



Via Electronic and Certified Mail

April 9, 2018

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RE: Sixty-day Notice of Intent to Sue for Violations of the Endangered Species Act Relating to Failure to Designate Critical Habitat for the Spring Pygmy Sunfish

Dear Sirs,

In accordance with Section 11(g) of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), the Center for Biological Diversity (Center) provides this 60-day notice of its intent to sue the U.S. Fish and Wildlife Service (Service) for violations of the ESA¹ in connection with the Service's failure to designate critical habitat for the spring pygmy sunfish (*Elassoma alabamae*). Specifically, the Service violated and continues to be in violation of Section 4 of the ESA, which requires the Service to designate critical habitat concurrently with making a determination that a species is endangered or threatened and within one year of publishing a proposed rule to designate critical habitat.²

On November 24, 2009, the Center submitted to the Service an emergency petition to list the spring pygmy sunfish as endangered and to designate critical habitat. On April 1, 2011, the Service issued a 90-day finding that there was substantial scientific or commercial information indicating listing the spring pygmy sunfish may be warranted.³ On October 2, 2012, the Service published its 12-month finding and a proposal to list the spring pygmy sunfish as threatened and to designate approximately 8 stream miles and 1,617 acres of spring pool and spring-influenced

¹ 16 U.S.C. § 1531, *et seq.*; 50 C.F.R. § 402, *et seq.*

² 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C).

³ 76 Fed. Reg. 18,138 (Apr. 1, 2011).

wetland in Limestone County, Alabama, as critical habitat.⁴ On April 29, 2013, the Service reopened the comment period on the proposed listing and designation of critical habitat for the spring pygmy sunfish and described a proposed reduction to the size of the designated critical habitat from 1,617 acres to 1,549.4 acres, and announced the availability of a draft economic analysis for the critical habitat designation.⁵ On October 2, 2013, the Service issued a final rule listing the spring pygmy sunfish as threatened under the ESA and stated it would “finalize the designation of critical habitat for the spring pygmy sunfish” in a “separate, future rulemaking.”⁶ The October 2013 notice did not provide a timeline for the critical habitat designation other than to say it would be completed “in the near future,” and it did not indicate a need or basis for an extension of time for such designation.⁷ On February 5, 2014, the Service reopened the public comment period on the proposed designation of critical habitat, explaining that it would exclude lands covered by three candidate conservation agreements with assurances entered into by the landowners and the Service.⁸ To date, the Service has not finalized a rule designating critical habitat for the spring pygmy sunfish.

When the Service receives a petition to list a species as endangered or threatened and designate critical habitat, ESA Section 4(b)(3) requires the Service to “make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted” within 90 days of receiving the petition.⁹ If the Service finds the petition presents substantial information, it must “promptly commence a review of the status of the species,”¹⁰ and “[w]ithin 12 months after receiving the petition” it must make a finding that listing is: 1) warranted; 2) not warranted; or 3) warranted but precluded by higher priority listing activities.¹¹

The ESA also requires that the Service designate critical habitat concurrently with its determination to list a species unless such designation is not determinable at the time, in which case the Service may extend the period to designate critical habitat by no more than one year.¹² Additionally, once the Service publishes in the Federal Register notice of a proposed regulation designating critical habitat, it has one year to either: 1) publish “a final regulation to implement such designation”; or 2) if critical habitat is not determinable, publish notice that it is extending the one-year period by no more than one additional year.¹³ If the Service avails itself of an extension because it finds critical habitat is not determinable, it must within one year publish a final regulation designating critical habitat “based on such data as may be available at that time.”¹⁴

The Service has violated the ESA by failing to designate critical habitat within the statutory timeframes required under the Act. First, the Service failed to designate critical habitat for the

⁴ 77 Fed. Reg. 60,180 (Oct. 2, 2012).

⁵ 78 Fed. Reg. 25,033 (Apr. 29, 2013).

⁶ 78 Fed. Reg. 60,766, 60,767 (Oct. 2, 2013).

⁷ *Id.*

⁸ 79 Fed. Reg. 6,871 (Feb. 5, 2014).

⁹ 16 U.S.C. § 1533(b)(3)(A).

¹⁰ *Id.*

¹¹ *Id.* § 1533(b)(3)(B).

¹² *Id.* § 1533(a)(3)(A)(i), (b)(6)(C); 50 C.F.R. §§ 424.12(a), 424.17(b).

¹³ 16 U.S.C. § 1533(b)(6)(A)(ii); 50 C.F.R. § 424.17(a).

¹⁴ 16 U.S.C. § 1533(b)(6)(C)(ii).

spring pygmy sunfish “concurrently” with its October 2, 2013 rule listing the species as threatened. Second, the Service did not publish a final rule designating critical habitat within a year of publishing the proposed rule on October 2, 2012. Based on the statutory timelines, the Service’s designation of critical habitat is more than four and a half years overdue.

The Service did not indicate a lawful need or basis to extend the timeline to designate critical habitat. Even if it had sought a one-year extension, such an extension would have long expired, as more than five years have elapsed since the Service published a proposed rule to designate critical habitat for the spring pygmy sunfish on October 2, 2012, and more than four years have elapsed since the Service published a final rule listing the spring pygmy sunfish on October 2, 2013.

Consequently, the Service has failed to timely designate critical habitat for the spring pygmy sunfish and is in violation of ESA Section 4. The Service will continue to be in violation of the law until it publishes a final rule designating critical habitat for the spring pygmy sunfish. If the Service does not make the required critical habitat designation for the spring pygmy sunfish within the next sixty days, the Center intends to file suit in federal court. Please contact me if you have any questions or if you would like to discuss this matter.

Sincerely,

A handwritten signature in cursive script that reads "Ecp Bennett". The signature is written in black ink on a white background.

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