



Via Facsimile and Certified Mail/Return Receipt Requested

April 13, 2011

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RE: Notice of Intent to Sue, Violations of the Endangered Species Act: Failure to Issue an Emergency Regulation To List the Miami Blue Butterfly as “Endangered”, and Failure to Demonstrate that Listing the Miami Blue is “Warranted But Precluded”, as Required by the Endangered Species Act

This letter serves as official notice by the Center for Biological Diversity (“Center”) of its intent to sue the U.S. Fish and Wildlife Service (“FWS”) and Ken Salazar, Secretary of the U.S. Department of the Interior (“Secretary”), for violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), in connection with the failure of FWS and the Secretary to prevent a significant risk to the well-being of the Miami blue butterfly (*Cyclargus thomasi bethunebakeri*), and issue an emergency rule listing the species as “endangered” under the ESA. In addition, by this notice, the Center informs you that it intends to enforce violations of the ESA in connection with FWS’s most recent determination that listing the Miami blue butterfly is precluded by higher priority listing actions and that FWS is making “expeditious progress” in meeting those priorities. 16 U.S.C. § 1533(b)(3)(B)(iii).

This letter is being provided to you pursuant to the notice requirement of the ESA’s citizen suit provision, to the extent that such notice is deemed necessary by a court. See 16 U.S.C. § 1540(g) (requiring 60 days written notice prior to commencing an ESA citizen suit, “except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants”).

I. Introduction

Almost three decades ago, FWS first recognized that the Miami blue butterfly warrants “endangered” status under the ESA. However, after letting the Miami blue go nearly extinct and following a failed reintroduction effort that was FWS’s justification for not

issuing an emergency listing rule eight years ago, FWS has still failed to comply with its affirmative, mandatory duty to prevent a significant risk to the Miami blue by issuing an emergency rule to list the species under the ESA. 16 U.S.C. § 1533(b)(3)(C)(iii) (placing an affirmative duty on the Secretary to “monitor effectively the status of all species” receiving a “warranted but precluded” 12-month listing determination and “make prompt use of the authority under paragraph 7 to prevent a significant risk to the well being of any such species”); *id.* § 1533(b)(7) (authorizing Secretary to issue a regulation “in regard to any emergency posing a significant risk to the well-being of any species”).

Additionally, despite recognizing that the magnitude of threats and risk of extinction could not be greater – and, thus, there simply can not be any listing activities that could possibly preclude FWS from finally listing this highly-endangered animal under the ESA – in its most recent, recycled Candidate Notice of Review (“CNOR”), FWS failed to demonstrate that listing the Miami blue under the ESA is actually precluded by higher priorities and that it is making “expeditious progress” in meeting any of its listing priorities, as required by the ESA. 75 Fed. Reg. 69,222 (Nov. 10, 2010) (“2010 CNOR”); 16 U.S.C. §§ 1533(b)(3)(B)(iii)(I)-(II).

The Center for Biological Diversity (“Center”) is a national, non-profit conservation organization headquartered in Tucson, Arizona and supported by over 320,000 members and online activists. On January 11, 2011, the Center petitioned FWS and the Secretary to issue an emergency regulation listing the Miami blue butterfly under the ESA.¹ FWS has yet to respond to the Center’s Petition.

II. The Miami Blue Butterfly

First recognized as “endangered” in 1984, and thought extinct in the 1990s, the Miami blue butterfly teeters on the brink of extinction. It faces serious, imminent threats that are the very highest in magnitude and present a significant risk to its very survival, including loss and degradation of habitat, loss of genetic diversity within small, isolated populations, herbivory of host plants by iguanas, mosquito control activities, stochastic weather events, and many other threats.² Despite its highly-precarious status, FWS again

¹ See Center for Biological Diversity, EMERGENCY PETITION TO LIST THE MIAMI BLUE BUTTERFLY (*CYCLARGUS THOMASI BETHUNEBAKERI*) AS ENDANGERED UNDER THE ENDANGERED SPECIES ACT (Jan. 11, 2011) (“Petition”).

² U.S. Fish and Wildlife Service (FWS). Species Assessment and Listing Priority Assignment Form. *Cyclargus thomasi bethunebakeri* Miami blue butterfly. May 2010. Accessed Jan. 4, 2011 at: http://ecos.fws.gov/docs/candforms_pdf/r4/I02Q_I01.pdf (hereinafter “2010 Candidate Assessment and Listing Priority Assignment Form”).

decided in November 2010 that listing of the Miami blue as “endangered” under the ESA was precluded, even while it recognized that the “loss of or additional decline” of one of two remaining metapopulation “would be detrimental to the status of the species”.³ The Miami blue’s uncertain status has continued to decline further, even since FWS made this observation, with one of the two remaining colonies, in Bahia Honda State Park, now apparently extirpated, and the species now struggling to persist in a single, declining population, in the Key West National Wildlife Refuge (KWNWR).⁴

FWS first designated the butterfly as warranting endangered status in 1984, but did not provide protection under the ESA at that time, instead designating the butterfly a “category 2” candidate species. For seven years, the butterfly languished on the candidate list without any substantive protections, until 1991, when FWS deemed it likely extinct and lowered its candidate to “category 3A.” In 1996, FWS eliminated candidate status for all species listed as category 2 or lower, including the Miami blue.

In 1999, however, a colony was discovered in Bahia Honda State Park, and in 2000, the North American Butterfly Association submitted an emergency listing petition for the Miami blue. Two years later, FWS issued a positive-90 day finding on the petition, but again refused to issue an emergency rule to list the species. 67 Fed. Reg. 280 (Jan. 3, 2002).

In 2003, FWS initiated emergency listing, including budgeting the money for the administrative process. See 72 Fed. Reg. 34,657, 34,660 (June 25, 2007) (stating that FWS initiated “[w]ork on assessing the status of the species and preparing a listing rule” in FY 2003 and “considered ... it ... an emergency” but “later decided not to ... emergency list the species”). FWS decided to not issue an emergency listing rule based on a captive breeding and reintroduction effort, *id.*, which failed. 75 Fed. Reg. 69,222, 69,258 (Nov. 10, 2010) (“Reintroduction efforts have not been successful.”). FWS designated the species a candidate for protection in 2005, where it has remained ever since. See *Am. Lands Alliance v. Norton*, 242 F. Supp. 2d 1, 11 (D.D.C. 2003) (calling FWS’s candidate list a “virtual ‘black-hole’” for species that warrant protections as endangered or threatened under the ESA).⁵

³ *Id.*

⁴ Wadlow, K. 2010. Rare Keys butterfly disappears again. KeysNet.com, December 11, 2010. Available at: <http://www.biologicaldiversity.org/news/center/articles/2010/keysnet-12-11-2010.html>.

⁵ Research by the Center for Biological Diversity found that since passage of the ESA at least 24 species had gone extinct after being added to the candidate list.

When it designated the butterfly as a candidate in 2005, FWS assigned it a “Listing Priority Number” (“LPN”) of 6. 70 Fed. Reg. 24,870, 24,872 (May 11, 2005). In the 2010 CNOR, the Miami blue received an LPN of 3 – reflecting the highest possible magnitude of threats and imminence of extinction risk. 75 Fed. Reg. 69,222, 69,258 (Nov. 10, 2010). Yet, in the 2010 CNOR FWS failed to identify any listing activities that take a higher priority than finally listing the highly-endangered Miami blue, let alone show that it is making expeditious progress in meeting such “higher priorities.” As a direct consequence of FWS’s foot-dragging, ESA protection for the Miami blue – which teeters on the brink of extinction – has been delayed for more than 25 years.

III. The Endangered Species Act

Congress enacted the ESA in 1973 to provide “a program for the conservation of ... endangered species and threatened species” and “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). As the first step in the protection of these species, Section 4 of the ESA, 16 U.S.C. § 1533, requires the Secretary to list species as “endangered” or “threatened” when they meet the statutory listing criteria.⁶

FWS must make listing determinations under the ESA based “solely on ... the best scientific and commercial data available”, *id.* § 1533(b)(1)(A), and the following five listing factors:

- (A) the present or threatened destruction, modification, curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1).

The ESA provides two mechanisms for considering species for listing. First, the Act requires FWS to identify and propose for listing those species that require listing under

⁶ The ESA defines “species” to mean “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16). A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range,” *id.* § 1532(6), and is “threatened” if it is likely to become endangered within the foreseeable future. *Id.* § 1532(20).

the five criteria in Section 4(a)(1). 16 U.S.C. § 1533(a)(1). If FWS determines that a species warrants listing as threatened or endangered, but decides not to list the species, the agency places the species on the “candidate” list. Candidate species receive none of the protections afforded to listed species under the ESA. 50 C.F.R. §424.15(b); see also *Am. Lands Alliance*, 242 F. Supp. 2d at 11 (calling candidate list a “virtual ‘black-hole’” for species).

Second, any “interested person” can petition FWS to add a species to the endangered or threatened species lists. When FWS receives a petition, it is required to determine, within 90 days, whether the petition presents substantial information such that listing “may be warranted” (“90-day finding”). 16 U.S.C. § 1533(b)(3)(A). If FWS makes a positive 90-day finding, it must then make one of three possible “12-month” findings within 12 months: warranted, not warranted, or “warranted but precluded.” *Id.* § 1533(b)(3)(B).

For any “warranted-but-precluded” 12-month finding, FWS must demonstrate that listing the species is actually precluded by higher priority listing activities, and that FWS is making “expeditious progress” in completing such higher priorities. *Id.* § 1533(b)(3)(B)(iii). Species for which listing is “warranted but precluded” receive none of the protections afforded listed species under the ESA. A “warranted but precluded” finding is subject to judicial review. *Id.* §1533(b)(3)(C)(ii).

Additionally, for any petition regarding which FWS has made a “warranted but precluded” finding, the ESA requires FWS to make annual findings determining listing of the species continues to be “warranted but precluded.” *Id.* § 1533(b)(3)(C)(i). Such annual findings are referred to as “recycled petition findings” and must be made until FWS publishes a proposed rule listing the species as threatened or endangered, or makes a determination that listing is not warranted. Recycled petition findings are made via FWS’s CNORs. See 67 Fed. Reg. 40,664 (June 13, 2002).

FWS adds all petitioned species subject to a “warranted but precluded” finding to the candidate species list. 67 Fed. Reg. 40664 (June 13, 2002). In the CNOR, FWS issues a listing priority number to each candidate species.

In 1983, FWS issued guidance for prioritizing candidate species for listing. 48 Fed. Reg. 43,098 (Sep. 21, 1983). Under this system, FWS considers three factors in assigning species numerical listing priorities on a scale of 1 to 12, with 1 as the highest priority. The three factors are:

- (a) magnitude of threat;
- (b) immediacy of threat; and
- (c) taxonomic distinctiveness.

Id. at 43,103.

The ESA requires FWS to monitor the status of all species that have received a “warranted but precluded” 12-month finding, and make “prompt use” of the Act’s emergency listing authority to “prevent a significant risk to the well-being of any such species.” 16 U.S.C. § 1533(b)(3)(C)(iii). This duty requires FWS to issue a regulation to protect a species from “any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.” 16 U.S.C. §§ 1533(b)(3)(C)(iii), (b)(7). An “emergency listing” may take effect immediately upon publication of the regulation in the Federal Register, and is effective for 240 days. 16 U.S.C. § 1533(b)(7). Once an emergency listing becomes effective, the species immediately receives the substantive protections afforded to listed species under the ESA.

IV. Violations of the ESA

In the 2010 CNOR, the Miami blue received an LPN of 3 – reflecting the highest possible magnitude of threats and imminence of extinction risk. 75 Fed. Reg. at 69,258. Yet, FWS failed to identify in the 2010 CNOR any listing activities that take a higher priority than listing the highly-endangered Miami blue, let alone show that it is making expeditious progress in meeting such “higher priorities.”

In addition, FWS has failed to meet its affirmative duty to issue an emergency regulation listing the Miami blue butterfly under the ESA, as required by Section 4(b)(3)(C)(iii) of the ESA. 16 U.S.C. § 1533(b)(3)(C)(iii). Although FWS recognized that the Miami blue warrants emergency listing in 2003, it declined to do so based on a captive breeding and reintroduction program that has since failed. Meanwhile, recent information suggests that one of the two colonies where the Miami blue was believed to persist – the Bahia Honda State Park – has been extirpated, leaving the species to struggle to survive in a sole remaining colony in the KWNWR. FWS is under a duty to monitor the status of the Miami blue and issue an emergency regulation to prevent a significant risk to its well-being, but has failed to do so in violation of the ESA.

V. Conclusion

As explained above, the Secretary and FWS have violated and are continuing to violate Section 4 of the ESA as a result of their failure to prevent a significant risk to the well-being of the Miami blue butterfly by issuing an emergency regulation to list the species as endangered under the ESA, and as a result of the 2010 CNOR, by which FWS again assigned the Miami blue butterfly an LPN of 3, but failed to articulate any listing activities that could take a higher priority than actually listing the Miami blue butterfly or that FWS is making expeditious progress in meeting any such higher priorities.

If the Secretary and FWS do not act to correct the violations described in this letter, the Center will pursue litigation against the Secretary and FWS in U.S. District Court following your receipt of this notice. To avoid litigation, the Secretary and FWS must immediately begin to promulgate an emergency regulation to list the Miami blue butterfly under the Endangered Species Act.

If you have any questions, wish to discuss this matter, or feel this notice is in error, please contact me at 503-283-5474. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'AR Atwood', with a stylized flourish at the end.

Amy R. Atwood
Center for Biological Diversity

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