



Sent via electronic mail and certified mail

January 6, 2021

Aurelia Skipwith, Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240
aurelia.skipwith@fws.gov

David Bernhardt, Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240
exsec@ios.doi.gov

RE: 60-Day Notice of Intent to Sue Regarding Violations of the Endangered Species Act in Failing to Designate Critical Habitat for Eight Florida Plants

Dear Director Skipwith and Secretary Bernhardt,

This letter serves as the Center for Biological Diversity's sixty-day notice of intent to sue the U.S. Fish and Wildlife Service (Service) over violations of Section 4 of the Endangered Species Act (Act), 16 U.S.C. § 1531 *et seq.* Specifically, the Service has failed to designate critical habitat for Big Pine partridge pea (*Chamaecrista lineata* var. *keyensis*), Blodgett's wild mercury (*argythamnia blodgetti*), sand flax (*linum arenicola*), wedge spurge (*Chamaesyce deltoidea* ssp. *serpyllum*), Everglades bully (*Sideroxylon reclinatum* ssp. *austrofloridense*), Florida pineland crabgrass (*Digitaria pauciflora*), Florida prairie-clover (*Dalea carthagenesis* var. *floridana*), and pineland sandmat (*Chamaesyce deltoidea* ssp. *pinetorum*). *Id.* §§ 1533(a)(3)(A), 1533(b)(6)(C). The Service's failure deprives these Florida plants important protections and puts them at further risk of extinction. This letter is provided 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. *Id.* § 1540(g).

A. The ESA Requires the Service Immediately Designate Critical Habitat for These ESA-Listed Florida Plants

In enacting the ESA, Congress recognized that certain species "have been so depleted in numbers that they are in danger of or threatened with extinction." *Id.* § 1531(a)(2). Accordingly, a primary purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species." *Id.* § 1531(b).

To accomplish these goals, Congress amended Section 4 of the ESA in 1978 to mandate that, when the Service lists a species as endangered or threatened, the Service generally must also concurrently designate critical habitat for that species. Section 4(a)(3)(A)(i) of the Act now states

that, “to the maximum extent prudent and determinable,” the Service “shall, concurrently with making a determination . . . that a species is an endangered species or threatened species, designate any habitat of such species which is then considered to be critical habitat.” *Id.* § 1533(a)(3)(A); see also *id.* § 1533(b)(6)(C).¹

Section 3 of 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 the species at the time it was listed . . . upon a determination by [the Service] that such areas are essential for the conservation of the species. 16 U.S.C. § 1532(5)(A).

“Conservation,” in turn, means recovery of the species “to the point at which the measures provided pursuant to this chapter are no longer necessary.” *Id.* § 1532(3).

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.” *Id.* § 1536(a)(2). 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. *Id.*

When critical habitat is prudent, but not determinable at the time of final listing, the Service may take one additional year to designate critical habitat, giving the Service two years from the proposed listing to finalize the critical habitat designation. *Id.* 1533(b)(6)(C)(ii). The Act requires publication of a finalized critical habitat rule no later than this two-year deadline, “based on such data as may be available at that time.” *Id.*

B. Violations of the Act

The Service’s failure to designate critical habitat for the eight Florida plants constitutes a violation of the Act.

The Service proposed listing the Big Pine partridge pea, Blodgett’s wild mercury, sand flax, and wedge spurge under the ESA on September 29, 2015, but did not propose designating critical habitat at that time, stating that critical habitat was “not determinable because the specific

¹ The Service may only find that it is “not prudent” to designate critical habitat for a species where designating critical habitat would either increase the degree of threat to a species or would not be beneficial to the species. 50 C.F.R. § 424.12(a)(1)(i)-(ii) (2011). As Congress made clear when it passed the ESA, it only intended the Service to invoke the “not prudent” exception to designating critical habitat in “rare circumstances.” H.R. Rep. No. 95-1625 at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467. See *Natural Res. Def. Council v. U.S. Dept. of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997).

information sufficient to perform the required analysis of the impacts of the designation is currently lacking.” 80 Fed. Reg. 58536, 58566. The Service listed the Big Pine partridge pea, Blodgett’s wild mercury, sand flax, and wedge spurge under the ESA on September 29, 2016, however did not designate critical habitat at that time either, instead stating that critical habitat was not determinable, and that it was “in the process of obtaining more information needed to properly evaluate the economic impacts of designation,” and that it would publish the designation “by end of fiscal year 2017.” 81 Fed. Reg. 66842, 66864. The Service’s “not determinable” findings gave the agency two years from the proposed listing, or one year from the date of the final listing to designate critical habitat, for a final, nondiscretionary critical habitat determination deadline of September 29, 2017. 16 U.S.C. § 1533(b)(6)(C)(ii). As of the date of this notice letter, the Service has not issued critical habitat determinations for these four plants.

The Service proposed listing the Everglades bully, Florida pineland crabgrass, Florida prairie-clover, and pineland sandmat under the ESA on October 11, 2016, but did not propose designating critical habitat at that time, stating that critical habitat was “not determinable because the specific information sufficient to perform the required analysis of the impacts of the designation is currently lacking.” 81 Fed. Reg. 70282, 70307. The Service listed the Everglades bully, Florida pineland crabgrass, Florida prairie-clover, and pineland sandmat under the ESA on, however did not designate critical habitat at that time, instead stating that critical habitat was not determinable because “information was lacking” and that it was “in the process of acquiring the necessary [economic] information needed to perform that assessment.” October 6, 2017, 82 Fed. Reg. 46691, 46713. The Service’s “not determinable” findings gave the agency two years from the proposed listing, or one year from the date of the final listing to designate critical habitat, for a final, nondiscretionary critical habitat determination deadline of October 11, 2018. 16 U.S.C. § 1533(b)(6)(C)(ii). As of the date of this notice letter, the Service has not issued final critical habitat determinations for these four plants.

The Service’s failure to designate critical habitat for the eight Florida plants, leaves their habitat vulnerable to destruction, jeopardizing their continued existence and retarding their recovery. We are deeply concerned about and actively involved in the protection of the eight Florida plants and their habitat. Our members and staff engage in professional, recreational, aesthetic, and scientific activities involving these plants and their habitat, including observing and attempting to observe these plants. On their behalf, we urge you to take prompt action to protect these plants under mandatory requirements of the Act. Accordingly, an acceptable remedy would be prompt issuance of rules designating critical habitat for the eight Florida plants, or at a minimum, a binding commitment to date certain by which the Service will finalize the critical habitat.

We are eager to address these violations and to discuss with the Service prospects for resolution at the earliest possible date. If the Service does not act within 60 days to correct these violations of the Act, however, we may pursue litigation in federal court. We will seek injunctive and declaratory relief regarding these violations. If you have any questions, wish to discuss this matter, or feel this notice is in error, please contact me at 727-490-9190 or jlopez@biologicaldiversity.org. Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'J Lopez', with a long horizontal stroke extending to the right.

Jaclyn Lopez
Senior Attorney, Florida Director
Center for Biological Diversity
jlopez@biologicaldiversity.org