



**March 24, 2026**

*Via Electronic and Certified Mail*

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U.S. Department of Commerce  
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National Marine Fisheries Service  
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***Re: Sixty-day Notice of Intent to Sue for Violations of the Endangered Species Act for 90-day Negative Finding on American Horseshoe Crab Listing Petition***

Dear Secretary Lutnick and Director Piñeiro Soler:

The Center for Biological Diversity (“the Center”) provides this 60-day notice of intent to sue the U.S. Department of Commerce and the National Marine Fisheries Service (“the Service”) for violating the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), resulting from the Service’s negative 90-day finding on the Center’s and fellow petitioner Friends of Animals’ petitions to list the Atlantic (or American) horseshoe crab (*Limulus polyphemus*) as threatened or endangered. The Service bypassed the appropriate decision-making procedure for a 90-day finding, arbitrarily determined that the horseshoe crab species as a whole or in a significant portion of its range does not warrant protection under the ESA, and failed to follow the appropriate review standards, all in violation of the ESA. The Center provides this letter according to the 60-day notice requirement of the citizen suit provision. *Id.* § 1540(g)(2)(C).

The American horseshoe crab is a “living fossil” species that has been around for millennia but is now struggling for existence because of overharvesting and threats to the habitat that it needs to survive. The Center’s and Friends of Animals’ petitions to list the American horseshoe crab provided “substantial information” that the species is in decline and that its listing as threatened or endangered “may be warranted.” The Service responded with a negative 90-day finding. As detailed below, the 90-day finding on the American horseshoe crab is unlawful in several respects, including:

- (1) the Service applied an improperly heightened standard to determining whether the petitions provided sufficient information showing listing “may be warranted”;

- (2) the Service simply picked a side—in this case, it used erroneous, speculative, and misleading data—in the ongoing debate in the scientific community over the status of American horseshoe crabs, which is improper at the 90-day stage;
- (3) the Service solicited and cherry-picked information outside the four corners of the petitions when it prepared the 90-day finding, bypassing notice-and-comment and contravening the appropriate process; and
- (4) the Service arbitrarily concluded that the American horseshoe crab is not endangered in a significant portion of its range.

The Service's disregard for the legal standards and requirements of the ESA and the best available scientific information about the species led to an arbitrary, capricious, and unlawful decision. Accordingly, if the Service does not remedy the violations of law outlined in this letter within 60 days, we will file suit in federal court to resolve the matter.

### **Statutory Framework**

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ESA is intended to protect and recover species that the Service determines to be “endangered” or “threatened.” 16 U.S.C. § 1533(a). “Endangered” means the species “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). “Threatened” means the species is “likely to become an endangered species within the foreseeable future within all or a significant portion of its range.” *Id.* § 1532(20). The definition of “species” includes “subspecies” and “distinct population segments of vertebrate or wildlife which interbreeds when mature.” *Id.* § 1532(16).

Section 4 of the ESA permits private parties like the Center to petition the Service to add a particular species to the Service's formal list of threatened and endangered species. *Id.* § 1533(b)(3)(A). The Service is then directed to make a preliminary finding within 90 days. *Id.* If it finds “substantial information indicating that the petitioned action may be warranted,” the Service must publish that finding and proceed to conduct a full scientific review of the species' status. *Id.* Based on that review, the Service has 12 months to either issue a “not warranted” finding (thus rejecting the petition) or a proposed rule adding the species to either the endangered or threatened list. *Id.* § 1533(b)(3)(B). If the Service proposes to list the species under either category, it then has 12 more months to make a final decision. *Id.* § 1533(b)(6)(A).

When making listing determinations, the ESA requires the Service to determine whether any species is an endangered species or a threatened species because of five enumerated factors:

- (A) the present or threatened destruction, modification, or curtailment of a species' habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) predation or disease;
- (D) the inadequacy of existing regulatory mechanisms; and
- (E) other manmade or natural factors affecting the species' continued existence.

*Id.* § 1533(a)(1).

If a species meets the definition of “endangered” or “threatened” because of any one or a combination of these five factors, the Service must list the species. *Id.*; 50 C.F.R. § 424.11(c). In evaluating these factors, the Service must make listing determinations “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

The threshold for a positive 90-day finding—the preliminary step in the listing process—is low. The “specific question . . . is not whether there is conclusive evidence to establish that the petitioned action is warranted, but merely whether there is enough information to lead a reasonable [person] to believe that the petitioned action may be warranted.” *Ctr. for Biological Diversity v. Kempthorne*, Civ. No. 07-38, 2008 U.S. Dist. LEXIS 17517, \* 34-35 (D. Ariz. Mar. 6, 2008). “In other words, the 90-day review of a listing petition is a cursory review to determine whether a petition contains information that warrants a more in-depth review.” *Id.* at \* 25; *see also Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1204 (D. Or. 2003) (standard for making 90-day finding “is not overly burdensome, does not require conclusive information, and uses the ‘reasonable person’ to determine whether the substantial information has been presented to indicate that the action may be warranted.”); *Buffalo Field Campaign v. Zinke*, 289 F. Supp. 3d 103, 109-110 (D.D.C. 2018) (collecting case law for proposition that “at the 90-day stage, the question is not whether the designation *is* warranted, only whether it *may* be”) (emphases in original).

### **Factual Background**

#### ***The American Horseshoe Crab and Threats to Its Continued Existence.***

The horseshoe crab is one of the oldest living species on Earth, with fossils dating back as far as 450 million years ago. Horseshoe crabs have persisted through the ages and are often referred to as living fossils. Adult American horseshoe crabs are benthic creatures that inhabit shallow estuarine areas and offshore habitats near the continental shelf. Their range spans the Atlantic Coast from northern Maine to Florida, the Gulf Coast from Florida to Louisiana, and the Yucatan Peninsula. Horseshoe crabs have also been recorded in Nova Scotia, the Bahamas, Turks and Caicos, and Cuba. Their largest populations are found in Delaware Bay and coastal areas from Virginia to New Jersey.

American horseshoe crabs and their spawning activities have steeply declined to historic lows. In the past three decades, horseshoe crab populations have crashed. Since the 1990s, the Delaware Bay horseshoe crab population has fallen by two-thirds. Other horseshoe crab populations have experienced similar declines across most of their range. This is in large part because their habitat is disappearing. Sea level rise and extreme weather fueled by climate change have resulted in the destruction of the horseshoe crab’s spawning habitat. Habitat loss threatens horseshoe crabs in their entire range. Shoreline hardening and pollution have further degraded horseshoe crab habitat. Loss of habitat has reduced the available grounds for spawning horseshoe crabs and their eggs.

In addition, American horseshoe crabs are being overharvested for both bait and blood, and their spawning beaches are threatened by development, dredging, erosion, and pollution. In short, the species is imminently threatened by habitat loss, overexploitation, inadequate existing regulatory mechanisms, and other natural and manmade factors, including climate change. American horseshoe crabs are in danger of extinction across a significant portion of their range, and threats are likely to persist and worsen in the foreseeable future.

***The Center for Biological Diversity and Friends of Animals Listing Petitions.***

In response to these threats and the lack of adequate existing regulatory mechanisms to address them, both the Center and Friends of Animals submitted petitions to list the American horseshoe crab under the ESA. The Service received the petition from Friends of Animals on December 21, 2023, and the petition from the Center on February 27, 2024. The Center’s petition is 127 pages long and cites over 150 discrete references.

After more than a year without an initial response to its petition, the Center filed suit in the U.S. District Court for the District of Columbia to compel the Service to issue a 90-day finding. *Ctr. for Biological Diversity v. Nat’l Marine Fisheries Serv.*, 1:26-cv-00008-RDM (filed Jan. 5, 2026). The Center voluntarily dismissed the lawsuit on February 25, 2026, after receiving the Service’s 90-day finding.

***The Service’s February 2026 Negative 90-day Finding.***

On February 18, 2026, the Service issued its negative 90-day finding. In that document, the Service found that the Center and Friends of Animals petitions “do not present substantial scientific or commercial information indicating that the petitioned actions [i.e., listing the American horseshoe crab] may be warranted.” 91 Fed. Reg. 7448 (Feb. 18, 2026).

**Notice of Endangered Species Act Violations:**  
**Unlawful Negative 90-day Finding**

Federal agency action, including a 90-day finding under the ESA, is unlawful if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). An agency’s finding is arbitrary and capricious “if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008); see *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.*, 709 F.3d 1, 8 (D.C. Cir. 2013) (same).

The 90-day negative finding is arbitrary and capricious and contrary to law in several respects. First, the Service applied an improperly heightened standard to determining whether the petitions provided sufficient information showing listing “may be warranted.” As explained

above, “at the 90-day stage, the question is not whether the designation *is* warranted, only whether it *may* be.” *Buffalo Field Campaign*, 289 F. Supp. 3d at 109 (emphases in original). Here, the Center’s 157-page petition met the “relatively low” evidentiary requirement for a positive 90-day finding. *See Humane Soc’y of U.S. v. Pritzker*, 75 F. Supp. 3d 1, 10-14 (D.D.C. 2014). The petition provides information showing how American horseshoe crab populations have plummeted across their range, including by two-thirds in the past three decades in the biologically important Delaware Bay, and how horseshoe crab egg densities on spawning beaches have declined by more than 80% during the same period. The petition describes how all five enumerated factors point toward why listing as endangered or threatened “may be warranted” and, as described above, supports the listing request with over 150 discrete references—including studies performed and published by researchers working closest with American horseshoe crabs in the field. Indeed, among other sources, the petition notes how in 2023 the International Union for the Conservation of Nature gave the American horseshoe crab a “Recovery Potential of Zero.” The evidence in the petition supporting a 90-day positive finding “more than meets that amount of information that would lead a reasonable person to believe that the measure proposed in the petition *may* be warranted.” *Humane Soc’y of the U.S.*, 75 F. Supp. 3d at 14 (citation omitted) (emphasis added); *see also* 50 C.F.R. § 424.14(h)(1).

Second, throughout the petition, the Service dismissed the Center’s and Friends of Animals’ credible petition information in favor of erroneous, speculative, and incomplete data refuted by leading scientists. *See, e.g.*, 91 Fed. Reg. at 7453-54 (comparing Garmoe and Hunt studies cited in the petition with studies the Service solicited for its files); *id.* at 7454 (same, for Lipcius citation); *id.* at 7459 (same, for Leschen and Correia study); *id.* at 7463-64 (same, for Lipcius and Shoemaker expert reviews). But in doing so, it did not find the petitions’ supporting evidence to be so problematic as to be “irrelevant, unreliable, or otherwise unreasonable to credit,” *see Buffalo Field Campaign*, 289 F. Supp. 3d at 110, not could it. Rather, “the Service simply picked a side in an ongoing debate in the scientific community, which is improper at the 90-day finding stage.” *Id.* at 111; *see also Buffalo Field Campaign v. Williams*, 579 F. Supp. 3d 186, 204-05 (D.D.C. 2022) (Moss, J.) (same).

Third, the Service unlawfully solicited information beyond the petitions to make a 90-day negative finding. The Service heavily relied on information it solicited from the Atlantic States Marine Fisheries Commission and at least nine state marine fisheries agencies, including information that was published after the Service’s receipt of the Center and Friends of Animals petitions. The Service’s roving outreach for information beyond the petitions is contrary to the ESA, which requires the Service “to make a threshold determination as to ‘whether the *petition presents* substantial scientific or commercial information indicating that the petitioned action may be warranted.’” *Colo. River Cutthroat Trout v. Kempthorne*, 448 F. Supp. 2d 170, 176 (D.D.C. 2006) (quoting 16 U.S.C. § 1533(b)(3)(A)) (emphasis in original); *see also Friends of Animals v. Haaland*, 997 F.3d 1010, 1016 (9th Cir. 2021) (“Courts have repeatedly admonished the Services for soliciting information from states and other third parties during the 90-day finding period . . .”) (collecting cases).

Fourth, the Service arbitrarily and capriciously determined that the American horseshoe crab is not threatened or endangered in a specific portion of its range. The 90-day negative finding acknowledged that the New York regional population of the species is poor and

declining. The finding also relied on 2024 stock assessment data showing that the Southeast and Northeast regional populations are falling short of their benchmarks. Yet the Service arbitrarily determined that these regional populations—alone or together—do not suffice to show that a significant portion of the American horseshoe crab’s range “may warrant” listing.

Finally, the Service’s 90-day finding violates the ESA’s substantive mandate to make listing determinations “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

### **Conclusion**

The Service’s negative 90-day finding for the American horseshoe crab is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the ESA within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2). Therefore, the Service should withdraw its negative 90-day finding, reconsider the Center’s petition, and prepare a new 90-day finding within an expeditious timeframe. If the Service does not do so within the next 60 days, the Center will bring suit in federal court to challenge the 90-day negative finding.

Sincerely,

*/s/ Daniel H. Waltz*

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