



October 28, 2020

Sent via email and FedEx

David Bernhardt
Secretary of the Interior
U.S. Department of the Interior
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Aurelia Skipwith
Director
U.S. Fish and Wildlife Service
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Re: Notice of Violation of Endangered Species Act for Failure to Develop A Recovery Plan for the Unarmored Threespine Stickleback

Dear Secretary Bernhardt and Director Skipwith:

On behalf of the Center for Biological Diversity (“Center”), we hereby provide notice that the U.S. Fish and Wildlife Service (“Service”) is violating the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-559. Specifically, the Service has failed to update its unarmored threespine stickleback (“UTS”) recovery plan in violation of section 4(f) of the ESA, failed to pursue further UTS recovery in violation of section 7(a)(1) of the ESA, and failed to prepare a timely five-year status review for the UTS in violation of section 4(c).

I. The ESA Requires That the Service Develop Recovery Plans, Take Affirmative Conservation Actions, and Prepare Five-Year Status Reviews

The ESA was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). Once listed as “endangered” or “threatened,” a species is entitled to the ESA’s substantive protections, and federal agencies assume duties to conserve it.

Section 4(f) of the ESA directs the Service to develop and implement recovery plans for the “conservation and survival” of listed species unless the agency makes a finding that “such a plan will not promote the conservation of the species.”¹ The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”²

Each recovery plan must include, to the maximum extent practicable, “a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species; objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and estimates of the time required and the cost to carry out those measures needed to achieve the plan’s goal and to achieve intermediate steps toward that goal.” 16 U.S.C. § 1533(f)(1)(B)(i)-(iii).

The ESA also requires the Service to regularly assess the status of listed species. Specifically, section 4(c) requires that the Service “conduct, at least once every five years, a review of all [listed] species . . .” 16 U.S.C. § 1533(c)(2). Based on that review, the agency can determine whether the species should maintain its protections, be uplisted or be delisted. *Id.*; see also 50 C.F.R. § 424.21.

Section 7(a)(1) provides an “affirmative duty” for federal agencies to conserve listed species. It provides that all federal agencies shall “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed . . .” 16 U.S.C. § 1536(a)(1).

II. Background on the Unarmored Threespine Stickleback

The UTS was listed under the Endangered Species Conservation Act of 1969, the precursor to the Endangered Species Act of 1973.³ The UTS is a tiny, scaleless, freshwater fish that inhabits slow-moving reaches in streams and rivers in southern California. Male sticklebacks build nests with mucus threads spun from their kidneys, and then court all gravid females that enter the area. After spawning, often with multiple females, the male defends the nest and fry. Although UTS were documented to live in numerous rivers and tributaries including the Los Angeles, San Gabriel, and Santa Ana rivers, UTS are now only found in the upper Santa Clara River and its tributaries, San Antonio Creek on Vandenberg Air Force Base, and the Shay Creek vicinity.

¹ 16 U.S.C. § 1533(f)(1).

² 16 U.S.C. § 1532(3).

³ Wildlife and Fisheries; Hunting and Possession of Wildlife; Conservation of Endangered Species and Other Fish and Wildlife; 35 Fed.Reg. 16047 (Aug. 25, 1970).

III. The Service Has Violated the ESA by Failing to Prepare a Recovery Plan.

The Service has violated the ESA by failing to prepare an updated recovery plan for the UTS. The UTS's recovery plan was completed thirty-five years ago in 1985.⁴ In 2009, the Service explicitly acknowledged that its 1985 Recovery Plan no longer reflects the best available science, that additional threats to UTS have been identified, a new population has been discovered, and two populations have been extirpated; more specifically, in the UTS's Five-Year Review completed in 2009, the Service states:

Since the development of the recovery plan, much research has been conducted and additional threats have been identified. Furthermore, since the development of the recovery plan, a new population (Bouquet Creek) of the UTS has been discovered and two populations (Canada Honda and San Francisquito Creek) have been extirpated.⁵

The Five-Year Review itself recommends that the Recovery Plan be revised; it includes in the "Recommendations" section that the Service should "[r]evise the 1985 recovery plan for the UTS."⁶ The Five-Year Review also concedes that the recovery criteria in the Recovery Plan are "out of date" and "do not reflect the best available information on the biology of the subspecies."⁷

The Five-Year Review identifies other inadequacies with the Recovery Plan, as well as current efforts to protect UTS. For instance, the Five-Year Review concludes that the Recovery Plan failed to "identify inadequacy of existing regulatory mechanisms as a threat to the subspecies, nor did it identify any recovery tasks that would mitigate this factor."⁸

The need for an updated Recovery Plan is also underscored by the Five-Year Review's conclusion that current efforts are inadequate and the recovery criteria have not been met: "Although some efforts have been and are being made to acquire habitat for the species, little has been done so far, and none of the recovery criteria in the recovery plan for the UTS (Service 1985) have been fully met."⁹

In 2016, relocation of UTS from Soledad Canyon was undertaken to save that population from post-fire impacts from the Sand Canyon fire which could cause poor water quality and major sedimentation in UTS-occupied areas.¹⁰ The UTS were relocated to undisclosed locations in the Angeles National Forest that provided suitable habitat for the fish. Now, due to the most

⁴ U.S. Fish and Wildlife Service, Revised Unarmored Threespine Stickleback Recovery Plan (Dec. 1985) ("Recovery Plan").

⁵ U.S. Fish and Wildlife Service, Unarmored Threespine Stickleback (*Gasterosteus aculeatus williamsoni*) 5-Year Review: Summary and Evaluation (May 2009), at 26 ("Five-Year Review").

⁶ *Id.* at 29.

⁷ *Id.* at 26.

⁸ *Id.* at 22.

⁹ *Id.* at 28.

¹⁰ U.S. Fish and Wildlife Service, *Endangered Southern California fish saved after population threatened by fire* (May 8, 2017) available at https://www.fws.gov/cno/newsroom/featured/2017/unarmored_threespine_stickleback/.

recent Bobcat fire, at least some of the relocated UTS populations will need to be moved again.¹¹ The threats of increasing fire frequency in the species range and extremely limited suitable habitat urgently requires updating the outdated Recovery Plan.

The Service' failure to update the plan violates Section 4(f) of the ESA. 16 U.S.C. § 1533(f). That provision provides that the Service "shall develop and implement plans [] for the conservation and survival of endangered species and threatened species"¹² Where, as here, the Service itself has acknowledged that the existing plan is outdated, section 4(f)(1) imposes an obligation on the Service to "develop and implement" a plan that will in fact provide for the "conservation and survival" of the species.

Courts have found that the Service's duty to prepare a legally adequate recovery plan is non-discretionary. See *Ctr. for Biological Diversity v. Bernhardt*, No. 1:20-cv-00529 (TNM), 2020 U.S. Dist. LEXIS 150499 (D.D.C. Aug. 20, 2020) at *11 ("All endangered species must have a recovery plan that incorporates the enumerated measures set forth in Section 4(f)(1).").

IV. The Service Has Violated the ESA by Failing to Prepare a Five-Year Status Review.

The ESA requires that the Service prepare a Five-Year review "at least once every five years."¹³ Here, eleven years have passed since the Service prepared a status review for the UTS. As such, the Service has violated its duty to prepare a status review once every five years for the UTS.

Moreover, in refusing to update the recovery plan and five-year review, the Service has violated its affirmative duty to conserve under section 7(a)(1) of the ESA.¹⁴

In preparing an updated Recovery Plan and Five-Year Status Review, we urge the Service to utilize the Species Status Assessment ("SSA") framework. The SSA Framework forecasts the species' response to probable future scenarios of environmental conditions and conservation efforts.¹⁵ Such forecasts are particularly important here in light of potential changes in conditions for the UTS due to habitat degradation, climate change, and wildfire.

V. Conclusion

If the Service does not act to correct the violations described in this letter within the next 60 days, the Center intends to pursue litigation in U.S. District Court. The Center will seek

¹¹ Louis Sahagún, "Bobcat fire aftermath threatens endangered species in San Gabriel Mountains," *Los Angeles Times* (Oct. 14, 2020), available at <https://www.latimes.com/environment/story/2020-10-14/fire-stripped-slopes-and-winter-storms-point-to-a-bleak-scenario-for-wildlife-in-the-san-gabriel-mountains>.

¹² 16 U.S.C. § 1533(f)(1).

¹³ 16 U.S.C. § 1533(c)(2)(a); *see also* 50 C.F.R. § 424.21.

¹⁴ 16 U.S.C. § 1536(a)(1); *see also id.* § 1536(c)(1) ("It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.").

¹⁵ United States Fish and Wildlife Service, *Species Status Assessment Framework Assessment* (Aug. 2016), available at https://www.fws.gov/endangered/improving_esa/pdf/SSA%20Framework%20v3.4-8_10_2016.pdf.

injunctive and declaratory relief, and legal fees and costs regarding these violations. If you wish to discuss this matter or believe this notice is in error, please contact J.P. at 408-497-7675.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Rose", with a long horizontal flourish extending to the right.

J.P. Rose

Staff Attorney

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