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VIA E-MAIL AND CERTIFIED MAIL

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**Re: Notice of Intent to Sue to Remedy Unlawful Delay of 12-Month Determination
Concerning Petition to List Pinyon Jay**

Dear Secretary Haaland, Director Williams, and Regional Director Hogan:

I write to notify you that Defenders of Wildlife (“Defenders”) intends to sue the Secretary of the U.S. Department of the Interior, in her official capacity, and the U.S. Fish and Wildlife Service (“FWS” or the “Service”) for violations of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, and Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, in connection with FWS’s unlawful delay of its “12-month” finding in response to Defenders’ April 25, 2022 Petition to List the Pinyon Jay (*Gymnorhinus cyanocephalus*) as Endangered or Threatened Under the Endangered Species Act (“Petition”). This letter constitutes the required 60-day notice under Section 11(g) of the ESA, 16 U.S.C. § 1540(g).

I. Background

A. Legal Framework

The ESA serves “to provide a program” and a “means” of conserving endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(b). Under the statutory scheme, “listing” a species—determining that it qualifies as endangered or threatened under the Act—is a vital, threshold step on which the ESA’s benefits and protections hinge. See *generally* 16 U.S.C. § 1533 (Section 4). For species that are listed, the ESA, which “represent[s] 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), has proven wildly successful. Some 95-99% of the species listed under the Act still exist today (including species which have now recovered, like the bald eagle).¹

Given listing’s importance, “Congress from the outset recognized” timeliness in the process as “essential.” *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1175 (9th Cir. 2002). Thereafter, concerned that species “had languished” in limbo for years, it passed amendments to the statute in 1982 specifically to speed up the process. See *id.* (internal quotation marks omitted). Section 4 of the ESA, which governs the listing process, accordingly includes a mandatory deadline by which FWS must make a listing determination. See 16 U.S.C. § 1533(b).

Under Section 4, “[a]ny ‘interested person’ may petition the FWS to list a species.” *Ctr. for Biological Diversity v. Haaland*, No. 20-573 (EGS), 2023 WL 2401662, at *2 (D.D.C. Mar. 8, 2023) (quoting 16 U.S.C. § 1533(b)(3)(A)). FWS² then must, to the maximum extent practicable, “make a finding as to whether” the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted” within 90 days of receipt. 16 U.S.C. § 1533(b)(3)(A). Whether or not the agency meets the 90-day deadline, if FWS finds that a petition does present substantial scientific or commercial information indicating that listing may be warranted, FWS must, “[w]ithin 12 months after receiving a petition,” make one of the following determinations: (1) that listing is warranted; (2) that listing is not warranted; or (3) that listing is warranted but precluded due to circumstances specified in the statute. 16 U.S.C. § 1533(b)(3)(B).³

The ESA’s deadline for such “12-month findings” is mandatory, and FWS has no discretion to disregard it or set a different deadline. *Forest Guardians v. Babbitt*, 174 F.3d

¹ See, e.g., [JRC Testimony for EPW Hearing ESA 2.15.17.pdf \(defenders.org\); Endangered Species Act | Defenders of Wildlife](#)

² The ESA places the responsibility for listing on the Secretary of the Interior, the authority who oversees and discharges listing obligations through the “Services,” FWS and National Marine Fisheries Service. See 16 U.S.C. § 1533.

³ Section 4 further mandates that FWS publish its 12-month determination in the Federal Register. 16 U.S.C. § 1533(b)(3)(B).

1178, 1190-92 (10th Cir. 1999); see also *Friends of Animals v. Ashe*, 808 F.3d 900, 903, 905 (D.C. Cir. 2015) (“[T]he deadlines set forth in § 1533(b) are mandatory”); *Ctr. for Biological Diversity*, 2023 WL 2401662, at *2 (“The ESA permits no exceptions to this 12-month mandatory deadline.”) (quoting *In re Endangered Species Act Section 4 Deadline Litig.*, 277 F.R.D. 1, 4 (D.D.C. 2011)). Neither “budgetary limitations,” nor “agency preferred priorities” may “be considered as excuses for failing to perform” this mandatory duty. *Sw. Ctr. for Biological Diversity v. Dep’t of Interior*, No. CIV99519LFLGLCSACE, 2000 WL 36739927, at *3 (D.N.M. Mar. 13, 2000) (applying *Forest Guardians*).

ESA Section 11 provides for citizen suits against the Secretary of the Interior for failure “to perform any act or duty under [ESA Section 4] which is not discretionary with the Secretary.” 16 U.S.C. § 1540(g)(1)(C). In such suits, “[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.” *Id.* § 1540(g)(1).

In addition to violating the ESA, “[w]hen an agency fails to meet a concrete statutory deadline, it has unlawfully withheld agency action” in violation of the APA, and a reviewing court *must* “compel the action unlawfully withheld”; it has no discretion to do otherwise. See *Forest Guardians*, 174 F.3d at 1190-92 (applying APA as standard of review for ESA claim). In imposing a new deadline, a court “must consider what work” remains to be done “and how quickly that can be accomplished,” requiring action “as soon as possible, without regard” to other priorities. *Forest Guardians*, 174 F.3d at 1193.

B. Defenders’ Petition and FWS’s Lengthy, Ongoing Delay in Responding

1. Defenders Seeks Clearly Needed Protection for the Pinyon Jay

The Pinyon Jay is an iconic, keystone species that plays an important role in the biodiversity of the West. See *generally* Petition Ex. A. Overall, it is one of the most genetically distinct and ecologically important species in North America. These charismatic, dusky blue birds have a mutualistic, symbiotic relationship with the piñon pine. *Id.* at i. Although they eat many things, their primary food is piñon pine seeds, often referred to as pine nuts. *Id.* at i, 9. The piñon pine, in turn, relies on the Pinyon Jay’s role as a seed disperser to replenish the woodlands.⁴

Its situation is undisputedly dire. Ongoing loss of its woodland habitat represents a very significant threat to the Pinyon Jay, and one that is compounded by threats from climate change. *Id.* at 30-31, 44-45. The most current information shows the species has declined dramatically—by more than 80% according to some estimates—and we could lose up to

⁴ In addition to supporting high biodiversity, piñon-juniper woodlands make significant contributions to carbon sequestration. *Id.* at 29.

50% of the already-decimated global population by 2035.⁵ Indeed, a FWS staff member stated in an internal email that it “seems very possible” we could lose another 50% or more of the global population by the end of the century. FWS Internal Correspondence Ex. B, at 95.⁶ The interdependence of the Pinyon Jay and piñon pine also means that loss of the Pinyon Jay poses risks to the functioning of an entire ecosystem—including other species it supports.

Still, both the species and its habitat lack needed protection. Notably in this regard, federal agencies have jurisdiction over the largest proportion of Pinyon Jay occupied habitat in the United States. Together, the Bureau of Land Management (“BLM”) and the U.S. Forest Service manage almost half (48.9%) of the Pinyon Jay habitat within the bird’s range. See Petition Ex. A, at 35 & 78-79. A 2021 study suggests that, under their watch, extensive loss of suitable Pinyon Jay habitat has occurred on federal lands. *Id.* at 34.

Additionally, the IUCN has specifically identified the Forest Service’s piñon-juniper eradication efforts as significant contributors to the decline of piñon-juniper habitat across the Pinyon Jay range. See *id.* at 5. These woodlands, according to the IUCN, are often removed to create or promote sage grouse habitat and have also been converted into cattle rangeland. See *id.* (citing Birdlife International 2020). As Defenders has explained, it also is becoming increasingly common to manage piñon-juniper for the perceived benefit of big game species, especially mule deer, by thinning trees, as well as to conduct extreme thinning for perceived fire hazard reduction. See *id.* at 31, 33, 36-39, & 48.

In addition to the ecological damage, risks to the Pinyon Jay and piñon pine ecosystem threaten cultural losses as well. Pine nuts are a staple in Southwestern cuisine and collecting them is a time-honored tradition for many families in the West. Native Americans in the Southwest have harvested and consumed pine nuts for generations, and disappearance of these seeds would disproportionately impact Native American tribes and Hispanic communities.

2. FWS Takes More than 15-Months to Make a 90-Day Finding

As referenced above, Defenders submitted its petition on April 25, 2022. *Id.* On April 28, 2022, a staff member within the Mountain and Prairie Region (“Region 6,” which covers an eight-state area in the western United States), circulated the Petition internally, noting, among other things, that the agency was “looking for a region and Field Office to take the lead” and that “a good deal of the range falls within Region 6.” FWS Internal Correspondence Ex. B, at 2. In a response the same day, a staff member from the Utah Field Office expressed “an interest [in] being able to control the process” by taking the lead role. *Id.* at 1. The same

⁵ *Pinyon Jay Working Group*, Partners in Flight (last visited Sept. 23, 2024), <https://partnersinflight.org/resources/pinyon-jay-working-group/>.

⁶ Defenders obtained the internal correspondence, including all materials attached in Exhibit B, through a Freedom of Information Act (“FOIA”) request.

email candidly disclosed, however, that the Utah Field Office lacked “the staff and capacity to do this alone” and would “need support and buy-in from other field offices, both from R6 FOs within the range of the species and also from Regions 1, 2, and 8,” along with “SIGNIFICANT assistance from Migratory Birds/Sci Apps.” *Id.* at 1-2. On May 2, 2022, the Field Supervisor in the Utah Field Office responded with agreement, noting, among other things, the need for “substantial help” from the Colorado-based staff member who leads the “PIJA working group.” *Id.* at 1.⁷

By June 2022, FWS had selected Region 6 as the lead for the Petition, with the Utah Field Office acting as the state lead. *Id.* at 11-13. There is no indication in the FOIA records Defenders received that in doing so, the agency considered whether a different office could complete the work more quickly or had greater resources and expertise to devote. The initial e-mail correspondence, however, clearly disclosed that the Pinyon Jay’s range spans large parts of other states. *Id.* at 3 & 8. A map included in the correspondence is excerpted below (but resized here for space):



Figure 1. Pinyon Jay Range, showing Bird Conservation Regions. Data from BBS. Exemptions and vagrants not included. CC BY Defenders of Wildlife 2021. See Appendix 1 for metadata.

Id.

⁷ In the interim, a different staff member in the Western Colorado Field office responded to “support Utah being lead office due to being central in the range” (which, as shown above, also spans large parts of other states, including a significant portion of Colorado). FWS Internal Correspondence Ex. B at 6.

More than fifteen months later, on August 17, 2023, FWS issued a positive 90-day finding. Therein, FWS explained that:

Based on our review of the petition and readily available information regarding adverse habitat treatments in piñon-juniper woodlands (Factor A), increased wildfire frequency (Factor A), invasive species (Factor A), inadequacy of existing regulatory mechanisms (Factor D), and climate change (Factor E), we find that the petition presents substantial scientific or commercial information indicating that the petitioned action to list the pinyon jay as an endangered or threatened species may be warranted.⁸

Part of the process for the 90-day finding involved back and forth concerning how much information to publish. FWS initially analyzed multiple threats to the Pinyon Jay but then reduced its discussion to one threat based on agency guidance. Then, it reverted back to its original approach after the Utah Field Office expressed concern that “only list[ing] woodland management as a substantial threat” could create “an issue of messaging [with] partners.” FWS Internal Correspondence Ex. B, at 16. That change, according to a Colorado-based staff member, was “extra work and likely set back timing some.” *Id.* at 14.

3. FWS Decides to “Kick” the 12-Month Finding Down the Road, Instead of Doing What It Can Now.

Months then passed with no further determination and no indication as to when FWS would make its 12-month finding. Concerned about the delay, Defenders, as referenced above, sought information through FOIA about the anticipated timing. The records released showed that FWS discussed how to prioritize this determination in October 2023. *Id.* at 24-28.⁹ Also in October 2023, FWS “reached out to federal, state, tribal, non-profit, and other conservation partners,” FWS Internal Correspondence Ex. B, at 58, 84, 87, & 96 (examples), to ask about outstanding studies in hopes of developing a “comprehensive record of all pending Pinyon Jay research efforts,” *id.* at 29 & 46. The inquiry, one staff member explained, would “help immensely as we work to figure out when the 12 month finding would be due (aka, how far down the road we can kick it).” *Id.* at 45.

⁸ Endangered and Threatened Wildlife and Plants; 90-Day Findings for Five Species, 88 Fed. Reg. 55991, 55995 (Aug. 17, 2023) (the “Factor[s]” refer to the five listing factors set forth in Section 4(a)(1)(A)-(E)); see also Ex. B at 23.

⁹ As FWS is of course aware, it uses a National Listing Workplan (“Workplan”) to reflect its priorities for addressing listing petitions and making critical habitat designations, relying on methodology it published in 2016 as a non-binding “tool.” See 81 Fed. Reg. 49248, 49248 (July 27, 2016). The 2016 methodology states that it is intended to complement and be used in conjunction with, not replace, the “1983 Endangered and Threatened Species Listing and Recovery Priority Guidelines (September 21, 1983; 48 FR 43098), which apply to species that have already been determined to warrant a listing proposal.” *Id.*

By contrast, none of the records FWS produced evidenced any parallel effort to canvass for information about whether anticipated harm to the Pinyon Jay supported giving the determination earlier attention, instead of “kick[ing] it” down the road. In particular, the records revealed no similar inquiry into habitat destruction on the horizon or already happening while the species waits in limbo.¹⁰

In November 2023, FWS staff recommended assigning the Pinyon Jay to the third of five prioritization “bins” for purposes of the agency’s Workplan, reasoning that “the information collected” meant that “New Science [is] Underway to Inform Key Uncertainties.” *Id.* at 58, 84, 87, & 96.¹¹ The email transmitting this recommendation described it as “based on [staff’s] review of available biological data [and] assessment of threats to the species,” even though this was something that, in reality, they “didn’t formally do.” *Id.* at 57.¹²

After receiving this recommendation, FWS’s headquarters, in turn, recommended putting the Pinyon Jay on the Workplan “for FY28, which [was] as far out as scheduling” went at the time. *Id.* at 83, 86, & 94-85. Thus, as of November 2023, FWS assigned the 12-month finding for the Pinyon Jay a tentative due date of fiscal year (“FY”) 2028, pending publication of an updated Workplan. *Id.* at 93, 98, 100 & 103. The self-imposed “deadlines” projections on the Workplan are not binding commitments by the agency, and FWS could revisit or miss this deadline as well. *See, e.g., id.* at 86.

Staff then decided that, to make the FY2028 deadline, they should start work on the Species Status Assessment (“SSA”) on which the determination would be based in FY2026 or FY2025. *Id.* at 86, 94-95, & 100. There was no indication in the records we reviewed that they determined they lacked any time at all to work on this determination before FY2025, or that it would be impossible to begin, now (or back in 2023), to analyze the information already available or otherwise move forward with an SSA. Rather, staff worked backward from FY2028 to proceed with the next step in its formal process for the overdue response to Defenders’ Petition. *See id.*

¹⁰ The closest material is a single forwarded email that attaches information on reported BLM projects and studies, which suggests taking some of the information “with a grain of salt.” *Id.* at 33-44.

¹¹ The recommendation also mentions an even lower “fourth bin” due to the potential for one state within the range to initiate a conservation agreement. *E.g., id.* at 84 & 87. The absence of any “ongoing concerted efforts in development or underway to reduce threats to the species,” however, made this “bin” unavailable. *Id.*

¹² Staff reasoned that it was still a “fair statement” despite this omission, because they had done analysis in connection with the separate determination in the 90-finding and it was “more or less” their view. *Id.*

4. FWS Rebuffs Defenders' Attempts to Persuade the Agency to Act with Greater Alacrity

Hoping to persuade FWS to change its mind before it committed to this course of action in publishing an update to the Workplan, Defenders wrote the agency on March 27, 2024. (Letter attached as Ex. C). Lacking a clear point of contact responsible for the determination, Defenders addressed this correspondence to Scott Somershoe, as chair of the Pinyon Jay Working Group and lead author of Conservation Strategy for the Pinyon Jay (*Gymnorhinus cyanocephalus*), Version 1, February 2020, and to Caitlin Snyder in her role as the Chief, Branch of Domestic Listing. See Exhibit C at 1. In that letter, we: (1) urged that if the Service intends to address the delay by placing the Pinyon Jay on the next iteration of the Workplan, one step in the right direction would be to give this determination a high priority thereon; and (2) stressed that FWS has an independent obligation to comply with the ESA's deadline regardless of any choices it makes in preparing the Workplan. See *id.* at 2, 6.

Concerning the Workplan, the March 27, 2024 letter stressed the pinyon jay's great need for ESA protection, the particular benefits of ESA listing to this species, the potential for protecting this iconic bird to benefit other species and avoid the need to consider future listing determinations, and Region 6's comparatively low listing workload relative to other FWS Regions. *Id.* at 2-3. Therein, Defenders also explained that for purposes of the Workplan, placement of the pinyon jay in "Bin 2" for "Strong Data Already Available on Status" appeared warranted. See *id.* at 4. It further reminded the agency that it need not at this stage obtain all of the information needed to finalize a recovery plan or resolve every uncertainty concerning the species to make a listing decision. See *id.*

On April 1, 2024, we received a response from Ms. Snyder advising that she had shared the letter with the Mountain-Prairie Region and that FWS was in the process of reviewing it. We then received a further response from George Weekley, Field Office Supervisor for FWS's Utah Field Office on April 10, 2024. Mr. Weekley's message advised that his office served as the FWS lead office and was preparing a response. It also provided his contact information and indicated that we could e-mail him with any questions. See E-mail Correspondence Ex. D, at 3.

In light of this offer, Defenders reached out to Mr. Weekley on May 8, 2024 to raise concerns about information disclosed in the FOIA records we received. See *id.* at 1-2. This correspondence related to the internal recommendation, discussed above, to place the Pinyon Jay in prioritization "Bin 3"—which appeared to be based on a collection of 49 studies. See *id.* We explained, among other things, that none of the studies would have any significant impact on the listing decision. *Id.* at 1. In fact, most are either occupancy or presence/absence surveys, which provide no information regarding population size or population trend, and most of which are limited, in small portions of the Pinyon Jay range. *Id.* at 1-2. We further explained, for example, that the already-existing USGS Breeding Bird Survey provides reliable information on Pinyon Jay trends, and it shows the species has

undergone a massive population decline. *Id.* at 1. Partners in Flight provides population size information, and there is sufficient information regarding Pinyon Jay range. *Id.*

We further explained that of the remaining 19 studies:

- 6 research topics for which sufficient information already exists, such as habitat needs
- 5 are now complete and either did not provide any helpful information or provided additional information that, per our interpretation, support Pinyon Jay listing.
- 6 are studies that could be helpful, but are not critical for the listing decision, because they are only being conducted in small portions of the Pinyon Jay range, will have small sample sizes, and/or they are not addressing key Pinyon Jay threats adequately.
- 2 are studies/actions that have value but should have no influence on the listing decision (specifically, both are studies investigating how to better balance Pinyon Jay and Greater Sage-Grouse conservation).

Id. at 1-2. As Defenders explained in that correspondence, of course, more information is always better, but science entails ongoing study and additional information. “More is better” would not translate into the existence of any “key uncertainties.” *Id.* And this rationale could delay listings indefinitely, regardless of the adequacy of existing information. *See id.* at 1-2. There is no reason to believe that there is some date on which science concerning this species will stop, much less one in FY2025, when FWS plans to start work on its 12-month finding.

Not only did the list of studies FWS collected not disclose key uncertainties, it also omitted an important collaborative research project in New Mexico, which FWS should be considering regardless of Workplan recommendation. *See id.* at 2. That three-year research project, nearing completion, collected empirical data throughout New Mexico, evaluating the effects of thinning piñon-juniper woodlands on the Pinyon Jay (and other birds), and also the habitat use/needs for the Pinyon Jay (and other birds). *Id.* Initial analysis of the empirical data from the New Mexico research by Bird Conservancy of the Rockies indicates Pinyon Jay abundance is lower in thinned areas vs. unthinned areas. *Id.* These results are consistent with two other studies that show Pinyon Jays are negatively impacted by woodland thinning. *See id.* Further, a new, third study also shows thinning is detrimental for Pinyon Jay

populations¹³ and another recently published study introduces a new threat (the international pet trade).¹⁴

FWS published an update to its Workplan on May 23 or 24, 2024. That update formalized the decision to delay the 12-month finding for the Pinyon Jay until FY2028.¹⁵

The next day, FWS sent a letter in response to Defenders' March 27, 2024 correspondence. See May 24, 2024 Letter from FWS to Defenders ("May 24 Letter") Ex. E, at 1. There, it acknowledged that it was delaying the 12-month finding until a self-created "FY28 deadline," which could slip still further if "unforeseen circumstances" arose in the intervening years, and that it would not begin "formally developing" the SSA on which the finding is based until FY2025. *Id.* at 2. It gave three reasons for delaying its decision, each of which is discussed below.

II. Legal Violations

The legal violations are straightforward. As referenced above, Defenders submitted its Petition on April 25, 2022. FWS's deadline to make a "12-month" finding accordingly passed on April 25, 2023. See *infra* Section 1.A. To date, FWS has yet to make or publish a 12-month finding. As described above, its duty to timely make such a finding is non-discretionary and admits of no excuses (including claimed lack of resources). See *infra* Section 1.A; *Forest Guardians*, 174 F.3d at 1190-93; cf. *Env't Def. Ctr. v. Babbitt*, 73 F.3d 867, 871-72 (9th Cir. 1995) (duty to act on proposed listing rule by statutory deadline is a "mandatory, nondiscretionary duty which may be enforced by citizen suit"). Further, the agency's "preferred priorities" cannot trump a citizen's right to relief. *Forest Guardians*, 174 F.3d at 1193. By failing to timely make a 12-month finding in response to Defenders' Petition to list the Pinyon Jay, FWS has failed "perform an[] act or duty under [Section 4 of the ESA] which is not discretionary." 16 U.S.C. § 1540(g)(1)(C). It has also unlawfully withheld agency action in violation of the APA. See *Forest Guardians*, 174 F.3d at 1186-1192.

¹³ Van Lanen, N.J., A.P. Monroe, and C.L. Aldridge. Despite regional variation, *Gymnorhinus cyanocephalus* (Pinyon Jay) densities generally increase with local pinyon-juniper cover and heterogeneous ground cover. 2024. *Ornithological Applications*. <https://doi.org/10.1093/ornithapp/duae036>

¹⁴ Shepard, C.R., Bruslund, S., Leupen, B.T., & Nelson, S.S., Observation of threatened pinyon jays *Gymnorhinus cyanocephalus* in the EU pet market as a potential additional threat, *European J. of Wildlife Research* (2024) 70:97, [Observation of threatened pinyon jays *Gymnorhinus cyanocephalus* in the EU pet market as a potential additional threat | European Journal of Wildlife Research \(springer.com\)](https://doi.org/10.1007/s00433-024-02000-0)

¹⁵ A copy of the Workplan is available here: [National Domestic Listing Workplan Fiscal Years 2024-2028 \(fws.gov\)](https://www.fws.gov/national-domestic-listing-workplan-fiscal-years-2024-2028). FWS's website lists May 23, 2024 as the publication date, but a letter from FWS states that the agency published the update on May 24, 2024. See May 24 Letter, Ex. E, at 1.

Notably, FWS has not only violated the ESA and APA, it has shown a startling lack of concern for its legal obligations. Nowhere in the FOIA records we reviewed did we see any evidence of concerted effort to reduce the listing backlog or come as close as possible to compliance with Section 4's mandate in responding to Defenders' Petition. Quite the opposite, one staff member described the more than fifteen months that the agency took to make its 90-day determination for the Pinyon Jay as "fast." See FWS Internal Correspondence Ex. B, at 20. As referenced above, staff then undertook a survey of outstanding research to see how "far down the road" they could "kick" the 12-month determination. *Id.* at 45.

Troublingly, this attitude may extend beyond FWS's response to Defenders' Petition to a broader disregard for the importance of listing deadlines, and perhaps even the process itself. FWS's webpage suggests that simply by publishing the agency's timeline and priorities for making overdue decisions through the Workplan, FWS is serving "the goal of encouraging proactive conservation so that federal protections are not needed in the first place."¹⁶ It does not, however, explain or offer support for how this would be so. And, this rationale has sweeping implications. An agency out of compliance with any statutory deadline could suggest that its delay is actually a good thing because it could encourage other parties to be more proactive. Taking this reasoning a step further, one could argue in any context that by not doing what Congress required it to do, an agency is inviting innovative, alternative solutions that will better serve a statute's underlying objectives than if the agency had followed the law.

Turning back to the Pinyon Jay, it bears noting that although there is no legal excuse for FWS's delay, none of the reasons FWS gave would justify delay, even as practical matter. FWS's May 24, 2024 letter cited: (1) a desire to wait for the results of studies that would be completed in FY2025; (2) resources it was devoting towards developing a conservation agreement with the State of Utah and encouraging other states to do the same; and (3) reduced staffing in the Utah Field Office. Each is unfounded.

First, FWS maintained, among other things, that the requirement to use the "best available science" supported its decision to wait to start the SSA pending certain studies that would be finished in FY2025. May 24 Letter Ex. E, at 1-2. It is well established, however, that the "best available science" refers to science that is "available"—*i.e.* that presently exists. It does not require FWS to conduct, much less wait for, other studies. See, *e.g.*, *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (no obligation to conduct independent studies); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) (stating in Section 7 context that the best available science standard does not "require an agency to . . . make decisions on data that does not yet exist"). Even analysis that the agency might want, but does not need, to perform is not grounds for delay.

¹⁶ *National Listing Workplan*, U.S. Fish & Wildlife Serv. (May 23, 2024) <https://www.fws.gov/project/national-listing-workplan>. [Listing Workplan | U.S. Fish & Wildlife Service \(fws.gov\)](#)

See *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. C 16-06040 WHA, 2018 WL 6067546, at *4 (N.D. Cal. Nov. 20, 2018) (rejecting FWS’s request for additional delay so that it could apply a “new” process that it asserted “generally leads to stronger assessments and improved and more transparent decisions” without offering any persuasive reason why a “standard assessment” under the old process “would be inadequate”). And, FWS offered nothing to specifically address the points Defenders raised in its May 8, 2024 e-mail regarding these same studies. Waiting for these studies also would not prevent it from beginning to consider other, existing studies, instead of putting the SSA off entirely.

Second, FWS stated that “Service staff are actively working with State and Federal partners to develop a conservation agreement and strategy for pinyon jay in the state of Utah, which we expect to complete by the end of FY25.” May 24 Letter Ex. E, at 2. It is also devoting additional resources to “encouraging other states” to do the same. *Id.* FWS made no attempt to explain, however, why the claimed information gaps causing it to slow-walk the listing determination would not also frustrate a conservation agreement. If such an agreement would require an assessment of not only whether the Pinyon Jay requires conservation measures, but also what type of work would best support recovery, it seems the purported lack of knowledge would have an even greater impact on such efforts than on a 12-month finding.

In this regard, more important than this internal inconsistency in FWS’s reasoning is the agency’s lack of authority to substitute its preferred approach for the ESA’s mandate. If FWS has *additional* resources to devote to encouraging state-level conservation agreements, it is free to do so. It may not, however, delay the ESA’s statutorily mandated listing determination in favor of discretionary activities. See *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 193 (D.C. Cir. 2016) (“Federal agencies must obey the law, and congressionally imposed mandates . . . trump discretionary decisions.”). Indeed, FWS’s own guidance recognizes that the potential for voluntary measures to later materialize is not grounds to delay a listing decision. See DOI, FWS & NMFS, *Announcement of Final Policy for Candidate Conservation Agreements with Assurances*, 64 Fed. Reg. 32726, 32730 (June 17, 1999) (recognizing that “the Act requires the Services to issue a final determination within 1 year of issuing a proposed rule to list” and assuring that “[t]he Services will not extend this time frame in order to allow for the completion and/or consideration of an Agreement with assurances.”). FWS asserts that waiting to see if its efforts to develop these agreements are successful will help it make the “best decision possible” on the Petition when it resumes its formal decision-making work in FY2025. See May 24 Letter Ex. E, at 2. The question, which Section 4 requires FWS to answer, is whether the Pinyon Jay, which is in the midst of an alarming, ongoing decline and lacks adequate regulatory protections, needs the ESA’s protections *now*—not whether, years from now, after the population has further declined, a conservation agreement might seek to address some of the harm.

Third, FWS asserted that the overdue determination is one of “many actions” contributing to the workload of the Utah Field Office, which has experienced reduced

staffing. *Id.* at 2. There is no indication in the FOIA records we reviewed, however, that the staffing reduction occurred after the Utah Field Office volunteered to take the lead on this listing determination. And, as discussed above, the office did so knowing that its “limited staffing” was insufficient. FWS had no obligation to allow a particular office to “control the process.” See *infra* Section I.B. It could, and if staffing is responsible for the delay, should, have considered whether one of the multiple other offices in the heart of the Pinyon Jay’s range could complete a more timely 12-month determination.

III. Conclusion and Remedy

As set forth in this letter, FWS is in violation of the ESA for failing to timely make a 12-month finding on Defenders’ Petition. If FWS does not act within 60 days to correct this ESA violation, Defenders intends to pursue legal action. An appropriate remedy would be for FWS to make the 12-month finding by a date certain. Although FWS cannot go back in time to meet its deadline, it can make this determination as soon as possible. The date ordered should be based on the time strictly necessary to complete needed work that remains undone on the determination, without regard to other priorities or desire to divert resources to other activities.

If legal action becomes necessary, it would also be appropriate for a court to clarify, as part of the relief, that FWS cannot lawfully delay a listing decision past the statutory deadline to: (1) wait for new studies (especially certain, selected studies of its choosing); (2) divert resources to, or wait for development of, other conservation measures; and (3) accommodate interest of a particular office in taking a lead role without regard to whether other offices are better resourced to complete the determination.

If you have any questions, believe any of the information presented above is inaccurate or incomplete, or would like to discuss this matter further, please contact undersigned counsel at your earliest convenience.

Sincerely,

Lisa Saltzburg

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Enclosures