



February 7, 2022

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U.S. Department of the Interior  
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**RE: Sixty-day Notice of Intent to Sue for Violations of the Endangered Species Act Regarding the U.S. Fish and Wildlife Service's Failure to Designate Critical Habitat for Florida Bonneted Bat (*Eumops floridanus*)**

Dear Secretary Haaland and Director Williams,

In accordance with Section 11(g) of the Endangered Species Act (Act), 16 U.S.C. § 1540(g), the Center for Biological Diversity, Tropical Audubon Society, and the Miami Blue Chapter of the North American Butterfly Association provides this 60-day notice of their intent to sue the U.S. Fish and Wildlife Service (Service) for violations of the Act<sup>1</sup> regarding its failure to designate critical habitat for the Florida bonneted bat (*Eumops floridanus*). The Service violated and continues to be in violation of Section 4 of the Act, which requires the Service to designate critical habitat concurrently with its listing determination for the bat,<sup>2</sup> and no later than one year after proposing critical habitat.<sup>3</sup> We provide this letter pursuant to the 60-day notice requirement of the citizen suit provision of the Act, to the extent that such notice is deemed necessary by a court.<sup>4</sup>

## **I. Legal Background**

The Act defines critical habitat as:

(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 a species at the time it was listed . . . upon a determination by [the Services] that such areas are essential for the conservation of the species.<sup>5</sup>

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

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

<sup>3</sup> 16 U.S.C. § 1533(b)(6)(A)(ii)(I).

<sup>4</sup> 16 U.S.C. § 1540(g).

<sup>5</sup> 16 U.S.C. § 1532(5)(A).

“Conservation,” in turn, means recovery of these species “to the point at which the measures provided pursuant to this chapter are no longer necessary.”<sup>6</sup>

Critical habitat provides important protection for imperiled species beyond that provided by listing alone. Pursuant to section 7(a)(2) of the Act, federal agencies must 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.”<sup>7</sup> For species with critical habitat, each federal agency must additionally guarantee that its actions will not “result in the destruction or adverse modification” of the critical habitat.<sup>8</sup>

Section 4 of the Act provides that once the Service publishes in the Federal Register notice of a proposed regulation listing a species, it has one year to either: 1) publish a final regulation that lists the species and finalize critical habitat designation concurrently; or 2) if critical habitat is prudent but not determinable, publish notice that it is extending the one-year period by no more than one additional year.<sup>9</sup> If the Service avails itself of the one-year extension because it finds critical habitat is prudent but not determinable, it must within the additional year publish a final regulation designating critical habitat “based on such data as may be available at that time,” giving the Service a final deadline of two years from the date of publication of the proposed listing to publish a finalized critical habitat rule.<sup>10</sup>

## **II. Florida Bonneted Bat**

Found in tree cavities, buildings, and artificial bat houses, the Florida bonneted bat is the largest bat in Florida.<sup>11</sup> Getting its common name from large, broad ears which project over the eyes, the bat forages in open spaces without dense vegetation, using its speed and agility at night as a “fast hawking” bat to target insects in the absence of background clutter.<sup>12</sup> While flying, the Florida bonneted bat produces relatively loud echolocation calls that can be heard by some humans, unlike the ultrasonic calls of most other North American bats.<sup>13</sup> Florida bonneted bats have been recorded in a variety of habitat types, including “pine flatwoods, pine rocklands, cypress, hardwood hammocks, mangroves, wetlands, rivers, lakes, ponds, [and] canals.”<sup>14</sup> In forested areas, mature trees are essential roosting sites, and the availability of suitable roosting sites is an important habitat requirement.<sup>15</sup>

The Florida bonneted bat has one of the most restricted ranges of any bat species in the New World, consisting of approximately 26 colonies in south and southwest Florida.<sup>16</sup> The greatest

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<sup>6</sup> *Id.* at § 1532(3).

<sup>7</sup> *Id.* at § 1536(a)(2).

<sup>8</sup> *Id.*

<sup>9</sup> 16 U.S.C. § 1533(b)(6)(A)(ii); 50 C.F.R. § 424.12; 50 C.F.R. § 424.17(b)(2).

<sup>10</sup> 16 U.S.C. § 1533(b)(6)(C)(ii).

<sup>11</sup> *Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Florida Bonneted Bat*, 78 Fed. Reg. 61004, 61005 (Oct. 2, 2013).

<sup>12</sup> *Id.* at 61004-06.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 61007.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 61010, 61012.

threats to the species' survival are habitat loss and degradation due to development and climate change effects, including sea-level rise and coastal squeeze.<sup>17</sup> These threats are compounded by the bat's small population size, genetic isolation, slow reproduction, and low fecundity, placing the species at risk of extinction.<sup>18</sup> At the time of listing, all known roosting sites were artificial structures;<sup>19</sup> however in 2014, a biologist discovered a colony of Florida bonneted bats roosting inside a tree cavity in Avon Park Airforce Range.<sup>20</sup> Since then, natural roosts have also been discovered in tree cavities located in Florida Panther National Wildlife Refuge and Big Cypress National Preserve.<sup>21</sup>

On October 4, 2012, as part of a July 12, 2011 settlement agreement with the Center, the Service published a proposed rule to list the Florida bonneted bat as endangered throughout its range, but did not propose critical habitat, instead asserting that designation was not determinable.<sup>22</sup> On October 2, 2013, the Service issued a final rule listing the Florida bonneted bat as endangered under the Act, again stating that critical habitat for the Florida bonneted bat was not determinable.<sup>23</sup> The October 2013 decision did not provide a timeline for designating critical habitat other than to state the Service intended to publish a separate rule designating critical habitat "in the near future," and "within our statutory timeframe."<sup>24</sup>

On October 22, 2018, the Center filed a complaint against the Service for failing to designate "critical habitat" for the Florida bonneted bat concurrently with its decisions to list the species as endangered, or within one additional year from the dates of proposed listing after making a "not determinable" finding.<sup>25</sup> As a result of the lawsuit, the Service agreed to submit a proposed determination concerning the designation of critical habitat for the Florida bonneted bat to the office of the Federal Register for publication on or before May 15, 2020.<sup>26</sup> On June 9, 2020, the Service published a proposed regulation in the Federal Register proposing to protect 1.5 million acres as critical habitat for the Florida bonneted bat.<sup>27</sup> More than one year has passed since the Service published its proposed critical habitat determination for the Florida bonneted bat and the Service has not published a final critical habitat determination.<sup>28</sup>

### **III. Violation of the Endangered Species Act**

The Service is in violation of the Act by failing to designate critical habitat for the Florida bonneted bat within the statutory timeframes required under the Act. The Service failed to

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<sup>17</sup> *Id.* at 61004.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* At 61007.

<sup>20</sup> National Park Service, *Florida bonneted bat*, <https://www.nps.gov/ever/learn/nature/flbonnetedbat.html>.

<sup>21</sup> Ridgley, Frank, *Discovering Our Endangered Neighbor*, <https://www.zoomiami.org/florida-bonneted-bat>.

<sup>22</sup> *Endangered and Threatened Wildlife and Plants; Proposed Endangered Species Status for the Florida Bonneted Bat*, 77 Fed. Reg. 60750, 60750 (Oct. 4, 2012).

<sup>23</sup> 78 Fed. Reg. at 61004.

<sup>24</sup> *Id.* at 61004, 61022.

<sup>25</sup> *Center for Biological Diversity et al. v. Zinke et al.*, Case 1:18-cv-02407 (D.D.C. Oct. 22, 2018).

<sup>26</sup> *Id.* at DE 13.

<sup>27</sup> *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Florida Bonneted Bat*, 85 Fed. Reg. 35510 (June 10, 2020).

<sup>28</sup> 16 U.S.C. § 1533(b)(6)(A)(ii)(I).

designate critical habitat “concurrently” with its October 2, 2013 rule listing the species as endangered. The Service then missed its October 4, 2014 deadline to designate critical habitat within an additional year from the date of the proposed listing rule. The Service has also failed to publish a final critical habitat more than a year after publishing its proposed critical habitat rule on June 10, 2020.

Consequently, the Service has failed to timely designate critical habitat for the Florida bonneted bat and is in violation of Section 4 of the Act. The Service will continue to be in violation of the law until it publishes final rules designating critical habitat for the Florida bonneted bat. If the Service does not remedy the violation, we intend to file suit in 60 days. Please contact me at 727-490-9190 or [jlopez@biologicaldiversity.org](mailto:jlopez@biologicaldiversity.org) to discuss this matter.

Sincerely,

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

Jaclyn Lopez  
Center for Biological Diversity  
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St. Petersburg, FL 33731

RE: Sixty-day Notice of Intent to Sue for Violations of the Endangered Species Act Relating  
to Failure to Designate Critical Habitat for the Florida Bonneted Bat