



Via Electronic and Certified Mail

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Re: Sixty-day Notice of Intent to Sue for Violations of the Endangered Species Act for Failure to Timely Promulgate a Final Rule to Designate Critical Habitat for the Rufa Red Knot

Dear Secretary Burgum, Director Nesvik, and Regional Directors Oetker and Marino:

The Center for Biological Diversity (“the Center”) provides this 60-day notice of intent to sue the U.S. Department of the Interior and the U.S. Fish and Wildlife Service (the “Service”) for violating Section 4 of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), by failing to timely publish, within the statutory deadlines, a final rule designating critical habitat for the rufa red knot (*Calidris canutus rufa*) (hereinafter, “red knot”).¹ The Center provides this letter in accordance with the 60-day notice requirement of the ESA’s citizen suit provision.²

The Center is a national, non-profit conservation organization that works through science, law, and policy to protect imperiled wildlife and their habitat, including the red knot. The Center is headquartered in Tucson, Arizona, with offices throughout the United States and currently has more than 1.8 million members and supporters.

¹ 16 U.S.C. §§ 1533(b)(6)(A)(i), 1533(b)(6)(C).

² *Id.* § 1540(g)(2)(C).

Legal Background

In response to a petition to list a species as endangered or threatened, Section 4 of the ESA requires the Service to determine within 90 days whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.³ If the Service makes a “may be warranted” finding, it must determine within 12 months whether the listing is warranted, not warranted, or warranted but precluded by higher-priority actions.⁴ If, in that 12-month finding, the Service determines that listing is warranted, the Service must publish that finding in the Federal Register along with the text of a proposed regulation to list the species as endangered or threatened and take public comments on the proposed listing rule.⁵

Within one year of the proposed action’s publication in the Federal Register, the ESA requires the Service to publish a final regulation determining whether to list the species.⁶ Specifically, it must publish either: “(I) a final regulation to implement such determination, (II) a final regulation to implement such revision or a finding that such revision should not be made, (III) notice that such one-year period is being extended under subparagraph (B)(i), or (IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based.”⁷

The Service must also publish a final designation of critical habitat “concurrently” with its final listing determination.⁸ Furthermore, “if a designation of critical habitat is involved,” then the Service must publish in the Federal Register, “either (I) a final regulation to implement such designation, or (II) notice that such one-year period is being extended under such subparagraph.”⁹

The ESA authorizes “any person” to commence civil suits against the Service “where there is alleged failure of the Secretary to perform any act or duty under section 1533 . . . which is not discretionary.”¹⁰ “The Service’s duties to make initial and final determinations—once triggered—are nondiscretionary and are therefore enforceable under the citizen-suit provision.”¹¹

The Red Knot

The red knot (*Calidris canutus rufa*) is a long-distance migratory shorebird known for migrations with nonstop flights and for its rusty plumage during spring migration.¹² Red knots migrate from as far south as the Tierra del Fuego archipelago at the southern tip of South

³ *Id.* § 1533(b)(3)(A).

⁴ *Id.* § 1533(b)(3)(B).

⁵ *Id.*

⁶ *Id.* § 1533(b)(6)(A).

⁷ *Id.* § 1533(b)(6)(A)(i).

⁸ *Id.* § 1533(c)(3)(A), (b)(6)(C).

⁹ *Id.* § 1533(b)(6)(A)(ii).

¹⁰ *Id.* § 1540(g).

¹¹ *Friends of Animals v. Ashe*, 808 F.3d 900, 903 (D.C. Cir. 2015).

¹² Mass. Div. of Fisheries & Wildlife, Mass. State Wildlife Action Plan, “Red Knot,” *available at* <https://www.mass.gov/info-details/red-knot>.

America all the way to their breeding grounds in the Arctic, stopping in the United States along their way.



Photo Credit: Gregory Breese/USFWS
Available at <https://www.fws.gov/media/red-knot-6>

The red knot is a shorebird with one of the steepest, if not *the* steepest, population declines in North America over the last three decades.¹³ The species depends on protected coastal stopover sites like those in Delaware Bay and Massachusetts for survival.¹⁴ Beaches at North American stopover locations offer sites where red knots can rest and gather sustenance to fuel the remainder of their migratory journeys.

The red knot faces the possibility of extinction from a multitude of threats. These threats include human disturbance of foraging and roosting, habitat destruction or modification from sea level rise and coastal development and engineering, depredation by native and nonnative predators, and natural or man-made disasters like hurricanes and oil spills.¹⁵ The overharvest of horseshoe crabs—a species whose eggs provide food for red knots during their migration—also threatens the red knot by reducing food availability for the species.¹⁶

Because of these and other threats to the red knot and because of the species' downward spiraling population numbers, on July 28, 2005, several conservation groups petitioned the Service to secure federal protection for the red knot.¹⁷ On December 11, 2014, nearly a decade later, the Service issued a final rule that listed red knot as threatened, effective January 12, 2015.¹⁸ More than six years after listing the red knot under the ESA, in July 2021 the Service

¹³ See P.A. Smith et al., *Accelerating declines of North America's shorebirds signal the need for urgent conservation action*, *Ornithological Appl.* 125:1-14 (2023)

¹⁴ See Mass. Div. of Fisheries & Wildlife, Mass. State Wildlife Action Plan, "Red Knot," available at <https://www.mass.gov/info-details/red-knot>.

¹⁵ See generally Proposed Rule, Designation of Critical Habitat for Rufa Red Knot, 88 Fed. Reg. 22530 (Apr. 13, 2023).

¹⁶ See *id.* at 22555-56; see Final Rule, Threatened Species Status for the Rufa Red Knot, 79 Fed. Reg. 73706, 73707 (Dec. 11, 2014).

¹⁷ American Bird Conservancy et al., Emergency Petition for a Rule to List the Red Knot (*Calidris canutus rufa*) as Endangered under the Endangered Species Act (Jul. 28, 2005), available at https://defenders.org/sites/default/files/publications/red_knot_listing_petition.pdf.

¹⁸ 79 Fed. Reg. 73706.

issued a proposed rule designating 649,066 acres of critical habitat across 120 units for the species.¹⁹ Nearly two years later, in April 2023, the Service revised its proposed rule and proposed to designate 683,405 acres of critical habitat across 127 units; the Service also reopened the comment period on the revised proposed rule.²⁰ However, in the more than three years since its April 2023 revised proposed designation of critical habitat and the more than 11 years since listing the red knot as threatened, the Service has not published a final rule designating critical habitat for the red knot.

Endangered Species Act Violations

The final rule listing the red knot as a threatened species under the ESA was published on December 11, 2014. The Service had a deadline to designate critical habitat concurrently with, or at most within one year of, the final listing determination.²¹ Thus, the Service should have promulgated a final rule designating critical habitat for the red knot on or before December 11, 2015. This deadline has since passed, and the Service has yet to designate critical habitat. This failure to timely finalize critical habitat designation for the red knot violates the ESA.

The red knot requires urgent federal protection of its critical habitat, as it is currently threatened by habitat loss and fragmentation, reduced food availability, nonnative depredation, and foraging and roosting interference, among other threats, all affecting its ability to survive and reproduce. The Service has neglected its duty to ensure that the red knot has timely received all protections available under the ESA. Because the Service has missed its deadline to promulgate a final rule designating critical habitat for this species, it has violated Section 4 of the ESA. If the Secretary fails to publish a final rule designating critical habitat for the red knot or contact us to develop a timeline for this designation within the next sixty (60) days, we intend to file suit to enforce the ESA.

Please contact me if you have any questions or if you would like to discuss this matter.

Sincerely,



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¹⁹ Proposed Rule, Designation of Critical Habitat for Rufa Red Knot (*Calidris canutus rufa*), 86 Fed. Reg. 37410 (Jul. 15, 2021).

²⁰ 88 Fed. Reg. 22530. The Center submitted two separate comments on the proposed critical habitat designation during this comment period.

²¹ 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C)(ii).

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