



April 21, 2020

Via Email and Certified Mail, Return Receipt Requested

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Re: Notice of violations of the Endangered Species Act regarding EPA's suspension of the Enforcement and Compliance Assurance Program

Dear Sirs/Madams:

This letter serves as the Center for Biological Diversity's formal notice to the U.S. Environmental Protection Agency ("EPA") of violations of the Endangered Species Act, 16 U.S.C. §§ 1531–1544 ("ESA"), in connection with the EPA's March 26, 2020 Memorandum titled "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program" setting forth a policy regarding suspension of EPA enforcement of environmental legal obligations during the COVID-19 pandemic (the "non-enforcement policy"). While the Center recognizes that certain steps may be appropriate to protect people from harm during the pandemic, we believe that EPA's suspension of monitoring, reporting and enforcement under its Enforcement and Compliance Assurance Program pursuant to the non-enforcement policy will needlessly place endangered and threatened species at risk, in violation of Section 7 of the ESA,

and that EPA has failed to take necessary and reasonable actions to address those impacts in the manner required by the ESA.¹

Section 7 of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.”² The definition of agency “action” is broad and includes “all activities or programs of any kind,” including all discretionary agency “actions directly or indirectly causing modifications to the land, water, or air.”³ The duties in ESA Section 7 are only fulfilled by an agency’s satisfaction of the consultation requirements that are set forth in the ESA implementing regulations, and only after the agency lawfully complies with these requirements—including obtaining the views of the Fish and Wildlife Service (“FWS”) and/or National Marine Fisheries Service (“NMFS”)—may an action that “may affect” protected species go forward.⁴ Accordingly, the ESA’s threshold for triggering the Section 7 consultation requirement is “very low” so that species at risk of extinction receive appropriate consideration before a federal agency implements an action that may heighten that risk even further.⁵

There can be no doubt that EPA’s non-enforcement policy triggers the agency’s Section 7 consultation obligations. EPA has taken discretionary action that effectively authorizes regulated entities to forego routine compliance monitoring, integrity testing, sampling, lab analysis, training, and reporting or certification where the affected companies maintain that such actions are “not reasonably practicable due to COVID-19.” The non-enforcement policy leaves the determination of practicability to the regulated entity’s sole discretion, and the policy is in place indefinitely.

¹ While the EPA policy does not suspend monitoring and enforcement under delegated state programs, EPA maintains primary enforcement authority in many situations. For example, a number of states and territories, including New Mexico, Idaho, New Hampshire, Massachusetts, Washington, D.C., American Samoa, Guam, and Puerto Rico, are only subject to the federal Clean Water Act National Pollutant Discharge Elimination System (“NPDES”) program. Many other states have received only “partial” authorization to oversee NPDES enforcement, and so would presumably also be affected by the EPA non-enforcement policy.

² 16 U.S.C. § 1536(a)(2).

³ 50 C.F.R. § 402.02.

⁴ *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055-57 (9th Cir. 1994). Further, pursuant to ESA Section 7, Federal agencies must confer with Services on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the ESA. 16 U.S.C. § 1536(a)(4).

⁵ See 51 Fed. Reg. 19,926, 19,949 (June 3, 1986).

The suspension of monitoring and reporting requirements under the Clean Water Act, Clean Air Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, and Emergency Planning and Community Right-to-Know Act creates an immediate and serious risk to imperiled wildlife. That risk is heightened by EPA's broad invitation to regulated industries to suspend monitoring and reporting without public disclosure and without adequate justification or oversight.

These regulatory programs—particularly those under the Clean Air Act and Clean Water Act that are intended to limit pollution and prevent adverse environmental harm—expressly implicate interests to listed wildlife species and the habitat they rely on. Others, such as the SDWA and EPCRA, are broad programs that protect water and air quality, and thereby provide important benefits to such species. The suspension of monitoring and reporting requirements under the non-enforcement policy, and the wholesale abandonment of enforcement penalties for non-compliance with these environmental laws, certainly “may affect” listed species and critical habitat, and therefore trigger EPA's obligations under section 7 of the ESA.

For example, suspension of the NPDES effluent sampling program may harm listed species by allowing unmonitored and unreported (and hence unrestricted) contamination of waterways such species depend on (*i.e.* increased levels of chemicals, suspended sediment, or temperature variations). NPDES permits are required to contain limitations to reflect the application of available treatment technologies, as well as any more stringent limitations needed to ensure compliance with water quality standards.⁶ Water quality standards, in turn, are intended to protect the condition of the water body to ensure that its designated uses remain available (which often includes use as habitat for species), and contain an antidegradation policy to protect existing uses and provide a mechanism for maintaining high water quality, which is essential to ensuring the ongoing availability of suitable habitat for many listed species. Because the EPA's issuance of NPDES permits has the potential to harm endangered and threatened species, EPA must engage in section 7 consultation before it issues such permits, and it must reinstate consultation in the event that changed circumstances or new information reflects threats to species that were not previously considered.⁷

⁶ See 33 U.S.C. § 1311(b). Regular sampling is necessary to evaluate whether a facility is complying with effluent limits for myriad pollutants. See 40 C.F.R. pts. 401-471 (EPA's effluent guidelines and standards). Those limits serve as the primary mechanism for controlling discharges of pollutants to receiving waters. EPA (or the relevant state) must set effluent limits in line with the Act's overarching goal to “eliminat[e] the discharge of all pollutants” into our nation's waters, 33 U.S.C. § 1311(b)(2), and to “assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water[s],” *id.* § 1312(a); see also *id.* § 1251(a).

⁷ See 50 C.F.R. § 402.16.

Consequently, EPA's indefinite suspension of monitoring and reporting obligations poses distinct threats to species affected by EPA-issued NPDES permits. For example, EPA issued a NPDES permit to the City of Lewiston, Idaho in 2015 (NPDES Permit No. ID0022055), which indicates that endangered sockeye salmon and steelhead, along with threatened chinook salmon and bull trout, are in the area of the discharge, and could therefore be adversely affected if effluent levels are not controlled.⁸ EPA determined these species would not be adversely affected due to the protectiveness of the permit limits on effluents such as toxics (ammonia and metals), pH, dissolved oxygen, temperature, and turbidity, with daily and weekly monitoring requirements. Accordingly, if such monitoring and reporting is avoided due to the EPA's non-enforcement policy, there will be no factual basis for ascertaining whether the required permit limits will be satisfied and, in turn, there may be serious adverse effects to listed salmon and bull trout that go undisclosed and hence unaddressed.

Likewise, in 2014 the FWS issued a biological opinion for EPA's authorization of pollutants in stormwater discharges from Municipal Separate Storm Sewer Systems (MS4) in the Middle Rio Grande Watershed (NPDES Permit No. NMR04A000).⁹ That opinion acknowledges "stormwater may adversely affect federally listed species," and shows that effluent from the stormwater system "may affect, [and] is likely to adversely affect," the endangered Rio Grande silvery minnow and its designated critical habitat due to low oxygen concentrations. The biological opinion found that the silvery minnow would not be jeopardized because "the duration and intensity of events causing adverse effects are short-term;" however, one of the required Reasonable and Prudent Measures (RPMs) set forth in the opinion as a means of reducing harm and avoiding jeopardy is monitoring oxygen in the water column to determine the effectiveness of the Dissolved Oxygen Strategy. Hence if, as authorized by the non-enforcement policy, monitoring and reporting for this NPDES permit is suspended, there is no way to ensure that oxygen levels from this MS4 will remain acceptable for the Rio Grande silvery minnow.

In 2000, the USFWS issued a biological opinion for the EPA's issuance of a NPDES Permit for the Nogales International Wastewater Treatment Plant (NPDES Permit No. AZ0020150), which is designated as an Aquatic and Wildlife effluent dependent water and home to the endangered Gila topminnow. The biological opinion found that chronic problems with water quality in the project area—i.e. exposure to chemicals such as ammonia and chlorine that inhibit growth and cause direct mortality—adversely affect the Gila topminnow and contribute to the decline of the species. The Service determined that an actual amount or extent of take was difficult to determine, and so used a surrogate for reinitiation of consultation, which included monitoring

⁸ Available at <https://www.epa.gov/sites/production/files/2017-12/documents/r10-npdes-lewiston-wwtp-id0023027-fact-sheet.pdf>

⁹ Available at https://www.fws.gov/southwest/es/NewMexico/documents/BO/2011-F-0024-R001_EPA_MRG_MS4_Permit_BO_final_August2014.pdf

and reporting requirements such as toxicity identification evaluation. If these monitoring and reporting requirements are suspended indefinitely under the non-enforcement policy, there will be no way to ensure that effluent from this NPDES permit will not jeopardize the continued existence of the Gila topminnow.

Still another example involves EPA's 2010 reissuance of NPDES Permit No. MA0101214 for the Greenfield Water Pollution Control Plant. In reissuing that permit, the EPA determined that endangered shortnose sturgeon in the Deerfield River were not likely to be adversely affected by total suspended solids, biochemical oxygen demand, pH, fecal coliform, non-conventional pollutants such as chlorine, and other effluents including nitrogen and phosphorous. This determination was based on strict limitations that must be monitored as often as three times per week to ensure that the concentration limits are not violated.¹⁰ Again, the suspension of these monitoring requirements pursuant to the EPA's non-enforcement policy creates the risk that—for an indefinite time period—the strict permit conditions necessary to protect this highly imperiled species will not be satisfied.

Furthermore, since the non-enforcement policy does not require regulated entities even to “catch up” with certain missed monitoring or reporting, EPA will have no way of knowing whether water quality conditions during the COVID-19 pandemic resulted in direct take of these listed species or adverse impacts to their habitat requiring remediation to prevent jeopardy, as the ESA requires.

Other programs subject to the EPA non-enforcement policy similarly have the potential to result in catastrophic harm to listed species. For example, the EPA's oil tank-integrity testing is intended to “detect oil leaks, spills, or other potential integrity or structural issues before they can result in a discharge of oil to navigable waters of the U.S. or adjoining shorelines.”¹¹ Regulated facilities' abandonment of these important spill- and disaster-prevention measures increases the risk of toxic chemical releases that “endanger public health, impact drinking water, devastate natural resources, and disrupt the economy,”¹² thereby putting both people and wildlife at risk.

Therefore, EPA's adoption of the non-enforcement policy clearly meets the ESA's low “may affect” threshold for triggering the agency's Section 7 obligations. However, there is no evidence that in issuing the policy EPA gave any consideration whatsoever to compliance with

¹⁰ Available at <https://www3.epa.gov/region1/npdes/permits/draft/2010/draftma0101214permit.pdf>

¹¹ See 40 C.F.R. § 112.8(c)(6).

¹² See EPA, Spill Prevention, Control and Countermeasure (SPCC) Regulation, 40 CFR Part 112, A Facility Owner/Operator's Guide to Oil Pollution Prevention, <https://www.epa.gov/sites/production/files/documents/spccbluebroch.pdf>.

Section 7. Indeed, the non-enforcement policy provides total discretion to the regulated entities to determine whether and how the policy will apply, without public disclosure and without adequate justification or oversight, creating a clear opportunity for abuse. Likewise, allowing the policy to apply indefinitely—with no sunset provision or discussion of the circumstances under which the policy would be revoked—provides an opportunity for regulated entities (and the Trump administration) to exploit the current epidemic to allow unfettered pollution and hence harm to protected species in the absence of the safeguards mandated by the ESA.

While the Center recognizes that COVID-19 presents unique challenges and that appropriate measures may be necessary to protect individuals involved in implementing programs under EPA’s jurisdiction, that certainly does not mean EPA may simply ignore its vitally important ESA Section 7 duties and thereby disregard potential impacts on imperiled species and their critical habitats. Indeed, if EPA believes the non-enforcement policy is necessary to respond to an ongoing “emergency,” that does not excuse total non-compliance with the ESA. Rather, there are specific steps the agency must take to ensure compliance with Section 7, and yet there is no evidence that EPA has followed the Services’ “emergency consultation” procedures.

Pursuant to the Services’ regulations and Section 7 Consultation Handbook, in the event of an emergency (*i.e.* act of God/security concern) where the response “may affect” listed species but requires the agency to take immediate action without first going through formal consultation, the agency must notify the Services and seek advice on minimizing the effects of the emergency response, and then initiate formal consultation after the action (*i.e.* after the emergency is over).¹³ The Services must then provide an after-the-fact biological opinion that documents the impacts to listed species and provides for remediation measures necessary to address harm resulting from the emergency.¹⁴

Based on the information available to the public, EPA has failed even to comply with the Section 7 emergency consultation procedures. The non-enforcement policy itself does not indicate that EPA has contacted the Services to discuss the suspension of monitoring and reporting requirements to see what steps can be taken to protect species while the non-enforcement policy is in effect. Nor does the non-enforcement policy suggest that the agency intends to gather the necessary information once the policy is revoked to initiate formal consultation after the emergency has passed—to the contrary, as noted above the policy specifically states that “EPA does not plan to ask facilities to ‘catch up’ with missed monitoring or reporting....” The EPA has not made any other documents publicly available that explain how the non-enforcement policy will comply with the Services’ emergency consultation procedures or otherwise fulfill the agency’s Section 7 duties.

¹³ See 50 C.F.R. § 402.05; ESA Section 7 Consultation Handbook at 8-3.

¹⁴ See Endangered Species Consultation Handbook at 8-3.

The Center therefore formally puts EPA on notice that it is in violation of Section 7 of the ESA. To avoid litigation over this matter, the Center requests that EPA advise us, within 14 days of receipt of this letter, of what steps it is taking to comply with Section 7 of the ESA while the non-enforcement policy is in effect, and what actions it will take going forward to ensure that species have not been and will not be jeopardized and appropriate remediation actions are taken to address harm to listed species from the EPA's suspension of monitoring, reporting and enforcement during the COVID-19 pandemic. If an adequate explanation is not forthcoming, the Center will have no choice but to invoke judicial remedies to enforce the EPA's crucial Section 7 obligations.

I look forward to your prompt response.

Sincerely,

A handwritten signature in black ink that reads "Jared Margolis". The signature is written in a cursive style with a large initial "J".

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