

Sent via U.S. mail and email

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RE: 60-Day Notice of Intent to Sue Regarding Violations of the Endangered Species Act and Administrative Procedure Act; Failure to Revise Critical Habitat for the Florida Manatee (*Trichechus manatus latirostris*).

Dear Secretary Haaland, Principal Deputy Assistant Secretary Estenoz, Principal Deputy Director Williams, and State Supervisor Williams,

This letter serves as a sixty-day notice of intent to sue the U.S. Fish and Wildlife Service (FWS) over violations of the Endangered Species Act (ESA or Act) and the Administrative Procedure Act (APA) for failing to revise critical habitat for the Florida manatee (*Trichechus manatus latirostris*) in response to a 2008 petition.¹ This notice is submitted on behalf of the Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club, all signatories to the 2008 petition. Revised critical habitat is necessary to provide these imperiled marine mammals life-saving protections, to enhance their recovery, and to reduce the risk of their extinction. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the Act, to the extent that a court deems such notice necessary.²

I. The Florida Manatee's Imperiled Habitat

Florida manatees need revised designated critical habitat to survive and recover. As 2021 has shown us, they face several dire habitat-based threats, including the loss of warm water

¹ 16 U.S.C. § 1533(b); 5 U.S.C. § 706(1).

² 16 U.S.C. § 1540(g).

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refuge and poor water quality. Accompanying threats include a growing number of boat-strikes and the loss of seagrass manatees desperately rely on as a food source.

Over half of Florida manatees seek shelter from cold winter waters in the warm-water discharges of power plants.³ The rest of the population uses natural springs and thermal basins to stay warm.⁴ There are currently 14 “major” warm-water discharges (i.e., sites with at least one winter count of 50 or more manatees).⁵ Ten of these sites are outfalls from power plant cooling systems and four are warm water springs.⁶ Power companies will likely phase out power plant discharges within the next 30 years, and human-caused impacts, such as flow reductions and other activities, threaten Florida’s springs and thermal basins.⁷ The threats to the springs’ warm-water habitat used by manatees include diminishing spring flows from human-caused groundwater withdrawals, obstructions that limit or preclude access, disturbance from recreational activities, loss of nearby forage resources, climatic variations and sea level rise.⁸

As major power plant outfalls and natural warm-water refuges are lost, manatees may struggle to find suitable alternative habitats, as food supply, space, and temperatures necessary for thermoregulating may not be sufficient to support a large influx of displaced animals.⁹

Over the last decade, the Florida manatee population has endured large die-offs from depleted seagrass, red tide, cold stress, and boat-strikes. With fewer than 8,000 manatees in the southeastern United States, these mortality events present serious present and future threats to the overall survival of the species.¹⁰

Just this year more than 900 manatees have died in Florida,¹¹ more than double Florida’s five-year average.¹² At least 50 percent of these deaths have been in the Indian River Lagoon where the suspected cause of mortality is starvation and malnutrition due to nutrient pollution killing off local seagrass in important warm water refuge.¹³ This year’s extreme die-off has led to

³ Florida Fish and Wildlife Conservation Commission, *Florida Manatee Warm Water Action Plan*, Oct 2020, at 1.

⁴ *Id.*

⁵ Laist, D.W., Reynolds, J.E. 2005. *Florida Manatees, Warm-Water Refuges, and an Uncertain Future*, Coastal Management, 33:279-295, 281.

⁶ *Id.*

⁷ Florida Fish and Wildlife Conservation Commission, *Florida Manatee Warm Water Action Plan*, Oct 2020, at 1.

⁸ Edwards, H.H. 2013. *Potential Impacts of Climate Change on Warm Water Megafauna: the Florida Manatee Example (Trichechus manatus latirostris)*. Climatic Change, 121(4): 727-738.

⁹ Laist 2005.

¹⁰ FWS, West Indian Manatee, <https://www.fws.gov/southeast/wildlife/mammals/manatee/>.

¹¹ Waymer, J. 2021. *Merritt Island Park Now a ‘Manatee Graveyard’ as Florida Sea Cows Starve to Death*, Florida Today, March 20, 2021.

¹² Sampson, Z. 2021. *Florida Manatees are Dying at a Worrisome Rate. Many Appear to be Starving*, Tampa Bay Times, March 11, 2021.

¹³ Green, A. 2021. *Manatee Die-Off in Indian River Lagoon Prompts Call For Federal Investigation*, WMFE, March 25, 2021.

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the official designation of an Unusual Mortality Event under the Marine Mammal Protection Act.¹⁴

In 2018, red tide in southwestern Florida caused the deaths of at least 288 manatees. Though 2018 was the most catastrophic red tide-related mortality event to date, more than 100 red tide-related mortalities were documented in 1996, 2003, and 2013. And during the winter of 2009 – 2010, when Florida experienced extremely cold weather, FWC documented 282 manatee deaths directly attributable to cold stress. The following year, FWC documented 114 deaths due to cold stress.¹⁵ Meanwhile, because of the raging red tide in Tampa Bay fueled by the Piney Point disaster, at least 19 manatees have succumbed to red tide since June, and the persistent bloom threatens to degrade important foraging habitat near regional warm water refuges.

Increased human activity in areas supporting manatee populations lead to other sources of mortality as well. From 2016 – 2019, 478 manatees died as a result of boat-strikes. Each year has seen more watercraft fatalities than the last. Already this year 70 manatees have died from boat strikes. A recent study concluded that one out of every four adult manatees analyzed bore evidence of 10 or more watercraft strikes, and 96% of adult manatees had watercraft-related scars.¹⁶

II. Federal Legal Framework

A. *Endangered Species Act*

Critical habitat provides important protections for imperiled species beyond that provided by listing alone;¹⁷ species with designated critical habitat are more than twice as likely to have improving population trends than species without designated critical habitat.¹⁸ Federal agencies must ensure through consultation with the FWS that any action they authorize, fund, or carry out will not “jeopardize the continued existence of any [listed] species.”¹⁹ For species with critical habitat, each federal agency must additionally guarantee that its actions will not “result in the destruction or adverse modification” of the critical habitat.²⁰

The 1978 amendments to the Act required the critical habitat be designated concurrently with a species’ listing and defined critical habitat as:

¹⁴ FWC, *Manatee Mortality Event Along the East Coast: 2020 –2021*, <https://myfwc.com/research/manatee/rescue-mortality-response/ume/>, last updated May 26, 2021.

¹⁵ FWC, *Yearly Mortality Summaries*, 2010-2011.

¹⁶ FWC, *New Study Shows Impact of Watercraft on Manatees*, <https://myfwc.com/research/manatee/rescue-mortality-response/publication/>.

¹⁷ *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1185-86 (10th Cir. 1999) (holding “critical habitat designations serve to protect species vulnerable to extinction”).

¹⁸ Taylor, M.F.J., K.F. Suckling, and J.J. Rachlinski. 2009. *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, BioScience.

¹⁹ 16 U.S. Code § 1536(a)(2).

²⁰ *Id.*

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(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the [Act], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it was listed . . . upon a determination by [FWS] that such areas are essential for the conservation of the species.”²¹

The 1978 amendments also included the addition of what is now known as Section 1533 (c)(2)(B), which requires the Secretary to make periodic determinations on whether a listed species should be up-listed, down-listed, or delisted altogether.²² The provision requires FWS, when making these determinations, to comply with subsections (a) and (b) of 1533.²³ 16 U.S.C. 1533(a)(3)(A)(i) requires that the Secretary “concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat.” 16 U.S.C. 1533(b)(6)(C).

The 1982 amendments adjusted the requirement that critical habitat designation be made concurrently, including requiring that it be done concurrently to “the maximum extent practicable.”²⁴ The 1982 amendments also provided a new petition process to revise already-designated critical habitat, requiring FWS to swiftly respond to petitions to revise critical habitat.²⁵ Indeed, the Act provides two ways for FWS to revise critical habitat. FWS “may, from time-to-time . . . as appropriate, revise” critical habitat.²⁶ Or any “interested person” may petition FWS to make such a revision.²⁷ FWS has 90-days to issue “a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted.”²⁸

If FWS agrees the petition presents substantial scientific information indicating critical habitat revision may be warranted, it must then publish in the Federal Register, within 12 months of receiving the petition, a determination as to “how [it] intends to proceed with the requested revision.”²⁹

The standards governing critical habitat revisions are the same as for original designations:

²¹ Pub. L. 95-632 §§ 2, 11 (1978); 16 U.S.C. § 1532(5)(A).

²² Endangered Species Act of 1978, Pub. L. 95-632 § 11(4)(B).

²³ 16 U.S.C. § 1533 (c)(2)(B).

²⁴ Pub. L. 97-304 § 2(a)(1)(E); 16 U.S.C. § 1533(a)(3)(A). “to the maximum extent prudent and determinable, [FWS] shall, concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat.”

²⁵ Pub. L. 97-304 § 2(b)(2).

²⁶ 16 U.S.C. § 1533(a)(3)(B).

²⁷ *Id.* § 1533(b)(3)(D); 50 C.F.R. § 424.14.

²⁸ 16 U.S.C. § 1533(b)(3)(D)(i); 50 CFR § 424.14(i)(1).

²⁹ 16 U.S.C. § 1533(b)(3)(D)(ii).

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The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.³⁰

Until recent revisions, 50 C.F.R. § 424.12(b) detailed the types of “physical” and “biological” features essential to the conservation of the species which may require special management or considerations as:

(1) space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally, (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. Department of Interior regulations also specify that these elements “may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dry land, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.”

The 2016 amendments to the regulation removed that language and instead detail that the analysis of the “physical and biological features essential to the conservation of the species” as including:

Consideration of the appropriate quality, quantity, and spatial and temporal arrangements of such features in the context of the life history, status, and conservation needs of the species.

In making the change, FWS asserted that it still expects “to provide a comparable level of detail and specificity in defining and describing physical or biological features essential to the conservation of the species.”³¹

To ensure compliance with these mandatory duties and deadlines, the Act’s citizen suit provision authorizes “any person” to commence an action.³² This provision specifically provides

³⁰ 16 U.S.C. § 1533(B)(2).

³¹ 81 Fed. Reg. 7414, 7432, *Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat*, (Feb. 11, 2016).

³² 16 U.S.C. § 1540(g), § 1533(b)(6)(C).

courts with jurisdiction for any action against the FWS for its failure to perform any nondiscretionary duty under the Act's Section 4.³³

As one court has held:

A citizen petition to revise critical habitat starts a process that may, as here, ultimately establish an obligation for the Service to act despite its discretion otherwise under section 4(a)(3)(B) of the ESA. Congress requires the Service to review such petitions and to determine their merits on a timely basis. A 12-Month Finding on a citizen petition starts the clock of reasonable timeliness under the APA. Thus, citizen petitions can constrain FWS's discretion when they are scientifically sound and demonstrate that revision of a critical habitat designation is warranted.³⁴

B. Administrative Procedure Act

The APA establishes general rules governing the issuance of proposed and final regulations by federal agencies.³⁵ It defines a "rule making" to mean the "process for formulating, amending, or repealing a rule."³⁶ Absent narrow circumstances, a federal agency must publish a notice and allow public comment on any proposed "rule making."³⁷

The statute establishes that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."³⁸ It also requires that, "within a reasonable time, each agency shall proceed to conclude a matter presented to it."³⁹ Further, the agency must give "prompt notice" of the "denial in whole or in part" of a written petition, together with a "brief statement of the grounds for denial."⁴⁰

The APA establishes judicial review provisions for agency actions that apply unless statutes preclude judicial review or the action is committed to agency discretion by law.⁴¹ "Agency action" is defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."⁴² Under the APA's judicial review provision, the reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed[.]"⁴³

³³ *Id.* § 1540(g)(1)(C).

³⁴ *Biodiversity Leg. Found. v. Norton*, 285 F. Supp. 2d 1, 11 (D.D.C. 2003).

³⁵ 5 U.S.C. §§ 551–559.

³⁶ *Id.* § 551(5).

³⁷ *Id.* § 553(b), (c).

³⁸ *Id.* § 553(e).

³⁹ *Id.* § 555(b).

⁴⁰ *Id.* § 555(e).

⁴¹ 5 U.S.C. §§ 701–706.

⁴² *Id.* § 551(13).

⁴³ *Id.* § 706(1).

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Courts consider several factors in determining whether an agency's delay is unreasonable, including: (1) "the length of time that has elapsed since the agency came under a duty to act," (2) "the context of the statute which authorizes the agency's action," (3) "the consequences of the agency's delay," and (4) "any plea of administrative effort, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources."⁴⁴

III. Florida Manatee Regulatory Background

The Florida manatee, listed as an endangered species in 1967,⁴⁵ has continued to suffer from habitat loss and unnatural mortalities since the time of its listing. FWS designated critical habitat for the Florida manatee in 1976,⁴⁶ prior to the 1978 ESA amendments requiring that critical habitat designations include a description of the "physical and biological features essential to the conservation of the species."⁴⁷ As a result, the critical habitat designations for the Florida manatee only list specific waterways known to be concentration areas for manatees in 1976, and not any of the physical or biological features that are essential to the conservation of the species. FWS designated critical habitat in Citrus, Hillsborough, Manatee, Sarasota, Charlotte, De Soto, Lee, Collier, Monroe, Dade, Palm Beach, Martin, West Palm Beach, Volusia, Brevard, Nassau and Duval counties.⁴⁸

In 1980, FWS produced the first recovery plan for the Florida manatee, which it revised in 1989, 1996, and 2001.⁴⁹ The 1980 recovery plan lists designating additional areas as critical habitat as an objective. It states:

The 1980 plan states:⁵⁰

To meet the intents, provisions, and spirit of the Endangered Species Act, the Marine Mammal Protection Act, and the Florida Manatee Sanctuary Act, human-associated injuries and mortalities must be minimized, *and critical habitats must be identified and protected.*

The 1980 recovery plan lists as its "Primary Objective and Rationale" the need to "re-establish and maintain minimum sustainable populations" by "protecting-natural habitat within all significant portions of historical range" and identifying and protecting

⁴⁴ *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001); see also *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

⁴⁵ The manatee was originally listed under the Endangered Species Preservation Act of 1966 in 1967. It was later listed as endangered species in 1973 under the Endangered Species Act. 12-month Finding on a Petition to Revise Critical Habitat for Florida manatee (*Trichechus manatus latirostris*), 75 Fed. Reg. 1574 (Jan. 12, 2010).

⁴⁶ *Id.* at 1574.

⁴⁷ Endangered Species Act of 1978, Pub. L. 95-632 § 4(a)(1)-(5).

⁴⁸ 41 Fed. Reg. 41916 (September 24, 1976).

⁴⁹ U.S. Fish and Wildlife Service. *Florida Manatee Recovery Plan* (*Trichechus manatus latirostris*), Third Revision. U.S. Fish and Wildlife Service. Atlanta, Georgia. i – D2 (2001).

⁵⁰ U.S. Fish and Wildlife Service. *West Indian Manatee Recovery Plan*. (1980) at 1 (emphasis added).

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“essential habitats.”⁵¹ The 1989 recovery plan lists as an objective to “designate additional areas as ‘Critical Habitat.’”⁵²

The 2001 recovery plan identifies the loss of warm water habitat during the winter months as one of the primary threats to the manatee,⁵³ and describes the need for further protections in areas where human development has pushed out the manatee.⁵⁴ The 2001 recovery plan states that the manatee’s “survival will depend on maintaining the integrity of ecosystems and habitat sufficient to support a viable manatee population,”⁵⁵ and states that “much has been learned about manatee distribution in the decades since manatee critical habitat was original defined . . . FWS should assess the need to revise critical habitat for the Florida manatee.”⁵⁶

On December 19, 2008, the Center, Defenders of Wildlife, and Save the Manatee Club petitioned the FWS under the APA and ESA requesting the agency initiate rulemaking to revise critical habitat for the Florida manatee.⁵⁷ On September 16, 2009, FWS issued a 90-day positive finding determining that a revision to the manatee’s critical habitat may be warranted.⁵⁸ FWS agreed that “the 1976 critical habitat designations did not address the physical and biological features essential to the conservation of the manatee,” that “scientific information regarding manatee conservation has dramatically increased since the original designation,” and therefore, revision to critical habitat for the manatee may be warranted “to more adequately address the features essential to the species’ conservation.”⁵⁹

On January 12, 2010, after holding notice and comment, FWS published a 12-month finding that a revision of Florida manatee critical habitat was “warranted.”⁶⁰ FWS found “the geographic areas originally described as manatee critical habitat need to be updated, based on recent scientific studies of manatee distribution, habitat use, and habitat needs,”⁶¹ and that the “loss of Florida’s warm-water habitats is one of the leading threats facing the manatee population.”⁶² However, FWS also asserted that that immediate revision was precluded due to lack of available funds.⁶³

⁵¹ *Id.* at 11.

⁵² FWS. 1989. Florida Manatee Recovery Plan, First Revision. U.S. Fish and Wildlife Service. Atlanta, Georgia. 25.

⁵³ *Id.* at 23.

⁵⁴ *Id.* at 86.

⁵⁵ *Id.* at 23.

⁵⁶ *Id.* at 98.

⁵⁷ 75 Fed. Reg. 1574 (Jan 12, 2010).

⁵⁸ 74 Fed. Reg. 49842 (Sept 29, 2009).

⁵⁹ *Id.* at 49844.

⁶⁰ 75 Fed. Reg. 1574 (Jan 12, 2010).

⁶¹ *Id.* at 1577.

⁶² *Id.* at 1575.

⁶³ *Id.* at 1574.

In 2017, FWS downlisted the Florida manatee from “endangered” to “threatened”.⁶⁴ One study FWS relied on heavily in the downlisting decision predicted that it was “unlikely that the Florida population of manatees will fall below 4,000 total individual over the next 100 years, assuming current threats remain at the current levels indefinitely.”⁶⁵ The author of this study, Dr. Michael C. Runge, recently conceded, “[t]his winter’s IRL die-off does raise questions about whether the assumptions in our baseline scenario were correct.”⁶⁶

V. Violations

FWS has not revised Florida manatee critical habitat despite determining that such revision was warranted in 2010. FWS designated critical habitat for the manatee in 1976, two years before the Endangered Species Act was amended to define critical habitat by statute.⁶⁷ As such the critical habitat designation does not identify any physical or biological features for the Florida manatee. As a result, the critical habitat designation has been deficient for over 45 years. Moreover, each of the three manatee recovery plans identifies the need for additions to, or revisions of, the manatee critical habitat designation.

The signatories below petitioned FWS under the ESA and APA to initiate rulemaking to revise the Florida manatee’s designated critical habitat in 2008. FWS’s 2010 decision determined revision of the manatee’s critical habitat designation was warranted,⁶⁸ thus triggering FWS’ discrete duty to act. To date, FWS has neither initiated rulemaking to revise critical habitat nor denied the 2008 petition for rulemaking.

For these reasons, the FWS’s ongoing failure to revise the manatee’s critical habitat—more than a *decade* after FWS found such a designation to be warranted in order to conserve the manatee as required by the Act—violates the ESA and constitutes unreasonably delayed action under the APA.

While section 4(b)(3)(D)(ii) does not impose a precise deadline on FWS to revise critical habitat in response to a petition that FWS itself has deemed meritorious, Congress plainly intended to impose an obligation on the agency to actually implement the revision within *some* reasonable time frame. *See* 16 U.S.C. § 1533(b)(3)(D)(ii). Otherwise, the petition process created by Congress, including the obligation that Congress imposed on FWS to *respond* to petitions within specific time frames, would be rendered meaningless.

⁶⁴ FWS claimed that it did designate critical habitat for the Florida manatee in 1976, and that it was permitted but not required to revisit the designation pursuant to Section 1533 (a)(3)(A)(ii). 82 Fed. Reg. 16668, 16689 (Apr. 5, 2017).

⁶⁵ *Id.* at 16701.

⁶⁶ Pittman, C. 2021. *Four Years Ago the Trump Administration Said Manatees Weren’t Endangered Anymore. Now They’re Dying in Doves*, FlaglerLive (March 23, 2021).

⁶⁷ *Id.*; *see also* Endangered Species Act of 1978, Pub. L. 95-632 § 4(a)(1)-(5).

⁶⁸ 75 Fed. Reg. 1574 (Jan 12, 2010).

Underscoring the obligation to revise the designation here is section 4(f) of the Act, which mandates, in pertinent part, that the FWS “shall . . . implement” formal recovery plans for endangered and threatened species.⁶⁹ As explained, the FWS’s recovery plans have recognized for at least *forty years* the need to revise the manatee’s critical habitat designation. Consequently, it is indisputable that FWS is not “implementing” its own recovery plans for the manatee by indefinitely avoiding an admittedly necessary revision of critical habitat.

Conclusion

We are deeply concerned about and actively involved in the protection of the Florida manatee and its habitat. Our members and staff engage in professional, recreational, aesthetic, and scientific activities involving this species and its habitat, including observing and attempting to observe the species. On their behalf, we urge you to take prompt action to protect the species under mandatory requirements of the ESA and to respond to our 2008 rulemaking petition as required by the APA. Accordingly, an acceptable remedy would be an agreement for the agency to commit to dates certain by which to propose and finalize revisions to the critical habitat designation for the Florida manatee.

We are eager to address these violations without the need for litigation and to discuss with FWS prospects for amicable resolution of these issues at the earliest possible date. If FWS does not act within 60 days to correct these violations, however, we will have no choice but to pursue litigation in federal court.

If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me at jlopez@biologicaldiversity.org or (727) 490-9190. Thank you for your prompt attention to this matter.

Sincerely,



Jaclyn Lopez
Florida Director
Center for Biological Diversity

⁶⁹ 16 U.S.C. § 1536(f).