerged vegetation moderates water temperature in the springs and provides shelter, egg substrate, and foraging sites, the decline in submerged vegetation caused by this sedimentation and storm-water runoff is significantly impairing the spring pygmy sunfish's essential feeding, breeding, and sheltering activities. *Id.*

Construction and operation of this industrial Mega Site development adjacent to the Beaverdam Spring and Creek system will also decrease water quantity by limiting percolation of water into the aquifer that supplies Beaverdam Creek, and increasing peak flows during storm events. *Id.* at 60,183. Construction of water-impermeable roofs, pavements, parking surfaces, and road surfaces prevents "aquifer recharge," which reduces spring flow, thereby limiting the species' ability to move throughout the system, breed, and feed. *Id.* Meanwhile, impermeable surfaces change storm-water flow rates from slow and gradual to fast and concentrated, uprooting vegetation and destroying important foraging, spawning, and refuge habitat for the species. *Id.* The construction of impermeable surfaces degrades water quality by directing water via surface routes into specific areas of the springs and creeks, where it will decrease oxygen levels and increase temperature, turbidity, and flow velocity. *Id.* These surface waters will transport other pollutants on the Project site as well.

Even after construction is complete and the Auto Plant is operating, these industrialized areas will continue to disrupt seasonal flow rates and prevent precipitation from infiltrating into the soil or draining naturally into the surface water. *Id.* at 60,184. Without this recharge from precipitation, there will be insufficient water for the springs, spring runs, and wetlands that the spring pygmy sunfish needs to survive. Urban and industrial development will further degrade water quality with chemicals and other pollutants, such as fertilizers from landscaping and pollutants from cars and parking lots. *Id.* at 60,185. Indeed, it is for all these reasons that the Service concluded that "[c]hange in land use from rural to urban/industrial within the Beaverdam Spring/Creek area will be detrimental to the spring pygmy sunfish." *Id.* at 60,184.

While certain conservation measures may mitigate take of spring pygmy sunfish, they cannot avoid all take, and to be lawful in any event, must be incorporated into a plan to minimize and

¹³ The appropriate permit to cover incidental take associated with construction and operation of the Auto Plant is a Section 10(a)(1)(B) incidental take permit—not a Section 10(a)(1)(A) enhancement of survival permit—because activities associated with constructing and operating the Auto Plant are wholly unrelated to scientific study or enhancing the survival of the species.

mitigate this incidental take to the greatest extent possible, as Section 10(a)(1)(B) of the ESA requires.

V. Violations of the Endangered Species Act

The ongoing and imminent construction and operation of the Auto Plant is causing and will continue to cause take of spring pygmy sunfish by significantly impairing habitat features that sunfish require for feeding, breeding, and sheltering, without a habitat conservation plan or incidental take permit issued to MTMUS and the City pursuant to Section 10(a)(1)(B) of the ESA, in violation of Section 9 of the ESA. 16 U.S.C. § 1538. Through MTMUS's and the City's site preparation, construction, and operation of the Auto Plant, MTMUS and the City are causing and will continue to cause sedimentation and storm-water runoff, and remove vegetative buffers, to the extent that food, shelter, and breeding are being and will continue to be significantly impaired. MTMUS and the City are also reducing water quantity in the springs by diverting surface waters from the watershed that supplies the sunfish's spring complexes, and degrading the springs' water quality by creating impervious, concrete surfaces, introducing storm-water runoff and other pollutants, causing take the spring pygmy sunfish with these activities as well. While MTMUS's and the City's mitigation measures may reduce or mitigate this take of spring pygmy sunfish, they cannot avoid take altogether, and must be presented to the Service in a proposed habitat conservation plan, and if the conservation plan is deemed adequate by the Service, incorporated into the terms and conditions of an incidental take permit.

Upon information and belief, MTMUS and the City are planning to construct and operate the Auto Plant without an incidental take permit issued pursuant to Section 10(a)(1)(B) of the ESA. Consequently, MTMUS and the City are liable for take that occurs as a result of the construction and operation of the Project.

VI. Conclusion

As this letter explains, MTMUS's and the City's ongoing and imminent plans to construct and operate the Auto Plant are resulting and will continue to result in the violation of Section 9 of the ESA. MTMUS and the City will continue to violate the ESA until they secure a valid incidental take permit and implement a habitat conservation plan that minimizes and mitigates the impacts of the Project. To comply with the ESA, MTMUS and the City must halt all activities that cause or are likely to cause take and immediately apply for and secure an incidental take permit and implement a habitat conservation plan that minimizes take of the spring pygmy sunfish "to the maximum extent practicable" and mitigates "to the maximum extent practicable" any incidental take that cannot be avoided by implementing minimization measures. *Id.* § 1539(a)(2)(B)(ii).

If MTMUS and the City do not bring their activities in connection with the Auto Plant into compliance with the ESA within 60 days, the Center will pursue litigation in federal court to seek appropriate relief to protect the spring pygmy sunfish from imminent take.

Please do not hesitate to contact the undersigned by phone at (727) 755-6950 or email at ebennett@biologicaldiversity.org. We can provide additional information that may allow us to avoid having to resort to seeking the remedies that are provided by the ESA.

Sincerely,

A handwritten signature in cursive script that reads "E.P. Bennett".

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