



*Sent via U.S. mail and electronic mail*

August 13, 2019

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**RE: 60-Day Notice of Intent to Sue Regarding Violations of the Endangered Species Act;  
Failure to Designate Critical Habitat for the Green Sea Turtle (*Chelonia mydas*)**

Dear Mr. Ross, Mr. Oliver, Mr. Bernhardt, and Ms. Everson:

This letter serves as a sixty-day notice of intent to sue the National Marine Fisheries Service and the Fish and Wildlife Service (collectively, “Services”) over violations of Section 4 of the Endangered Species Act (“Act”), 16 U.S.C. § 1531 *et seq.* This notice is submitted on behalf of the Center for Biological Diversity, Sea Turtle Oversight Protection, and Turtle Island Restoration Network. Specifically, the Services failed to designate critical habitat for green sea turtle (*Chelonia mydas*) distinct population segments (“DPS”) with ranges occurring within U.S. jurisdiction. *Id.* §§ 1533(a)(3)(A), 1533(b)(6)(C). The Services’ failures deprive these imperiled species of important protections and put 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. Legal Background**

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 Services] that such areas are essential for the conservation of the species.” 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. *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 Services 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 the Services list a species as endangered or threatened, they generally must also concurrently designate critical habitat for that species. Section 4(a)(3)(A)(i) of the Act states that, “to the maximum extent prudent and determinable,” the Services “shall, concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat.” 16 U.S.C. § 1533(a)(3)(A); *see also id.* § 1533(b)(6)(C).<sup>1</sup> The Services must finalize listing a species within one-year of proposing listing. *Id.* § 1533(b)(6)(A). Concurrent with the final regulation listing a species, the Services must issue a final regulation designating critical habitat. *Id.* § 1533(b)(6)(C). When critical habitat is prudent, but not determinable at the time of final listing, the Services may take one additional year to designate critical habitat, giving the Services 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. The Green Sea Turtle**

Having diminished significantly from historic levels, the Services listed the green sea turtle as threatened throughout its worldwide range, with endangered Florida and Mexican Pacific coast breeding colony populations, on July 28, 1978. 43 Fed. Reg. 32800. On March 23, 2015, the Services proposed superseding the green sea turtle listing rule with 11 DPSs. 80 Fed. Reg. 15272. The proposed DPS listing rule triggered the Services’ obligation to finalize the listing decision for each of the green sea turtle DPSs – and to designate determinable critical habitat for each of the proposed DPSs with ranges falling within U.S. jurisdiction – no later than March 23, 2016. 16 U.S.C. § 1533(b)(6)(C).

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<sup>1</sup> The Services 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 Services 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).

On April 6, 2016, the Services finalized listing for the 11 green sea turtle DPSs, including the endangered Central South and Central West Pacific DPSs, and the threatened South Atlantic, North Atlantic, East Pacific, and Central North Pacific DPSs, which have important U.S. marine habitats and beach nesting sites. 81 Fed. Reg. 20058 (Apr. 6, 2016). However, the Services did not designate critical habitat at that time, instead electing to make a “not determinable” finding and stating that the Services would propose critical habitat in future rulemaking. *Id.* at 20085. The Services’ “not determinable” finding gave the agencies one additional year from the date of the proposed listing publication to designate critical habitat, for a final, nondiscretionary critical habitat determination deadline of March 23, 2017.<sup>2</sup> To date, the Services have not issued a final critical habitat determination for any of the 11 green sea turtle DPSs.

### **C. Violations of the Act**

The Services’ failure to designate critical habitat for each U.S. green sea turtle DPS constitutes a violation of the Act. The Services proposed listing the green sea turtle DPSs on March 23, 2015 and issued a final rule listing the DPSs on April 6, 2016. Years later, the Services have yet to propose critical habitat for the DPSs, let alone finalize such rules.

We are deeply concerned about and actively involved in the protection of the green sea turtle and its habitat. Our members and staff engage in professional, recreational, aesthetic, and scientific activities involving this species and its habitat, including observing and attempting to observe the species. On their behalf, we urge you to take prompt action to protect the species under mandatory requirements of the Act. Accordingly, an acceptable remedy would be prompt issuance of the proposed rule identifying the critical habitat designation for the green sea turtle DPSs and a date certain by which to finalize the critical habitat.

We are eager to address these violations and to discuss with the Services prospects for resolution at the earliest possible date. If the Services do 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 meet to discuss this matter, or feel this notice is in error, please contact me at 727-490-9190 or [jlopez@biologicaldiversity.org](mailto:jlopez@biologicaldiversity.org). Thank you for your prompt attention to this matter.

Sincerely,

Jaclyn Lopez  
Senior Attorney, Florida Director  
Center for Biological Diversity  
[jlopez@biologicaldiversity.org](mailto:jlopez@biologicaldiversity.org)

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<sup>2</sup> The critical habitat designation formerly applicable to all green sea turtles remains in effect for the North Atlantic DPS. 81 Fed. Reg. 20058, April 6, 2016; 63 FR 46693, Sept. 2, 1998. This critical habitat designation, made 18 years prior to the final rule listing the North Atlantic DPS, does not meet the Act’s requirement to list critical habitat at the time of listing the DPSs and can only serve as an interim measure until the Services designate critical habitat specific to the North Atlantic DPS using the best scientific data available. *See* 16 U.S.C. §1533(b)(2); 81 Fed. Reg. at 20057.