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Via electronic and certified mail

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Re: Sixty-Day Notice of Intent to Sue for Violation of the Endangered Species Act: Warranted but Precluded for 19 Foreign Species

Dear Secretary Haaland, Director of U.S. Fish and Wildlife Service, Principal Deputy Director Williams, and Chief Maclin,

On behalf of the Center for Biological Diversity (“Center”), we write to notify you of our intent to sue the U.S. Department of the Interior and U.S. Fish and Wildlife Service (together, “the Service”). The Service’s finding that listing of 19 foreign species is “warranted” but nonetheless “precluded” by other priorities and that the Service is making expeditious progress to list or delist other foreign species violates the Endangered Species Act (“ESA”).¹ 86 Fed. Reg. 43,470 (Aug. 9, 2021). As a result, the agency failed to promptly publish a proposed rule for the 19 species, as required by the ESA. If the Service’s violation is not remedied within 60 days of this notice, the Center plans to file suit in federal court.

A. Legal Background

ESA Section 4(b) requires the Service to, within 12 months after receiving a petition to list a species, make a finding that either the petitioned action is warranted or not warranted. 16 U.S.C. § 1533(b)(3)(B)(i), (ii). If the Service finds listing warranted, the Service: (1) “shall promptly” propose a regulation to list the species, or (2) find that listing is “precluded by [other] pending proposals,” and (2) that “[e]xpeditious progress is being made” to add or remove species from the list. *Id.* § 1533(b)(3)(B)(iii)(I), (II). If the Service finds listing is “warranted but precluded,” the Service must publish that finding “with a description and evaluation of the reasons and data upon which the finding is based.” *Id.* The finding “shall be subject to judicial review.” *Id.* § 1533(b)(3)(C)(ii). Moreover, any petition for which the Service issues a warranted

¹ The Service’s decision also violates the Administrative Procedure Act (“APA”). 5 U.S.C. § 706(1).

but precluded finding “shall be treated as a petition that is resubmitted . . . on the date of [the warranted but precluded] . . . finding.” *Id.* § 1533(b)(3)(C)(i).

Courts have held that “the circumstances under which the Secretary may invoke the excuse of ‘warranted but precluded’ are narrowly defined.” *Ctr. for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1101 (9th Cir. 2006). As the legislative history confirms:

the Service must show that it ‘is actively working on other listings and delistings and must determine and publish a finding that such work has resulted in pending proposals which *actually* preclude proposing the petitioned action at that time,’ and ‘must determine and present evidence that [it] is, in fact, making, expeditious progress in the process of listing and delisting other species.’

Id. (quoting H. Conf. Rep. No. 97-835, at 22 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2863 (alteration omitted)).

B. Foreign Candidate Species and the Service’s Warranted-but-Precluded Finding

On August 9, 2021, and following litigation by the Center, the Service issued a new foreign species Candidate Notice of Review (“CNOR”). 86 Fed. Reg. 43,470. In the CNOR, the Service made a “warranted but precluded” finding for 19 foreign wildlife species. *Id.* at 43,481; *see* Table 1 (listing 19 species).

Many of these species have lingered on the Service’s warranted but precluded “candidate” list for decades. Six of the foreign bird species were first added to the candidate list in response to a petition filed in November 1980—more than 40 years ago. The Service initially stated that “[p]ublication of a proposal to list these species is planned during the present fiscal year (ending September 30, 1984).” 49 Fed. Reg. 2485, 2485 (Jan. 20, 1984). Yet the Service did not propose to list the species in 1984 nor in any of the 37 fiscal years that followed. A petition to list the other seven foreign birds was submitted in 1991. 59 Fed. Reg. 14,496 (Mar. 28, 1994). A petition to list five foreign butterflies was filed in January 1994. 69 Fed. Reg. 70,580, 70,581 (Dec. 7, 2004). The Service found one foreign clam’s listing warranted but precluded on its own initiative in 2013. 78 Fed. Reg. 24,604, 24,606 (Apr. 13, 2013). Yet despite clear threats to these foreign species’ existence, the Service has failed to actually propose ESA protections, as required by law.

Table 1: Foreign Warranted-but-Precluded Species (2021)

Scientific Name	Common Name	Range
<i>Pauxi koepckeae</i>	Sira curassow	Peru
<i>Pauxi unicornis</i>	Southern helmeted curassow	Bolivia

<i>Strepera graculina crissalis</i>	Lord Howe Island pied currawong	Lord Howe Island, New South Wales
<i>Haematopus chathamensis</i>	Chatham oystercatcher	Chatham Islands, New Zealand
<i>Cyanoramphus malherbi</i>	Orange-fronted parakeet	New Zealand
<i>Rallus semiplumbeus</i>	Bogota rail	Colombia
<i>Porphyrio hochstetteri</i>	Takahe	New Zealand
<i>Tangara peruviana</i>	Black-backed tanager	Brazil
<i>Scytalopus novacapitalis</i>	Brasilia tapaculo	Brazil
<i>Aulacorhynchus huallagae</i>	Yellow-browed toucanet	Peru
<i>Zosterops luteirostris</i>	Ghizo white-eye	Solomon Islands
<i>Dryocopus galeatus</i>	Helmeted woodpecker	Argentina, Brazil, Paraguay
<i>Dendrocopos noguchii</i>	Okinawa woodpecker	Okinawa Island, Japan
<i>Mulinia modesta</i>	Colorado Delta clam	Mexico
<i>Parides ascanius</i>	Fluminense swallowtail	Brazil
<i>Parides hahneli</i>	Hahnel's Amazonian swallowtail	Brazil
<i>Mimoides (= Eurytides or Graphium) lysithous harrisianus</i>	Harris' mimic swallowtail	Brazil
<i>Protographium (= Eurytides or Graphium or Neographium or Protesilaus) marcellinus</i>	Jamaican kite swallowtail	Jamaica
<i>Teinopalpus imperialis</i>	Kaiser-i-Hind butterfly	Bhutan, China, India, Laos, Myanmar, Nepal, Thailand, Vietnam

C. Violation of the Endangered Species Act

In once again deeming the 19 species' listings warranted but precluded, the Service claims that it is "making expeditious progress in adding qualified species" to the ESA list and that listing of the 19 species is precluded by higher priority listing actions. 86 Fed. Reg. at 43,473, 43,475. The Service's decision violates the ESA.

The Service is not making expeditious progress, nor has the agency provided a sufficient description and evaluation of the reasons and data for each species upon which its determination is based. 16 U.S.C. § 1533(b)(3)(B)(iii)(II). The Service acknowledges that over the two-year period covered by the CNOR (FY 2019 and FY 2020) it added *only one* foreign species to the ESA and removed none. 86 Fed. Reg. at 43,476.² By comparison and with a similar budget, during the Obama administration from 2009 to 2016, the Service averaged five listing actions a year. Thus, during FY 2019 and FY 2020, the Service listed species at a mere 20% of its previous pace. The Service’s dismal pace is particularly concerning as the world faces an ongoing extinction crisis³ and because the Service has 65 foreign species on its Foreign Species Workplan for which it has found listing may be warranted but has failed to meet ESA deadlines to actually list the species. The Service provides no explanation or rationale for its lack of progress, the facts belie the agency’s conclusion, and its conclusion is arbitrary and capricious and violates the ESA.

Further and contrary to the Service’s conclusion, listing proposals for the 19 foreign species are not precluded by other pending proposals for listing, nor has the agency provided a sufficient description and evaluation of the reasons and data for each species upon which its determination is based. 16 U.S.C. § 1533(b)(3)(B)(iii)(I). The Service argues that listing is precluded by work identified in its Foreign Species Workplan and the congressionally-imposed spending cap on listing.

However, the Service’s budget for listing has remained consistently between \$18-22 million since 2008, yet the Service listed only a fraction (20%) of the species it listed on average during the Obama administration. The Service is also failing to meet its timelines established in its Foreign Species Workplan, developed in June 2020. Specifically, the Workplan states that the Service would complete 14 listing actions (either a 12-month finding or final rule) in FY 2020 and FY 2021.⁴ Yet with only a month remaining in FY 2021, the Service has completed *only three* of these promised actions: a final listing for the Yangtze sturgeon; a proposed listing for the emperor penguin (as required by a court settlement); and a proposed listing for the Amur sturgeon. 86 Fed. Reg. 21,950 (Apr. 26, 2021); *id.* at 41,917 (Aug. 4, 2021); *id.* at 47,457 (Aug. 25, 2021). The Service provides no explanation or rationale for why it has failed to meet its Foreign Species Workplan deadlines nor why a proposal for each of the 19 foreign candidate species is actually precluded, since it has not completed its other “priority” work. The Service’s CNOR further fails to explain why the Service has not taken action on the 19 foreign candidate

² Instead, the agency attempts to rely upon the (inadequate) progress it is making in listing domestic species, but that justification was already relied upon by the agency in finding it was making expeditious progress in listing domestic species (a finding which we also contend is unlawful), and the Service’s foreign listings are conducted by a separate branch within the Service under a separate workplan.

³ IPBES (2019): Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. E. S. Brondizio, J. Settele, S. Díaz, and H. T. Ngo (editors). IPBES secretariat, Bonn, Germany.

⁴ Notably, three of the candidate species do not even appear on the Service’s Workplan: the sira curassow, the southern helmeted curassow, and the Colorado delta clam. Apparently, the Service has no plan to take listing action on these species. Moreover, the Service’s Workplan provides no date for when the agency plans to propose listing for nine other foreign candidate species.

species in FY 2021, focusing only on its FY 2019 and FY 2020 actions. The facts belie the agency's conclusion, and its conclusion is arbitrary and capricious and violates the ESA.

Moreover, because the Service failed to make expeditious progress and take action that precluded proposals for the 19 species – and similarly failed to demonstrate expeditious progress and preclusion – it cannot lawfully conclude listing of the 19 species is warranted but precluded. Accordingly, because the Service has already found species' listing is warranted, the ESA required the Service to “promptly publish” a proposed rule for each species. 16 U.S.C. § 1533(b)(3)(B). Yet the Service has failed to do so.

III. Conclusion

For the reasons discussed above, the Service has and will continue to violate the ESA. We welcome discussion of this important conservation issue and are hopeful the Biden administration will correct these failures and drastically hasten the pace of listing foreign species.

However, we intend to pursue litigation against the Service if within 60 days it does not act to correct this violation or agree to a reasonable schedule for proposing listing for the 19 species. Please contact us if you have any questions or would like to discuss this matter.

Sincerely,



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