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June 12, 2023

The Honorable Debra Haaland
Secretary of the Interior
U.S. Department of the Interior
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Martha Williams
Director
U.S. Fish and Wildlife Service
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RE: Sixty-day Notice of Intent to Sue for Violation of the Endangered Species Act § 1533(b)(3)(B); Failure to Make a Timely 12-Month Determination on Petition to List the Ghost Orchid.

Dear Secretary Haaland and Director Williams,

This letter serves as a sixty-day notice that the Institute for Regional Conservation, Center for Biological Diversity, and National Parks Conservation Association (Petitioners) intend to sue the U.S. Fish and Wildlife Service (FWS) pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1533(b)(3)(B) for the agency's failure to make a timely listing decision regarding the petition to list the ghost orchid as endangered or threatened. The Petitioners are providing this letter to you pursuant to the 60-day notice requirement of the citizen suit provision of the ESA. *Id.* § 1540(g)(2)(C).

I. Requirements of the ESA

The ESA requires that “within 12 months after receiving a petition” that is found to “present substantial information indicating that the petitioned action may be warranted,” the FWS shall make one of the following findings:

1. The petitioned action is not warranted;
2. The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action; or
3. The petitioned action is warranted, but is precluded for some other reason.

Id. § 1533(b)(3)(B). Making one of the above findings by the statutory deadline is not discretionary under the ESA.

The ESA permits suits by any citizen who wishes to compel the Secretary to act where the Secretary has failed to perform an act or duty which is not discretionary under section 1533 of the ESA. *Id.* § 1450(g)(1)(C).

II. The Ghost Orchid

As explained in the petition to list, the ghost orchid (*Dendrophylax lindenii*) faces several serious threats to its continued existence and warrants immediate listing as a threatened or endangered species under the ESA. The ghost orchid grows only in humid, swampy forests in southwestern Florida and some parts of Cuba. The threats faced by the ghost orchid include poaching, and changes in its habitat, including hydrology changes, wildfire, threats to its host plants, sea level rise, and severe storms, including hurricanes. The best available science suggests that the threats to the ghost orchid are severe enough to warrant immediate listing.¹

Studies have shown that the population has declined by approximately 50 percent in Florida and up to 90 percent globally. It is estimated that of the approximately 1,500 ghost orchids remaining in the wild in Florida, only about half of them are mature enough to reproduce.² A study of populations within the Florida Panther National Wildlife Refuge found a predicted 20% decrease in total individuals by 2030. The ghost orchid is slow-growing, and studies have suggested that seed production and dispersal is not likely to keep up with the population decline.

As recently as February 2023, the Florida Fish and Wildlife Conservation Commission caught individuals poaching several rare plants, including a ghost orchid, from a Florida state park.³ Poaching events have also been documented in 2013 and 2020 in Fakahatchee Strand State Preserve and Big Cypress National Preserve.

Because the ghost orchid is epiphytic, meaning it grows on the surface of other plants, threats to its host species compound the threats the orchid itself already faces. The primary habitat for the ghost orchid is the pop ash tree, which is considered rare in Florida. This essential host plant faces threats from hurricanes, which can knock down trees or limbs. Recent monitoring of a subpopulation in Big Cypress National Preserve indicated that 30% of ghost orchid host trees had died as a result of Hurricane Irma in 2017.

III. FWS's Violation of the ESA

The FWS failed to comply with its duty under 16 U.S.C. § 1533(b)(3)(B) to issue a timely 12-month finding on the Petitioners' petition to list the ghost orchid. On January 24, 2022, the Petitioners petitioned to list the ghost orchid. This petition described the threats to the ghost orchid's continued existence, such as habitat loss and degradation, poaching, threats to its host trees, and climate change.

On October 22, 2022, in response to the petition, FWS issued a positive 90-day finding in which it concluded that Petitioners' petition presented "substantial scientific or commercial

¹ See The Institute for Regional Conservation, Center for Biological Diversity & National Parks Conservation Association, Petition to List the Ghost Orchid (*Dendrophylax lindenii*), as Threatened or Endangered under the Endangered Species Act, and to Designate Critical Habitat (Jan. 24, 2022), available at https://regionalconservation.org/ircs/pdf/2022_01_24_ghost_orchid_ESA_petition.pdf; Comments on Ghost Orchid Status Review (May 30, 2023) (Attachment A).

² NatureServe, Ghost Orchid *Dendrophylax lindenii* (Apr. 7 2023), available at https://explorer.natureserve.org/Taxon/ELEMENT_GLOBAL.2.132753/Dendrophylax_lindenii#:~:text=The%20Ghost%20Orchid%20is%20a,these%20activities%20threaten%20the%20species.

³ Fla. Fish and Wildlife Conserv. Comm'n, Incident Summary Report (Oct. 25, 2022) (Attachment B).

information” indicating that listing the ghost orchid “may be warranted.”⁴ However, FWS failed to follow up with the 12-month finding. 16 U.S.C § 1533(b)(3)(B).⁵

The ESA required FWS to issue its 12-month finding by January 24, 2023. More than a year and a half has passed since Petitioners petitioned to list the ghost orchid as threatened or endangered. Therefore, FWS’s failure to issue a 12-month finding determining whether to list the ghost orchid by January 24, 2023, constitutes a violation of the ESA. Any further delay puts this imperiled species at greater risk of extinction.

We are eager to address this violation and to discuss with FWS prospects for resolution soon. If the FWS does not act within 60 days to correct its ESA violation, we will pursue litigation in federal court to resolve the issue. Please contact Jaclyn Lopez at 727-490-9190 or jmlopez@law.stetson.edu or Elise Bennett at 727-755-6950 or ebennett@biologicaldiversity.org at your earliest convenience. Thank you for your prompt attention to this matter.

Sincerely,

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Cc: Larry Williams, Florida State Supervisor; Mike Oetker, FWS Southeast Region Acting Regional Director

⁴ *Endangered and Threatened Wildlife and Plants; 90-Day Findings for Four Species*, 87 Fed. Reg. 63468 (Oct. 19, 2022).

⁵ U.S. Fish & Wildlife Serv., National Domestic Listing Workplan for Fiscal Years 2023-2027, available at <https://www.endangeredspecieslawandpolicy.com/assets/htmldocuments/NewBlogs/EndangeredSpecies/National%20Listing%20Workplan%20April%202023.pdf> (Attachment C).