



August 9, 2021

SENT VIA EMAIL

The Honorable Deb Haaland
Secretary
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RE: Sixty-day notice of violations of the Endangered Species Act relating to failure to timely designate critical habitat for the Big Sandy crayfish (*Cambarus callainus*) and Guyandotte River crayfish (*Cambarus veteranus*)

Dear Secretary Haaland:

This letter serves as a sixty-day notice from the Center for Biological Diversity (“Center”) of our intent to sue you and the U.S. Fish and Wildlife Service (“FWS”) pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, *et seq.* and 50 C.F.R. § 402, *et seq.*, for failing to make timely final critical habitat determinations for two Central Appalachian freshwater species, the Guyandotte River crayfish (*Cambarus veteranus*) and the Big Sandy crayfish (*Cambarus callainus*). This letter is being provided to you pursuant to the 60-day notice requirement of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g)(2)(C).

Within twelve months of publishing in the Federal Register a general notice and the complete text of a proposed regulation to designate a species’ critical habitat, the Secretary must publish in the Federal Register a final determination on the question. *Id.* § 1533(b)(6)(A)(ii).

For decisions regarding whether to designate critical habitat pursuant to the ESA, the Secretary may satisfy her obligations under 16 U.S.C. § 1533(b)(6)(A)(ii) by publishing in the Federal Register:

- a final regulation to implement such designation; or

- notice that such one-year period is being extended under 16 U.S.C. § 1533(b)(6)(C).

Id. § 1533(b)(6)(A)(ii).

The Secretary must publish in the Federal Register a final regulation designating critical habitat of an endangered species or a threatened species concurrently with the final regulation implementing the determination that such species is endangered or threatened, *Id.* § 1533(a)(3)(A)(i), unless the Secretary deems that:

- it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or
- critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat

Id. § 1533(b)(6)(C); 50 C.F.R. § 424.17.

The Center and allies petitioned for protection of the Big Sandy crayfish as a threatened or endangered species on April 20, 2010, under the ESA. 5 U.S.C. § 553(e). On September 27, 2011, FWS issued a 90-day finding determining listing may be warranted under the Endangered Species Act for the Big Sandy crayfish. 76 Fed. Reg. 59835 (Sept. 27, 2011). In 2014, genetic analysis revealed that the taxa formerly known as the “Big Sandy crayfish” actually comprised two distinct species of crayfish, and so the crayfish in a portion of the range of the taxa were formally described as a new species, the Guyandotte River crayfish. Thoma et al. 2014.

On April 7, 2015, FWS published the proposed rule for listing the Big Sandy crayfish as Threatened and the Guyandotte River crayfish as Endangered under the ESA. 80 Fed. Reg. 18710 (April 7, 2015). In this proposed rule, FWS determined that designating critical habitat was prudent, but not determinable at the time. *Id.* at 18738. On April 7, 2016, FWS published its final rule listing the Big Sandy crayfish as Threatened, and the Guyandotte River crayfish as Endangered under the ESA. 81 Fed. Reg. 20450 (April 7, 2016). Under the pressure of a deadline lawsuit filed by the Center in June of 2018, FWS published a proposed rule designating critical habitat for both species on January 28, 2020. Consequently, FWS’ final determination on critical habitat designation for these two species was due on January 28, 2021. 16 U.S.C. § 1533(b)(6)(A)(ii). As of the date of this notice, FWS has yet to make a final determination on critical habitat designation for either the Big Sandy crayfish or the Guyandotte River crayfish.

The Service has violated the ESA by failing to designate critical habitat within the statutory timeframes required under the Act. First, the Service failed to designate critical habitat for the Big Sandy crayfish, and the Guyandotte River crayfish “concurrently” with its April 7, 2016 rule listing the species as threatened and endangered. Second, the Service did not publish a final rule designating critical habitat within a year of publishing the proposed rule on or about April 7, 2015. Based on the

statutory timelines, FWS's designation of critical habitat was due on April 7, 2017 at the latest. 16 U.S.C. § 1533(b)(6)(C). More than six years have elapsed since the Service published a proposed rule to list the Big Sandy crayfish and the Guyandotte River crayfish on April 7, 2015; more than five years have elapsed since the Service published a final rule listing the Big Sandy crayfish and the Guyandotte River crayfish on April 7, 2016; and more than one year has elapsed since FWS published a proposed critical habitat designation for both species. In the meantime, these species' habitat continues to be actively destroyed throughout their range in an ongoing campaign of coal exploitation.

Consequently, FWS has failed to timely designate critical habitat for the Big Sandy crayfish and the Guyandotte River crayfish, and is therefore in violation of ESA Section 4. 16 U.S.C. § 1533(b)(6)(A)(ii). FWS will continue to be in violation of the law until it publishes a final rule designating critical habitat for the Big Sandy crayfish and the Guyandotte River crayfish. If FWS does not make the required critical habitat designation for the Big Sandy crayfish and the Guyandotte River crayfish within the next sixty days, the Center intends to file suit in federal court.

FWS' failure to meet its statutory deadlines for these species is more significant than a simple procedural matter. The prospects for the survival of the Guyandotte River crayfish and Big Sandy crayfish as species are grim and growing more so by the day, due in no small part to the delay created by the agency in ensuring their protection from extinction at the hands of the coal industry.

Please contact me if you have any questions or if you would like to discuss this matter.

Sincerely,



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