

**CENTER FOR BIOLOGICAL DIVERSITY • CENTER FOR FOOD SAFETY  
TURTLE ISLAND RESTORATION NETWORK • WATERKEEPER ALLIANCE  
HUMBOLDT BAYKEEPER • RUSSIAN RIVERKEEPER • MONTEREY COASTKEEPER  
SNAKE RIVER WATERKEEPER • UPPER MISSOURI WATERKEEPER**

February 14, 2018

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**Re: Formal Notice of Intent to Sue: Violations of the Endangered Species Act Regarding Addition of an Applicability Date to 2015 Clean Water Rule**

On behalf of the Center for Biological Diversity, Waterkeeper Alliance, Center for Food Safety, Turtle Island Restoration Network, Humboldt Baykeeper – a program of the Northcoast Environmental Center, Russian Riverkeeper, Monterey Coastkeeper – a program of the Otter Project, Upper Missouri Waterkeeper, and Snake River Waterkeeper, we hereby provide notice, pursuant to Section 11(g) of the Endangered Species Act (“ESA” or “Act”), 16 U.S.C. §1540(g)(2)(A)(i), of our intent to sue the Environmental Protection Agency (“EPA”) and Army Corps of Engineers (“Army Corps”) for violations of the ESA.

EPA and the Army Corps have violated Section 7(a)(2) and Section 7(d) of the Endangered Species Act in connection with their two year delay<sup>1</sup> of the Clean Water Rule<sup>2</sup> by finalizing the rulemaking without first consulting with the Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (collectively “the Services”) to prepare a Biological Opinion as required by the Endangered Species Act.

For example, several categories of wetlands, including prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands, provide vital habitat for federally listed threatened and endangered species. Through this rulemaking, the Agencies are attempting to alter the protections for these waters by delaying the effectiveness of the 2015 Clean Water Rule and replacing it with a vague and arbitrary definition based on undisclosed “guidance, interpretations, memos, letters, and policies,”<sup>3</sup> which is likely to eliminate these and many other protections. Prairie potholes, for example, provide important stop-over habitat for endangered whooping cranes during their spring and fall migrations and

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<sup>1</sup> *Definition of “Waters of the United States” - Addition of an Applicability Date to 2015 Clean Water Rule*, 83 Fed. Reg. 5,200 (Feb. 6, 2018).

<sup>2</sup> *Clean Water Rule: Definition of “Waters of the United States”*, 80 Fed. Reg. 37,054 (June 29, 2015).

<sup>3</sup> *See Definition of “Waters of the United States” - Addition of an Applicability Date to 2015 Clean Water Rule*, 82 Fed. Reg. 55542 (Nov. 22, 2017).

summer breeding habitat for Northern Great Plains piping plovers. Vernal pools in California are essential for the survival and recovery of five species of fairy shrimp. By delaying the effective date of the 2015 Clean Water Rule and replacing it with a vague, undisclosed definition, these categories of wetlands will no longer receive necessary protections — meaning that individual wetlands could be destroyed over the next two years without going through any permitting process under the Clean Water Act.

It is clear that this Rule will alter CWA jurisdiction and that the Agencies have not evaluated the changes or provided any legitimate basis for them. Even if the Agencies faithfully returned to every practice and policy from the years immediately preceding the Clean Water Rule – and there is every indication that this is not what the Agencies intend to do – there would still be significant changes in what specific waters will, and will not, be protected. For example, in perhaps one of the most unhelpful and unclear statements in the proposed Repeal Rule, the Agencies state that “the 2015 rule would result in a small overall increase in positive jurisdictional determinations compared to those made under the prior regulation as currently implemented, and that there would be fewer waters within the scope of the CWA under the 2015 rule compared to the prior regulations.”<sup>4</sup> Thus, it is clear that the Agencies acknowledge that the scope of covered waters will differ under the Clean Water Rule, under the pre-2015 definition, and under the pre-2015 definition as they intend to implement it. However, it is impossible for anyone to know how any particular type of waterway may be impacted because the Agencies have not explained how they will define “waters of the United States” with or without the Delay Rule, analyzed how the definitional change will affect jurisdictional determinations, or even shared even the most basic information about how waters will be impacted with the public. Two years of uncontrolled pollutant discharges can cause a great deal of damage to a waterway, and the threatened and endangered species that depend upon it, yet pollution impacts were not even mentioned let alone evaluated. Extreme damage can occur in some instances from a single day of uncontrolled pollutant discharges.

Cumulatively, the resulting loss of waters and wetlands will degrade and destroy habitat for endangered species, harming or even killing individuals from numerous listed species. EPA’s and the Army Corps’ discretionary and ideological decision to deny countless acres of wetlands and many miles of surface water protection under the Clean Water Act is exactly the type of discretionary policy choice that is subject to the Endangered Species Act’s consultation requirement. The 2018 Delay Rule, which is nationwide in its scope, will directly, indirectly, and cumulatively impact endangered species and therefore easily crosses the “may affect” threshold – and, indeed, the Rule will adversely affect endangered aquatic species.

Section 2(c) of the Endangered Species Act establishes that it is “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 Act.”<sup>5</sup> The ESA defines “conservation” to mean “the use of all methods and procedures which are

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<sup>4</sup> See, e.g., *Definition of “Waters of the United States” – Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34899, 34903 (July 27, 2017).

<sup>5</sup> 16 U.S.C. § 1531(c)(1).

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.”<sup>6</sup> The Supreme Court has unequivocally stated that the Act’s “language, history, and structure” made clear “beyond a doubt” that “Congress intended endangered species to be afforded the highest of priorities” and endangered species should be given “priority over the ‘primary missions’ of federal agencies.”<sup>7</sup> Simply put, “the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*.”<sup>8</sup>

To fulfill the substantive purposes of the ESA, each federal agency is required to engage in consultation with the Services to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species ... determined ... to be critical.”<sup>9</sup> Section 7 consultations are required for “any action [that] may affect listed species or critical habitat.”<sup>10</sup> Agency “action” is broadly defined in the ESA’s implementing regulations to include “(a) actions intended to conserve listed species or their habitat; (b) *the promulgation of regulations*; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.”<sup>11</sup>

At the completion of consultation, the Services are required to issue a Biological Opinion that determines if the agency action is likely to jeopardize any affected species. If so, the Biological Opinion must specify “Reasonable and Prudent Alternatives” that will avoid jeopardy and allow the agency to proceed with the action. The Services may also “suggest modifications” to the action (called Reasonable and Prudent Measures) during the course of consultation to “avoid the likelihood of adverse effects” to the listed species even when not necessary to avoid jeopardy.<sup>12</sup>

Section 7(d) of the ESA provides that after federal agencies initiate consultation on an action under the ESA, the agencies “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”<sup>13</sup> The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

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<sup>6</sup> 16 U.S.C. § 1532(3).

<sup>7</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978).

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> 16 U.S.C. § 1536(a)(2).

<sup>10</sup> 50 C.F.R. § 402.14.

<sup>11</sup> 50 C.F.R. § 402.02 (emphasis added).

<sup>12</sup> 50 C.F.R. § 402.13.

<sup>13</sup> 16 U.S.C. § 1536(d).

## ESA VIOLATIONS

### **I. Failure to Insure No Jeopardy; Failure to Insure Against Destruction or Adverse Modification of Critical Habitat**

The 2015 Clean Water Rule was not perfect. There too, EPA and the Army Corps failed to consult with the Services regarding the impacts and benefits on endangered species stemming from the rule.<sup>14</sup> Indeed, the 2018 Delay Rule and the 2015 Clean Water Rule both suffer from the same legal and analytical flaw, namely that EPA and the Army Corps cannot simplistically make policy regarding the protection of our nation's wetlands and other waters based on a rudimentary zero-sum equation where the only factor that is relevant for endangered species impacts is the nationwide, aggregate-area of waters protected under the Clean Water Act. EPA and the Army Corps' decision to maintain what they have deemed the "the status quo" solely to benefit special interests and polluters will have significant real world impacts on specific waters in specific places, and in turn will have specific impacts on endangered species. Changing the definition of "waters of the United States" without consultation or even considering how that will alter Clean Water Act jurisdiction and impact endangered species certainly does not qualify as informed decision-making. The Agencies' failure to follow the procedural and substantive requirements of the Endangered Species Act is clearly a violation of law.

Since the 2018 Delay Rule may result in a decrease in positive jurisdictional determinations in some parts of the nation under the Clean Water Act, the agencies must consult with the expert wildlife Services to determine what effects the Rule will have on endangered species. As noted above, 2018 Delay Rule is likely to eliminate protections for vernal pools in California. These wetlands provide habitat for up to five different species of fairy shrimp — Conservancy Fairy Shrimp (*Branchinecta conservatio*), Longhorn Fairy Shrimp (*Branchinecta longiantenna*), Riverside Fairy Shrimp (*Streptocephalus woottoni*), San Diego Fairy Shrimp (*Branchinecta sandiegonensis*), and Vernal Pool Fairy Shrimp (*Branchinecta lynchi*) — as well as listed amphibians like the California tiger salamander (*Ambystoma californiense*). The loss of Clean Water Act protections would mean that more vernal pools could be destroyed without complying with the 404 permitting process under the Clean Water Act, cumulatively degrading habitat of these species. EPA and the Army Corps' collective decision – through a rulemaking – to delay protections for certain categories of waters is, therefore, subject to the consultation requirement of the Endangered Species Act.

A two-year delay in the applicability date of a regulation *is* the promulgation of a rule, and like any other regulation that crosses the "may affect" threshold, it is subject to consultations under Section 7 of the Endangered Species Act. Many judicial holdings reinforce the proposition that a regulation that may affect endangered species must be the subject of consultation.<sup>15</sup>

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<sup>14</sup> We are attaching our Notice of Intent to this as letter as Appendix A.

<sup>15</sup> See, e.g., *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F.Supp.3d 7 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 481 F.Supp.2d 1059 (N.D. Cal 2007); *Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F.Supp.2d 1158 (W.D. Was. 2006).

Because the Delay Rule will likely have effects on endangered species and their critical habitats as it is implemented in the future, consultations should have occurred with the Services.

**II. Irreversible or Irretrievable Commitment of Resources**

Section 7(d) of the ESA prohibits a federal agency from “mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”<sup>16</sup> By changing the definition of “waters of the United States” and failing to consult with the Services, EPA and the Army Corps have all but guaranteed that some wetlands and other waters will be degraded or destroyed over at least the next two years without the possibility that a reasonable and prudent measure could ever be implemented to protect a listed species or its critical habitat because the Agencies have improperly foreclosed the possibility of consultations in the Delay Rule. Accordingly, the Agencies are also in violation of Section 7(d) of the ESA.

**CONCLUSION**

If EPA and the Army Corps do not act within 60 days to correct the violations described in this letter, we will pursue litigation. If you would like to discuss this matter, please contact us.

Sincerely,



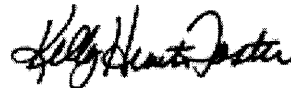
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<sup>16</sup> 16 U.S.C. § 1536(d).

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