

**Born Free USA • Center for Biological Diversity • Humane Society International
• Humane Society of the United States • Natural Resources Defense Council •**

November 13, 2019

Via Electronic and Certified Mail

Secretary David Bernhardt
U.S. Department of the Interior
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Ms. Margaret Everson
Principal Deputy Director Exercising the
Authority of the Director
U.S. Fish and Wildlife Service
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**Re: Notice of Intent to Sue for Failure to Issue 12-Month Finding on Petition to List
Seven Pangolin Species Under the Endangered Species Act**

Dear Secretary Bernhardt and Principal Deputy Director Everson,

The Center for Biological Diversity, Born Free USA, Humane Society International, the Humane Society of the United States, and the Natural Resources Defense Council (collectively, “Conservation Groups”) hereby notify you that we intend to file a lawsuit against the U.S. Department of the Interior and U.S. Fish and Wildlife Service (collectively, “the Service”) for violating the Endangered Species Act (“ESA”) and the Administrative Procedure Act (“APA”). Specifically, the Service: (1) failed to issue a 12-month finding on a July 15, 2015 petition to list seven pangolin species as endangered under the ESA; and (2) unreasonably delayed its response to a separate petition requesting that the Service treat the same pangolin species as endangered under ESA Section 4(e). 16 U.S.C. § 1533(b)(3)(B), (e). We provide this letter pursuant to the ESA’s citizen suit provision, and we intend to seek a judicial order to compel the Service’s action if the Service does not remedy these violations within the next 60 days. *Id.* § 1540(g).

A. Endangered Species Act

Congress enacted the ESA in 1973, responding to growing concern over the loss of biodiversity from “economic growth and development untempered by adequate concern and conservation.” 16 U.S.C. § 1531(a). To that end, the ESA establishes a comprehensive statutory program to conserve imperiled species and their habitats. The ESA sets forth a process to identify species that are “endangered” or “threatened” with extinction. *Id.* § 1533(a)-(c). The statute then generally bars the “take,” “import,” “export,” and “sale” of endangered species and further requires agencies to “utilize their authorities” to carry out “programs for the

conservation” of listed species and ensure their actions do not jeopardize listed species’ continued existence. *Id.* §§ 1538(a), 1536(a). Congress described the listing process as “[t]he cornerstone of effective implementation” of the ESA. S. Rep. No. 418, 97th Cong., 2d Sess. at 10; *see also* H. Rep. No. 567, 97th Cong., 2d Sess. at 10 (describing section 4 of the ESA, 16 U.S.C. § 1533).

The Service is required to list a species as endangered or threatened if it determines that the species is facing extinction due to, *inter alia*, “present or threatened destruction, modification or curtailment of a species’ habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; . . . [or] the inadequacy of existing regulatory mechanisms.” 16 U.S.C. § 1533(a)(1). Under the ESA, a species is “endangered” if it is “in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6); 50 C.F.R. § 424.02(e). A species is “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20); 50 C.F.R. § 424.02(m). In making listing decisions, the Service must rely “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b).

“Any interested person” may submit a petition to list a species under the ESA, 50 C.F.R. § 424.14(a), which triggers a series of mandatory deadlines for the Service, pursuant to ESA Section 4(b). 16 U.S.C. § 1533(b); *Friends of Animals v. Ashe*, 808 F.3d 900, 903 (D.C. Cir. 2015). Within 90 days of receiving a petition, the Service must determine whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(h)(1). If the Service makes a positive 90-day finding, the Service must conduct a full scientific review of the species’ status. 16 U.S.C. § 1533(b)(3)(A). Then, within 12 months of the date it receives the petition, the Service “shall” make one of three findings: (1) listing is warranted; (2) listing is not warranted; or (3) listing is warranted but presently precluded by other pending listing proposals, provided other circumstances are met. *Id.* § 1533(b)(3)(B); 50 C.F.R. § 424.14(h)(2). If the Service finds listing is warranted, the Service must promptly publish a proposed rule to list the species, with a final rule due within one year of that publication. 16 U.S.C. § 1533(b)(3)(B), (6).

Additionally, ESA Section 4(e) states that the Service may “treat any species as . . . endangered . . . or threatened . . . even though it is not listed” as such. *Id.* § 1533(e). To do so, the Service must find: (a) the non-listed species “so closely resembles in appearance, at the point in question, a species” listed as threatened or endangered “that enforcement personnel would have substantial difficulty” differentiating the species; (b) the species’ resemblance “is an additional threat to an endangered or threatened species;” and (c) “such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of” the ESA. *Id.*; 50 C.F.R. § 17.50(a), (b).

B. The Seven Pangolin Species

Pangolins are the most heavily trafficked, non-human mammal in the world, with an estimated 300 individuals poached every day for their scales and meat, totaling more than a million between 2004 and 2014 alone. There are eight pangolin species worldwide—four in sub-Saharan Africa and four in Asia—and only one is currently protected under the ESA: the

Temminck’s ground pangolin (*Manis temminckii*).¹ Yet all pangolin species are classified as Threatened with extinction by the International Union for Conservation of Nature (two as Critically Endangered, two as Endangered, and four as Vulnerable), and all species are threatened by illegal wildlife trafficking and habitat destruction. ESA protections are urgently needed for the seven species that remain unprotected by the ESA: the Chinese pangolin (*M. pentadactyla*), Sunda pangolin (*M. javanica*), Philippine pangolin (*M. culionensis*), Indian pangolin (*M. crassicaudata*), tree (or white-bellied) pangolin (*M. tricuspis*), giant ground pangolin (*M. gigantea*), and long-tailed (or black-bellied) pangolin (*M. tetradactyla*).²

Pangolins are the only mammal with scales, which are made of keratin. They have extremely long tongues and a keen sense of smell, enabling them to find and consume their primary food sources: termites and ants. They are shy, mostly nocturnal animals that curl into a ball when threatened, which is an effective defense against most predators, but ineffective when it comes to human poachers. Although pangolins are highly unique creatures, the species are difficult to distinguish from one another, particularly in their most-commonly-traded form: whole or powdered scales.

Most pangolins taken from the wild are destined for markets in China and Vietnam, where it is erroneously believed that pangolin scales cure a range of ailments, and where pangolin meat and fetuses are consumed as a display of social status and wealth. Historically, the United States was a large market for pangolin leather products, and some of that market remains today, with a 2019 study documenting ongoing trade in pangolin leather products on eBay.³ Another recent report found the United States had 127 pangolin trafficking incidents between 2010 and 2015—second only to China.⁴

All pangolin species were included on Appendix I of the Convention on International Trade in Endangered Species (“CITES”) in 2016. However, several recent seizures highlight the staggering number of pangolins still being trafficked, including more than 28 tons (25.6 tonnes) of scales confiscated during two seizures in April 2019 in Singapore—representing an estimated

¹ The CITES Parties and the Service use the genus *Manis* for all pangolin species, while the IUCN follows Gaudin et al. (2009), which considers the species to reside in three genera: *Manis*, *Phataginus*, and *Smutsia*. Accordingly, the IUCN refers to the Temminck’s ground pangolin as *Smutsia temminckii*, while the Service refers to the species as *M. temminckii*.

² The IUCN includes the tree (or white-bellied) pangolin and long-tailed (or black-bellied) pangolin in the genus *Phataginus* and the giant ground pangolin in the genus *Smutsia*.

³ Heinrich, S. et al. 2019. Of cowboys, fish, and pangolins: US trade in exotic leather. *Conservation Science and Practice*. 2019, e75.

⁴ Heinrich, S., et al. 2017. The Global Trafficking of Pangolins: A comprehensive summary of seizures and trafficking routes from 2010–2015. TRAFFIC, Southeast Asia Regional Office, Petaling Jaya, Selangor, Malaysia.

38,000 individual pangolins.⁵ These seizures followed two in Malaysia in February 2019 that contained around 33 tons (30 tonnes) of pangolin carcasses, live pangolins, and pangolin scales.⁶

While the largest threat to pangolins is the illegal wildlife trade, habitat destruction is also causing serious harm. Deforestation is occurring at a rapid rate in Africa for the oil, logging, and mining industries, increasing road density and causing habitat fragmentation. In Asia, logging and the conversion of forests to fiber and palm oil plantations are causing major habitat loss and increased poaching.

C. The Petitions and Procedural History

Several of the Conservation Groups submitted a petition to list the seven pangolin species as endangered on July 15, 2015. The petition was based on numerous factors that are putting pangolins at serious risk of extinction, including overutilization and international trade; habitat destruction; and inadequate regulatory mechanisms. 16 U.S.C. § 1533(a)(1). Also on July 15, 2015, those same groups submitted a second petition, pursuant to ESA Section 4(e), requesting that the Service issue a rulemaking to treat the seven pangolin species as endangered based on their similarity in appearance to the ESA-listed Temminck's ground pangolin. *Id.* § 1533(e). The Service issued a combined, positive 90-day finding on the two petitions on March 16, 2016, in which it determined that listing all seven pangolin species may be warranted due to the factors identified in the petitions. *Id.* § 1533(a)(1)(A)-(B), (D)-(E); 81 Fed. Reg. 14,058 (Mar. 16, 2016).

D. The Service's Legal Violations

Because the groups submitted their petition to list the seven pangolin species on July 15, 2015, under the ESA, the Service's 12-month finding was due by July 15, 2016. 16 U.S.C. § 1533(b)(3)(B). The ESA offers no discretion to delay past the one-year mark, *Friends of Animals*, 808 F.3d at 903, yet the Service has failed to issue a 12-month finding to date, and it is now more than three years overdue. Through this delay, the Service is both denying key conservation measures that would reduce threats confronting pangolins and violating its mandatory duties under the ESA. 16 U.S.C. § 1533(b)(3)(B).

The groups also submitted a petition requesting a rulemaking to treat the seven pangolin species as endangered under ESA Section 4(e) on July 15, 2015, more than four years ago. The APA requires each agency to conclude a petition for rulemaking "within a reasonable time." *Env'tl. Integrity Project v. U.S. EPA*, 160 F. Supp. 3d 50, 57 (D.D.C. 2015); 5 U.S.C. § 555(b), (e). In addition to violating the deadlines mandated under the ESA, the Service has also unreasonably delayed its response to the ESA Section 4(e) petition, in violation of the APA.

Pangolin populations cannot sustain the extreme levels of illegal trafficking and habitat loss occurring today, and it is essential for the Service to help stem and reverse these problems before it is too late. ESA protections would give the Service additional resources to investigate

⁵ Annabelle Liang, *Busts in Asia Reveal Scales from 38,000 Endangered Pangolins*, Associated Press, April 10, 2019, <https://www.apnews.com/800bd22abfc54dfc9a3564f5ddd20b83>.

⁶ *Malaysia makes record 30-tonne pangolin seizure*, The Straits Times, Feb. 12, 2019, <https://www.straitstimes.com/asia/east-asia/malaysia-makes-record-30-tonne-pangolin-seizure>.

and prevent trafficking and sale of pangolin products in the United States and to protect pangolin habitat, open additional funding opportunities for pangolin conservation, and send a strong message worldwide that pangolins deserve the strongest possible protections.

CONCLUSION

Time is running out to prevent the extinction of these incredibly unique animals. The Conservation Groups urge the Service to remedy its ongoing, unlawful delay and promptly publish its 12-month finding and respond to the pangolin petitions, as required by law. If the Service does not act within 60 days to correct this violation, the Conservation Groups will bring suit against the Service in federal court. Please contact us if you have any questions or would like to discuss this issue. Thank you for your attention to this critical matter.

Sincerely,



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