



February 10, 2021

Via Electronic and Certified Mail

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RE: Sixty-day Notice of Intent to Sue for violations of the Endangered Species Act relating to the Service's determination to deny the eastern black rail (*Laterallus jamaicensis jamaicensis*) endangered status.

Dear Secretary Haaland, Director Williams, and Assistant Director Phillips,

In accordance with Section 11(g) of the Endangered Species Act ("ESA"), the Center for Biological Diversity ("Center") and Healthy Gulf provides this supplemental 60-day notice of its intent to sue the Secretary and the U.S. Fish and Wildlife Service ("Service") for violations of the ESA in connection with the Service's determination that eastern black rail does not warrant endangered status.¹

The Center and Healthy Gulf previously served a Notice of Intent upon the Service dated March 3, 2021 regarding the Service's failure to designate critical habitat for the eastern black rail. The March 3, 2021 Notice of Intent is incorporated herein by reference.

¹ U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Threatened Species Status for Eastern Black Rail with a Section 4(d) Rule, 85 Fed. Reg 63,764 (October 8, 2020).

BACKGROUND

As detailed in our March 3 Notice, the eastern black rail's population has dramatically declined over the last century. Once occurring commonly across much of the eastern half of the United States, the species has declined by over 90 percent in less than 25 years.² Most of that decline has happened recently- reports indicate that populations have declined by 75 percent or greater over the past 10 to 20 years.³

In its Species Status Assessment Report for the Eastern Black Rail ("SSA"), the Service delineated seven total analysis units: Central Lowlands, Great Plains, Mid-Atlantic Coastal Plain, Southeast Coastal Plain, and Southwest Coastal Plain, Appalachians and New England.⁴ The Service determined that the eastern black rail is extirpated in New England, the Appalachians, and the Central Lowlands.⁵ Across its remaining range, the eastern black rail has very low to no resiliency and low redundancy.⁶

The Service has determined that the cause of this decline was and will continue to be the loss, degradation, and fragmentation of wetland habitat.⁷ In addition to urban and agricultural sprawl, the eastern black rail is increasingly threatened by sea level rise, increased temperatures, decreased precipitation and severe weather events caused by climate change which will likely significantly affect the future resiliency of the eastern black rail.⁸ The Service acknowledged that climate change, together with wetland loss "limit the ability of the eastern black rail to persist in place or to shift to nearly lightly flooded 'just right' areas as existing habitats are impacted."⁹

The Service also found that the loss of the populations in New England, the Appalachians, and the central lowlands of the Midwest coupled with the lack of habitat connectivity has reduced the rail's ability to withstand or recover from catastrophic events.¹⁰

The Service determined that all eastern black rails in the United States will be completely extinct by 2068.¹¹ However, the population of eastern black rails in the Great Plains will likely be extinct by 2043.¹² The Service found that all eastern black rail populations will exhibit a consistent downward trend in the number of sites remaining occupied over the next 25 years (by 2043).¹³

Despite the Service's conclusion that the entire species *will* be extinct by 2068, with the Great Plains population, a significant portion of its current range, reaching extinction by 2043, the Service determined that the eastern black rail does not warrant endangered status.¹⁴

² SSA at 27

³ 85 Fed. Reg. at 63,793.

⁴ SSA at vii

⁵ *Id.* at 95; 85 Fed. Reg. at 63,766.

⁶ SSA at 79-82.

⁷ 85 Fed. Reg. 63,793-4.

⁸ SSA at 65, 63; 85 Fed. Reg. at 63,794.

⁹ 85 Fed. Reg. at 63,794

¹⁰ SSA at 98.

¹¹ SSA at 165.

¹² *Id.*

¹³ *Id.*

¹⁴ 85 Fed. Reg. at 63,795.

THE ENDANGERED SPECIES ACT

Congress enacted the Endangered Species Act “to halt and reverse the trend toward species extinction, whatever the cost.”¹⁵ The ESA does so by conserving endangered and threatened species and the ecosystems upon which they depend.¹⁶ Since its enactment, only four species have gone extinct following listing and another 22 listed species are believed extinct.¹⁷ The ESA’s success is attributable to its strong science mandate, which requires the Service to make listing decisions “solely on the basis of the best scientific and commercial data available.”¹⁸ Congress aptly described Section 4 of the ESA¹⁹ as “[t]he cornerstone of effective implementation of the Endangered Species Act”²⁰

The Service must list a species as “endangered” if that species is “at risk of extinction throughout all or a significant portion of its range” or as “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”²¹

When a species is listed, an array of statutory protections applies. For example, the Service must designate “critical habitat” for listed species,²² and “develop and implement” recovery plans for listed species.²³ The Service also is authorized to acquire land for the protection of listed species,²⁴ and make federal funds available to states to assist in their efforts to preserve and protect threatened and endangered species.²⁵

A designation of “endangered” triggers a broad scope of protection in the form of prohibitions on “take” under Section 9 of the ESA.²⁶ “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²⁷ Unlike Section 7, which only applies to federal agencies, Section 9 applies to “any person.”²⁸ Thus, Section 9 prevents private actors from taking, even incidentally, endangered species.

The ESA provides more stringent substantive protections for endangered species. “If a species is listed as endangered, it is entitled to greater legal protections than a species that is listed as threatened.”²⁹ Endangered species generally receive higher priority for the preparation and

¹⁵ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

¹⁶ 16 U.S.C. § 1531(b).

¹⁷ Noah Greenwald, Kieran F. Suckling, Brett Hartl & Loyal A. Mehrhoff, *Extinction and the U.S. Endangered Species Act*, 7 PEERJ, Apr. 22, 2019, at 3.

¹⁸ 16 U.S.C. § 1533(b)(1)(A).

¹⁹ *Id.* § 1533.

²⁰ S. Rep. No. 418, 97th Cong., 2d Sess. at 10; *see also* H. Rep. No. 567, 97th Cong., 2d Sess. at 10.

²¹ 16 U.S.C. § 1532(6), (20).

²² *Id.* § 1533(a)(3).

²³ *Id.* § 1533(f).

²⁴ *Id.* § 1534.

²⁵ *Id.* § 1535(d).

²⁶ *Id.* § 1538(a).

²⁷ *Id.* § 1532(19).

²⁸ *Id.* § 1538(a)(1).

²⁹ *Center for Biological Diversity v. Everson*, 435 F.Supp.3d 69, 92 (D.D.C. 2020) citing 16 U.S.C. § 1538(a)(1) and *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 13 (D.D.C. 2002).

implementation of recovery plans, and the Service is more likely to determine that particular actions jeopardize the continued existence of endangered species, leading to better conservation measures under Section 7(a)(2) of the Act.

The goal of the ESA is to recover endangered and threatened species to the point at which the ESA protections “are no longer necessary.”³⁰ Any determination that a species listed as endangered is fully recovered or warrants reclassification as threatened must be made “solely on the basis of the best scientific and commercial data available.”³¹

ENDANGERED SPECIES ACT VIOLATIONS

The Service’s determination that the eastern black rail does not warrant endangered status constitutes a violation of the ESA and contradicts the evidence and best available science before the agency.

The evidence before the Service indicates that the eastern black rail is endangered throughout all its range and a significant portion of its range.

The Service determined that the eastern black rail *will* be extinct in its entirety by 2068, in just 46 years. The Service acknowledges that the presence of climate change, coupled with the continued impact of the species’ wetland habitat, it is unlikely that the eastern black rail will be able to persist in current habitats or in nearby potential habitats. In other words, it is unlikely that the eastern black rail will be able to survive in the future, meaning it is at risk of extinction (e.g. endangered) rather than at risk of becoming endangered (e.g. threatened). As the Service noted, “Future projections of habitat loss are expected to continue and be exacerbated by sea level rise and other drivers.”³² Additionally, the Service disclosed that the species’ current range has constricted significantly over the last 10-20 years as three analysis units have effectively been extirpated.

The overwhelming evidence disclosed in the Service’s SSA and in its Final Rule shows that the eastern black rail is endangered throughout its range.

The Service also determined that the eastern black rail in the Great Plains analysis area will be extinct by 2043, in just 21 years. The Service found that the Great Plains analysis area currently has low resiliency and very low occupancy rates and predicted further “large declines in the proportion of the sites occupied in [this analysis area].”³³ The Service disclosed that studies project less soil moisture, drier conditions and an increase in frequency, duration, and intensity of drought and severe precipitation events due to climate change.³⁴

Moreover, when analyzing whether the eastern black rail is endangered in a significant portion of its range, the Service combined the Mid-Atlantic Coastal Plain analysis area with the Southeast Coastal Plain analysis area. The combination of these two analysis areas washes out or diminishes

³⁰ *See id.* § 1532(3).

³¹ *Id.* § 1533(a), 1533(c).

³² 85 Fed. Reg. at 63,796.

³³ SSA at 10.

³⁴ SSA at 60

the very low resiliency of the Mid-Atlantic Coastal Plain. As the Service recognized, “The Mid-Atlantic Coastal Plain [analysis area] currently exhibits very low resiliency for the eastern black rail as it supports fewer birds and occupied habitat patches than the Southeast Coastal Plain [analysis area].”³⁵ The Southeast Coastal Plain analysis area, on the other hand, contains a “stronghold” for the species.³⁶ Therefore, by combining an analysis area that has “very low resiliency” with an analysis area that contains a “stronghold” for the species effectively covers up the dire state of the Mid-Atlantic Coastal Plain eastern black rails and masks the fact that the eastern black rail is endangered in the Mid-Atlantic Coastal Plain analysis area, a significant portion of its range. The Service’s decision to combine these two analysis areas when make its determination that the eastern black rail is not endangered in a significant portion of its range violates the ESA and is arbitrary and capricious.

The evidence before the Service, including the certain extinction in less than 50 years, the severe threats the species faces, and the significant loss of its range, indicate that the eastern black rail is in danger of extinction throughout all its range. The evidence also indicates that the eastern black rail is endangered in a significant portion of its range, specifically the Great Plains and the Mid-Atlantic Coastal Plain. Thus, the Service’s determination that the eastern black rail is “threatened” is contrary to best available science, is arbitrary and capricious, and in violation of the ESA.

The Service applies an improper standard for “threatened” vs “endangered.”

The Service stated that it “identif[ies] the foreseeable future for the eastern black rail to be 25-50 years from the present.”³⁷ It concluded that the eastern black rail will reach complete extinction by 2068 and extinction in the Great Plains analysis area by 2043.

However, the Service determined that the species is not in danger of extinction now but will become so in the future and is therefore is a “threatened” species.³⁸ Under the Service’s logic, a threatened species is one that is likely to become *extinct* in the near foreseeable future.

This application of the definition of “threatened” is contrary to the ESA. The ESA defines “endangered” as “at risk of extinction throughout all or a significant portion of its range” and “threatened” as “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”³⁹ Therefore, a “threatened” species is one that is likely to become *at risk of extinction* within the foreseeable future throughout all or a significant portion of its range.

Here, the Service found that the eastern black rail will likely be extinct in the foreseeable future. Thus, it is “at risk of extinction” now. The Service’s misapplication of the definition of “threatened” violates the ESA.

³⁵ 85 Fed. Reg. at 63, 795.

³⁶ *Id.*

³⁷ 85 Fed. Reg. at 63,794

³⁸ 85 Fed. Reg. at 63,795.

³⁹ 16 U.S.C. § 1532(6), (20).

CONCLUSION

In sum, the Service's determination that the eastern black rail is not endangered is contrary to the best available science, arbitrary and capricious, and violates the ESA. If the Service does not act to correct this violation within 60 days, the Center and Healthy Gulf will pursue litigation in federal court. Please contact us should you have any questions or if you would like to discuss this matter.

Sincerely,



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