

December 19, 2023

VIA CERTIFIED AND ELECTRONIC MAIL

Secretary Gina Raimondo
United States Department of Commerce
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Dr. Richard Spinrad
Under Secretary of Commerce for Oceans and Atmosphere & NOAA Administrator
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RE: Notice of Intent to Sue for Violation of the Endangered Species Act; Failure to Make a 12-Month Determination on Petition to List *Tridacninae* Giant Clams (excluding *Tridacna rosewateri*)

Dear Secretary Raimondo and Dr. Spinrad:

This letter constitutes notice that the Center for Biological Diversity (“Center”) intends to sue the U.S. Department of Commerce and National Marine and Fisheries Service pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. § 1533(b)(3)(B), for the agencies’ failure to issue a 12-month finding on the petition to list *Tridacninae* giant clams (excluding *Tridacna rosewateri*) as threatened or endangered under the ESA and designate its critical habitat. The Center is providing this letter to you pursuant to the 60-day notice requirement of the citizen suit provision of the ESA. *Id.* § 1540(g)(2)(C).

1. The ESA Requires a 12-Month Determination

The ESA requires that “within 12 months after receiving a petition” that is found to “present substantial information indicating that the petitioned action may be warranted,” the National Marine Fisheries Service (“the Service”) shall make one of the following findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted, in which case the Secretary of Commerce (“Secretary”) shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action; or (3) the petitioned action is warranted, but is precluded for some other reason. *Id.* § 1533(b)(3)(B).

Making one of the above findings by the statutory deadline is mandatory under the ESA. The Service has no discretion to delay its finding beyond 12 months. *See id.* The ESA permits suits by any citizen who wishes to compel the Secretary to act when the Secretary has failed to perform a non-discretionary duty or action under section 1533 of the ESA. *Id.* § 1540(g)(1)(C).

2. The *Tridacninae* Giant Clam and the Service's Violation of the ESA

Giant clams are a small but conspicuous group of large bivalves that are members of the cardiid bivalve subfamily *Tridacninae*.¹ They are the largest living marine bivalves found in coastal areas of the Indo-Pacific region and regarded as important ecological components of coral reefs, especially as providers of substrate and contributors to overall productivity.² While giant clams are typically found on or near coral reefs, they also live on sand or attached to coral rock and rubble by byssal threads, dead coral rubble, boulders, sandy substrates, seagrass beds, and macroalgae zones.³

Giant clams inhabit shallow coastal waters which are highly vulnerable to habitat degradation caused by various anthropogenic activities.⁴ Aquaculture and hatchery programs with several species being cultured in captivity for the purpose of international trade also pose a significant threat to the survival of giant clams.⁵ Furthermore, existing regulatory mechanisms at the international, federal, and state level to protect giant clams or the habitat they need to survive are inadequate.⁶

Due to the dwindling population, Center member, Dr. Dwayne Meadows petitioned the Service to list ten species of giant clam and designate its critical habitat on August 7, 2016. In its 90-day finding on that petition, the Service concluded that the petition presented “substantial scientific or commercial information indicating that the petitioned action may be warranted,” for seven species (*Hippopus hippopus*, *H. porcellanus*, *Tridacna costata*, *T. derasa*, *T. gigas*, *T. squamosa*, and *T. tevoroa*) of giant clam. 82 Fed. Reg. 28,946 (June 26, 2017).

This positive 90-day finding obligated the Service to complete a 12-month finding by August 7, 2017. *See* 16 U.S.C. § 1533(b)(3)(B). However, the Service has yet to complete the statutorily required 12-month finding even though more than seven years have passed since the petition was submitted. The Service has a “ongoing, binding statutory duty” to complete its evaluation of the petitioned action. *Inst. for Wildlife Prot. v. United States Fish & Wildlife Serv.*, No. 07-CV-358-PK, 2007 U.S. Dist. LEXIS 85197, at *15 (D. Or. Nov. 16, 2007); *Wilderness Soc’y v. Norton*, 434 F.3d 584, 589 (D.C. Cir. 2006) (noting that challenges to agency inaction are timely where plaintiffs do not “complain about what the agency has done but rather about what the agency has yet to do.”). The Service’s failure to issue a 12-month finding on the petition is thus in violation of the ESA.

3. Conclusion

¹ National Oceanic & Atmospheric Admin., *Endangered and Threatened Wildlife; 90-Day Finding on a Petition to List 10 Species of Giant Clams as Threatened or Endangered Under the Endangered Species Act*, 82 Fed. Reg. 28946, 28947 (June 26, 2017) [hereinafter “90-day finding”].

² *Id.* at 28948.

³ *Id.*

⁴ Dwayne W. Meadows, Petition to List the *Tridacninae* Giant (excluding *Tridacna rosewateri*) as Threatened or Endangered Under the Endangered Species Act at 17 (2016), https://media.fisheries.noaa.gov/dam-migration/clam_petition_2016_opr3.pdf [hereinafter “Giant Clam Petition”].

⁵ 82 Fed. Reg. at 28951.

⁶ Giant Clam Petition, *supra* note 4, at 20-21.

As stated above, the National Marine Fisheries Service has failed to complete its required 12 month finding on the petition to list the giant clam and designate critical habitat. If this violation is not corrected, after 60 days have passed from the date of this letter, the Center for Biological Diversity intends to file a suit against you, the Department of the Commerce, and the National Marine Fisheries Service pursuant to the Administrative Procedure Act, 5 U.S.C. § 702, and the Endangered Species Act, 16 U.S.C. § 1540(g)(2)(C).

To avoid litigation, the National Marine Fisheries Service must publish for comment the overdue 12-month finding within 60 days or provide a reasonable date certain for its completion. If you wish to discuss this matter further, please contact Lauren Parker.

Sincerely,

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