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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 90-day Finding for the Birmingham Darter

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

The Center for Biological Diversity (the "Center"), Black Warrior Riverkeeper, and Alabama Rivers Alliance ("ARA") provide this 60-day notice of intent to sue the U.S. Department of the Interior and the U.S. Fish and Wildlife Service's (the "Service") failure to issue an initial determination ("90-day finding") on the Center's petition to list the Birmingham darter, in violation of the Endangered Species Act's ("ESA") statutory deadline.[1] The Service's failure to meet this deadline delays critical protections for the Birmingham darter, increasing its risk of extinction in its already very narrow occupied habitat range. 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, policy, and creative media to protect endangered species and their habitats, including the

[1] 16 U.S.C. §§ 1533(b)(6)(A)(i), 1533(b)(6)(C).
[2] *Id.* § 1540(g)(2)(C).

Birmingham darter. The Center has more than 138,000 members and supporters, including 12,285 in Alabama. The Center is headquartered in Tucson, Arizona, with offices throughout the United States.

Black Warrior Riverkeeper is citizen-based nonprofit organization dedicated to promoting clean water for the sake of public health, recreation, and wildlife habitat throughout the Black Warrior River watershed.

Alabama Rivers Alliance is a statewide network of groups working to protect and restore all of Alabama's water resources through building partnerships, empowering citizens, and advocating for sound water policy and its enforcement.

Legal Background

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[3] Section 4 of the ESA requires the Service to determine if any species is endangered or threatened because of any one of, or combination of, the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.[4] The Service must base all listing determinations "solely on the basis of the best scientific and commercial data available."[5] If the Service determines that the species meets the definition of threatened or endangered because it is imperiled by any one or a combination of these five factors, the Service must list the species.[6]

Any interested person may petition the Service to add a species to its formal list of threatened and endangered species under the ESA.[7] In response to a petition to list a species as endangered or threatened, Section 4 of the ESA requires the Service to make a preliminary finding on the petition within 90 days of receiving the petition.[8] If in its 90-day finding the Service finds "substantial information indicating that the petitioned action may be warranted," it must publish that finding and conduct a full scientific review of the species' status.[9]

After completing the status review, and within 12 months of receiving the petition, the Service must publish one of three findings (known as "12-month findings"): (1) listing is "warranted"; (2) listing is "not warranted"; or (3) listing is "warranted but precluded" by other proposals for listing species.[10] If 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

[3] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).
[4] *Id.* § 1533(a)(1).
[5] *Id.* § 1533(b)(1)(A).
[6] *Id*.; 50 C.F.R. § 424.11(c).
[7] 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).
[8] *Id*. § 1533(b)(3)(A); 50 C.F.R. § 424.14(h)(1).
[9] *Id*.
[10] *Id.* § 1533(b)(3)(B).

species as endangered or threatened and provide a public comment period concerning the proposed listing rule.[11] Within one year of publishing a proposed rule to list a species, the Service must promulgate a final rule listing the species and designating critical habitat, unless the it finds that there is substantial disagreement regarding the sufficiency of the available data or that there is no longer sufficient evidence to justify the proposed action.[12]

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."[13] "The Service's duties to make initial and final determinations—once triggered—are nondiscretionary and are therefore enforceable under the citizen-suit provision."[14]

The Birmingham Darter



Male Birmingham darter / Photo Credit: Dr. Bernie Kuhajda

The Birmingham darter (*Etheostoma birminghamense*) is a two-inch long, brightly colored, freshwater fish.[15] It is a newly described darter and one of six species within the vermillion darter complex, all of which are found exclusively within Valley Creek other tributaries of the Black Warrior River.[16] The Birmingham darter is only known from six populations, all within Valley

[11] *Id*.
[12] *Id*. § 1533(a)(3), (b)(6)(A), (B), (C).
[13] *Id*. § 1540(g).
[14] *Friends of Animals v. Ashe*, 808 F.3d 900, 903 (D.C. Cir. 2015).
[15] Gwendolyn McManus, *Petition to Protect the Birmingham darter (Etheostoma birminghamense) Under the Endangered Species Act and to Concurrently Designate Critical Habitat*, CTR. FOR BIOLOGICAL DIVERSITY (Nov. 13, 2025) [hereinafter *Center Petition*], at 13, *available at* https://biologicaldiversity.org/docs/regions/Southeast/Birmingham_darter_final_petition-11132025.pdf.
[16] *Id.* at 19.

Creek system in Jefferson County, Alabama, which renders the fish a "microendemic" species with an exceptionally limited distribution.[17]

The Birmingham darter faces imminent threats to its survival and is already extirpated from sections of its historic range. For example, Fivemile Creek was once home to a thriving Birmingham darter population, but due to quarrying operations, Birmingham darters have not been observed since 2006, and researchers believe the species is extirpated from this location.[18] The Fivemile Creek circumstances are not unique. North-central Alabama has a history of exploitative mining practices and industrial uses that have created a highly altered landscape for Birmingham darter habitat. The species remains under constant pressure from new or worsening threats, including proposed Northern Beltline highway project around Birmingham and the Project Marvel hyperscale data center near Bessemer.

In addition to industrialization threats throughout the region, Valley Creek and its tributaries are rife with pollution and exhibit poor water quality as a direct result of urbanization throughout Jefferson County.[19] A broad range of pollutants, such as arsenic, nitrogen, mercury, and total dissolved solids, are elevated in the watershed and all contribute to negatively affect the metabolism, growth, behavior, and reproduction of Birmingham darters.[20] Prior research shows a clear connection between high water contaminant levels and altered biomarkers and behavior patterns in fish species.[21] The well-documented poor habitat and water quality throughout the Valley Creek system pose a significant threat to Birmingham darter populations, putting them at risk of extirpation and possibly extinction.

Current protections for the Birmingham darter cannot ensure its persistence. Despite Alabama Department of Conservation and Natural Resources' recognition of the Birmingham darter as a priority species of "Highest Conservation Concern" due to its extreme rarity and restricted distribution and habitat vulnerability due to both natural and human-caused factors.[22] Listing the Birmingham darter on Alabama's State Wildlife Action Plan does not impose any restrictions on the industries that are causing the darter's decline.[23] Absent additional protections afforded by the ESA, the species is expected to decline further under present conditions and looming threats such as new industrial development.

Listing Petition and Response

The Center submitted a petition to list the Birmingham darter as an endangered or threatened species on November 13, 2025.[24] The petition included additional petitioners and

[17] *Id.* at 19-20.
[18] *Id.* at 31.
[19] *Id.* at 37.
[20] *Id.*
[21] *Id.*
[22] Alabama Department of Conservation and Natural Resources, *Alabama State Wildlife Action Plan 2025–2035 Draft*, (2025), at Ch. 1, 24, *all chapters available at* https://www.outdooralabama.com/2025-swap-update/alabama-state-wildlife-action-plan-2025-2035-draft.
[23] *See id*. at Ch. 4.
[24] *See generally: Center Petition.*

supporters: Alabama Rivers Alliance, Black Warrior Riverkeeper, and The People's Justice Council. It included the Birmingham darter's recent taxonomic description, habitat, and other biological aspects, its current and historical distribution, and its population status and threats in great detail. In addition to the request for a listing determination under the ESA, the petition also requested that the Service designate critical habitat for the Birmingham darter.[25]

It has been over eleven months (330 days) since the Service received the Center's petition to list the Birmingham darter and to designate critical habitat concurrently with listing.

Endangered Species Act Violations

The Service must issue a finding as to whether the Birmingham darter petition provides the Service with substantial information to indicate that the petitioned action (listing as an endangered or threatened species under the ESA and concurrent designation of critical habitat) is warranted. It must also conduct a full scientific review of the species' status if it reaches this conclusion. The Service has yet to issue a 90-day finding on the Center's petition to list the Birmingham darter.

Therefore, the Service's 90-day finding on the Center's petition to list the Birmingham darter is past due and the agency has violated Section 4 of the ESA. The Birmingham darter is in dire need of protection at the federal level due to its extremely limited range and persistent threats to its habitat. If the Secretary fails to publish the 90-day finding or fails to contact us to develop a timeline for this determination within the following sixty (60) day period, we intend to file suit to enforce the ESA.

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

Sincerely,



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[25] *Id.* at 45.