



August 14, 2024

By Certified Mail, Return Receipt Requested and Electronic Mail

Hon. Deb Haaland
Secretary of the Interior
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Martha Williams
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Re: Notice of Intent to Sue for Violations of the Endangered Species Act

Dear Secretary Haaland and Director Williams:

On behalf of Western Watersheds Project, the Center for Biological Diversity, and WildEarth Guardians (collectively, Petitioners), we write to inform you that you are in violation of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, by failing to make a listing determination on Petitioners' March 6, 2023 petition to list the pygmy rabbit (*Brachylagus idahoensis*) as threatened or endangered under the ESA within the time required by law. 16 U.S.C. § 1533(b)(3)(A)-(B). This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision in the ESA. *Id.* § 1540(g)(2)(C).

Legal Background

The ESA is a comprehensive federal statute declaring that endangered and threatened species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). The purposes of the ESA are to provide a means and program to conserve endangered and threatened species and the ecosystems upon which these species depend. *Id.* § 1531(b). The ESA's ultimate goal is to recover listed species to the point where they no longer need the ESA's protection. *Id.* §§ 1531(b)-(c), 1532(3), 1533(f).

The United States Fish and Wildlife Service (FWS or the Service) administers the ESA for all terrestrial and freshwater species. *Id.* § 1532(15); 50 C.F.R. §§ 1.2, 1.8. Before the ESA can protect a species facing extinction or that species' habitat, FWS must list the species as either endangered or threatened under the ESA. 16 U.S.C. § 1533(d). A species is endangered if it "is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). A

species is threatened if it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). The listing process is the essential first step in the ESA’s system of species protection and recovery.

Any interested person can begin the listing process by filing a petition to list a species with the Secretary of Interior or FWS. *Id.* §§ 1533(a)(1)-(2), 1533(b)(3)(A); 50 C.F.R. § 424.14(a). When a citizen petition initiates the listing process, Congress imposed mandatory deadlines on FWS. *See* 16 U.S.C. §§ 1533(b)(3)(A)-(B).

First, on receipt of a petition to list a species, FWS is required to make an initial finding, commonly known as a 90-day finding. *Id.* § 1533(b)(3)(A). Within 90 days of receipt of a petition, “[t]o the maximum extent practicable,” FWS must determine whether the petition presents “substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* If FWS finds that the petition does not present substantial information indicating that the listing may be warranted, the petition is rejected, and the process ends. This is known as a “negative 90-day finding.” If FWS finds that the petition presents substantial information indicating that listing may be warranted, it must then commence a more comprehensive status review of the species. *Id.* § 1533(b)(3)(A)-(B). This is known as a “positive 90-day finding.”

If FWS issues a positive 90-day finding, then the agency must publish the finding in the Federal Register, commence a status review of the species, and make a finding on whether the petition action is warranted. *Id.* During the status review, FWS will consider public comments and is required to “consult as appropriate with affected States, interested persons and organizations, [and] other affected Federal agencies.” *Id.* § 1533(b)(3)(a); 50 C.F.R. § 424.13.

Moreover, if FWS issues a positive 90-day finding, the ESA requires FWS to make a finding within 12 months from receiving the petition determining whether the petitioned action is warranted, not warranted, or warranted but precluded by other pending listing proposals, which is commonly known as the “12-month finding” or “12-month determination.” 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(h)(2). The 12-month deadline for making this finding is mandatory. All findings are subject to judicial review in a U.S. District Court. 16 U.S.C. § 1540(c), (g).

Importantly, regardless of when the 90-day finding is made, the period for making the 12-month determination begins to run from the date of receipt of the initial petition. *Biodiversity Legal Found. v. Norton*, 180 F. Supp. 2d 7, 9 (D.D.C. 2001) (“The ‘12-month determination’ must be made ‘within 12 months after receiving a petition,’ regardless of when the Service issued its 90-day finding.”) (quoting 16 U.S.C. § 1533(a)(3)(D)(ii)). The Secretary cannot extend the deadline for making a 12-month finding. *See Center for Biological Diversity v. Norton*, 254 F.3d 833, 837-38 (9th Cir. 2001) (describing 12-month statutory deadline as “exquisitely clear”).

Factual Background

The Service has recognized the threats facing the pygmy rabbit since at least November 21, 1991, when it designated the rabbit as a category 2 candidate species for Endangered Species Act listing. 56 Fed. Reg. 58,804, 58,807 (Nov. 21, 1991). The pygmy rabbit was subsequently dropped from the list of candidate species in 1996 when the Service changed its categorization to eliminate category 2 from the list. *See* 75 Fed. Reg. 60516 (Sept. 30, 2010) (describing history).

On April 21, 2003, Western Watersheds Project and others submitted a petition requesting that the pygmy rabbit found in Oregon, Idaho, Montana, Wyoming, California, Nevada, and Utah be listed as endangered or threatened in accordance with section 4 of the ESA. On June 10, 2003, the Service responded that it would not provide emergency listing for the species, and that it would not be able to comply with the ESA's statutory listing deadlines. *Id.* Conservation groups filed suit to enforce the mandates of the ESA, which resulted in a March 2005 agreement under which the Service committed to completing a 12-month finding for the pygmy rabbit by February 15, 2006. *Id.*; *Western Watersheds Project et al. v. U.S. Fish and Wildlife Service*, CV-04-0440-N-BLW (D. Idaho).

The Service published a 90-day finding on May 20, 2005, stating that the petition did *not* present substantial information indicating that listing the pygmy rabbit may be warranted. 70 Fed. Reg. 29523 (May 20, 2005). Following litigation, a court remanded this determination to the agency on September 25, 2007 and directed the Service to issue a new 90-day finding on or before December 26, 2007. 75 Fed. Reg. 60516; *Western Watersheds Project et al. v. Gale Norton and U.S. Fish and Wildlife Service*, CV 06-CV-00127-S-EJL (D. Idaho). On January 8, 2008, the Service published a new 90-day finding, and determined that the petition presented substantial information indicating that the petitioned action may be warranted. 73 Fed. Reg. 1312 (Jan. 8, 2008). Then, on September 30, 2010, the Service issued a "Not Warranted" finding, declining to protect the pygmy rabbit under the Endangered Species Act. 75 Fed. Reg. 60516.

On March 6, 2023, Petitioners submitted a new petition to list the pygmy rabbit, which included evidence of emerging threats, shrinking habitats, and a lack of adequate regulatory mechanisms to prevent the extinction of the species. On January 25, 2024, the Service published a 90-day finding determining that the petition had presented substantial information indicating that listing the pygmy rabbit may be warranted and initiating a status review for the species. 89 Fed. Reg. 4884, 4888, 4890 (Jan. 25, 2024).

Because the Service made a positive 90-day finding on the March 6, 2023 petition, a 12-month finding was due March 6, 2024. The Service, however, has not yet made that finding as mandated by the ESA. 16 U.S.C. § 1533(b)(3)(B).

Endangered Species Act Violation: 16 U.S.C. § 1533(b)(3)(B)

As of the date of this notice, FWS has still not made a 12-month finding on the petition to list the pygmy rabbit under the ESA. Thus, FWS is in violation of the ESA.

Conclusion

If FWS does not promptly issue the overdue 12-month finding, we intend to initiate legal action on behalf of the Petitioners to require FWS to issue the overdue finding.



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