

Mon Mar 30 16:11:54 EDT 2020

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FW: Notice of Intent to File Citizen Suit for Violations of the ESA - Navigable Waters Protection Rule

To: "CMS.OEX" <cms.oex@epa.gov>

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**From:** McLaughlin, Jolie <jdmclaughlin@nrdc.org>

**Sent:** Monday, March 30, 2020 3:55 PM

**To:** Wheeler, Andrew <wheeler.andrew@epa.gov>; todd.t.semonite@usace.army.mil; ricky.d.james.civ@mail.mil

**Subject:** Notice of Intent to File Citizen Suit for Violations of the ESA - Navigable Waters Protection Rule

Dear Administrator Wheeler, Assistant Secretary James, and Lieutenant General Semonite:

Please find attached a formal notice, pursuant to section 11(g) of the Endangered Species Act, of the intent of the Natural Resources Defense Council, Conservation Law Foundation, Clean Wisconsin, Connecticut River Conservancy, Massachusetts Audubon Society, Merrimack River Watershed Council, Bangor Land Trust, New Mexico Wilderness Alliance, and Prairie Rivers Network to file a citizen suit against the Environmental Protection Agency and the Army Corps of Engineers for violating section 7 of the Endangered Species Act by failing to consult with the U.S. Fish & Wildlife Service and National Marine Fisheries Service on the Navigable Waters Protection Rule.

Regards,

Jolie McLaughlin

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**NATURAL RESOURCES DEFENSE COUNCIL • CONSERVATION LAW  
FOUNDATION • CLEAN WISCONSIN • CONNECTICUT RIVER CONSERVANCY  
• BANGOR LAND TRUST • MASSACHUSETTS AUDUBON SOCIETY •  
MERRIMACK RIVER WATERSHED COUNCIL • NEW MEXICO WILDERNESS  
ALLIANCE • PRAIRIE RIVERS NETWORK**

**Via Email and Certified Mail (Return Receipt Requested)**

March 30, 2020

Hon. Andrew Wheeler  
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Hon. R.D. James  
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Re: Notice of Intent to Pursue Legal Action for Failure to Consult on the Navigable Waters Protection Rule as Required by Section 7 of the Endangered Species Act

Dear Administrator Wheeler, Assistant Secretary James, and Lieutenant General Semonite:

This letter provides formal notice, pursuant to section 11(g) of the Endangered Species Act (ESA), of the intent of the Natural Resources Defense Council, Conservation Law Foundation, Clean Wisconsin, Connecticut River Conservancy, Massachusetts Audubon Society, Merrimack River Watershed Council, Bangor Land Trust, New Mexico Wilderness Alliance, and Prairie Rivers Network to file a citizen suit against the Environmental Protection Agency and the Army Corps of Engineers (together, the Agencies) for violating section 7 of the ESA and its implementing regulations.

These violations arise from the Agencies' failure to consult with the U.S. Fish & Wildlife Service and the National Marine Fisheries Service (together, the Services) before promulgating the Navigable Waters Protection Rule (the Rule). The Rule is a "discretionary" action, 50 C.F.R. § 402.03, that "may affect" endangered and threatened species, *id.* § 402.14(a). The Agencies therefore had a legal duty to complete consultation with the Services before promulgating the Rule. *See id.*; 16 U.S.C. § 1536(a)(2). The Agencies did not fulfill that legal duty. As a result, they have failed to ensure that the Rule is not likely to jeopardize ESA-listed species or result in the adverse modification of critical habitat, in violation of section 7 of the ESA. *See* 16 U.S.C.

§ 1536(a)(2). If the Agencies do not fulfill their section 7 obligations – including by completing the required consultation – within the next 60 days, the undersigned intend to file suit and seek appropriate declaratory and injunctive relief.

**I. Section 7 of the ESA requires federal agencies to ensure that their actions are not likely to jeopardize ESA-listed species or adversely modify critical habitat**

The ESA’s fundamental purpose is to conserve imperiled species and the ecosystems on which they depend. 16 U.S.C. § 1531(b). To that end, the ESA establishes a comprehensive program to ensure the survival and recovery of threatened and endangered species. The “heart” of this comprehensive program is section 7 of the Act. *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009). Pursuant to section 7, each federal agency “shall” consult with the Fish & Wildlife Service (for terrestrial species) and the National Marine Fisheries Service (for marine species) 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 destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2).

The threshold for triggering section 7’s consultation requirement is low. A federal agency must determine “at the earliest possible time” whether a proposed action “may affect” an ESA-listed species or its critical habitat. 50 C.F.R. § 402.14(a). If the agency determines that the proposed action “may affect” listed species or critical habitat, the agency must initiate formal consultation with the relevant Service, unless the agency and Service agree in writing that the proposed action is “not likely to adversely affect” listed species or critical habitat. *Id.* § 402.14(a), (b). “Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement.” Interagency Cooperation – Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986).

An agency must complete the section 7 consultation process “before engaging in a discretionary action” that “may affect listed species.” *Turtle Island Restoration Network v. NMFS*, 340 F.3d 969, 974 (9th Cir. 2003) (emphasis added). At the end of the formal consultation process, the relevant Service issues a “biological opinion” on whether the proposed action is likely to jeopardize any ESA-listed species or result in the adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(4), (h). If the Service concludes that a proposed agency action is likely to jeopardize a listed species or adversely modify its critical habitat, the Service must propose measures that would avoid jeopardy or adverse habitat modification. *See* 16 U.S.C. § 1536(b)(3)(A).

**II. The Agencies violated section 7 of the ESA by failing to ensure that the Rule is not likely to jeopardize endangered and threatened species or adversely modify critical habitat**

On January 23, 2020, the Agencies signed and finalized the Rule. The Rule reinterprets the meaning of “waters of the United States” under the Clean Water Act, thus redefining—and unlawfully restricting—the scope of the Act’s protections. The Rule illegally removes protections for many types of wetlands and waterbodies that have been protected by the Clean

Water Act for decades. For instance, the Rule declares that all ephemeral streams—streams that flow only in response to rain or snowfall—are not “waters of the United States” and therefore will no longer be protected by the Act. The Rule also declares that wetlands are not “waters of the United States” unless they satisfy an extremely narrow set of conditions such that the Rule defines them as “adjacent” to another “water of the United States.”

According to the Agencies’ preliminary estimates, about half of wetlands in the United States are at risk of being polluted and destroyed as a result of this Rule.<sup>1</sup> The Agencies themselves acknowledge that “more than one-third of the United States’ threatened and endangered species live only in wetlands, and nearly half use wetlands at some point in their lifecycle.”<sup>2</sup> Wetlands no longer protected under the Rule support a diverse range of animals by, for example, acting as integral components of food webs, and providing breeding sites for birds, nursery habitat for amphibians, colonization opportunities for invertebrates, and maturation habitat for insects.<sup>3</sup> Endangered and threatened species that inhabit wetlands include birds like the Audubon’s crested caracara, wood stork, Everglade snail kite, Cape Sable seaside sparrow, piping plover, yellow-billed cuckoo, Mississippi sandhill crane, least Bell’s vireo, and roseate tern. Wetlands also provide important habitat for endangered and threatened invertebrates like the Hine’s emerald dragonfly, Poweshiek skipperling, Mitchell’s satyr butterfly, and vernal pool fairy shrimp; amphibians like the California tiger salamander and Oregon spotted frog; reptiles like the eastern massasauga rattlesnake and bog turtle; mammals like the New Mexico meadow jumping mouse; and plants like the green pitcher plant, mountain sweet pitcher plant, northeastern bulrush, Cooley’s meadowrue, pondberry, bunched arrowhead, and eastern prairie fringed orchid. Many other ESA-listed species live in wetlands or rely on them for food.

The Rule also removes Clean Water Act protections for all ephemeral streams, which according to the Agencies’ own preliminary estimates, represent more than 18% of the country’s streams and nearly 40% of streams in the arid west.<sup>4</sup> As EPA itself has recognized, these streams provide essential dispersal corridors and habitat for various animals, including reptiles, amphibians, birds, and mammals.<sup>5</sup> Animals that depend on ephemeral and intermittent streams for habitat or shelter include ESA-listed species like the desert tortoise, arroyo toad, and others.

Because the Rule removes Clean Water Act protections for wetlands and streams that endangered and threatened species depend on for habitat and food, there is no question that the Rule “may affect” ESA-listed species. In fact, the Agencies explicitly recognize that endangered

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<sup>1</sup> NRDC Comments Re: Docket ID No. EPA-HQ-OW-2018-0149, Appendix A-Part 2, at 79-81.

<sup>2</sup> EPA and U.S. Army Corps of Engineers, Economic Analysis for the Proposed Revised Definition of “Waters of the United States,” at 49 (Dec. 2018) (“Proposed Rule Economic Analysis”).

<sup>3</sup> EPA, Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence, ES-3, 4-32 to 4-35 (Jan. 2015) (“Connectivity Report”).

<sup>4</sup> NRDC Comments Re: Docket ID No. EPA-HQ-OW-2018-0149, Appendix A-Part 2, at 73-76.

<sup>5</sup> EPA, Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest, 48-49 (2008).

and threatened species may rely on waters that will lose protection under the Rule.<sup>6</sup> For the same reasons, the Rule “may affect” designated critical habitat for endangered and threatened species by taking away Clean Water Act protections for parts of that critical habitat.

In addition, the Rule “may affect” the survival and critical habitat of countless other endangered and threatened species that live in or depend on downstream waters like rivers and lakes, such as the West Indian manatee, Atlantic salmon, pallid sturgeon, shortnose sturgeon, Atlantic sturgeon, Gila chub, Rio Grande silvery minnow, Colorado pikeminnow, bull trout, rabbitsfoot mussel, sheepsnose mussel, dwarf wedgemussel, higgins eye pearl mussel, snuffbox mussel, spectaclecase mussel, least tern, and Yuma clapper rail. The Rule will degrade the quality of those downstream waters—and harm the species that depend on them—because, as the Agencies previously found, the wetlands and ephemeral streams excluded by the Rule significantly impact those waters.<sup>7</sup>

Despite these impacts, the Agencies failed to engage in consultation with the Services, and failed to ensure that the Rule is not likely to jeopardize ESA-listed species or adversely modify their critical habitat. The Agencies are therefore in violation of section 7 of the ESA. If the Agencies do not remedy this violation immediately, we intend to pursue legal action against the Agencies after the 60-day notice period has expired.

Sincerely,



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<sup>6</sup> See, e.g., Proposed Rule Economic Analysis at 117 (“In some cases, non-jurisdictional waters may still be federally regulated in the event of an oil spill under other statutes, such as the Endangered Species Act (ESA), even if they would no longer be subject to CWA jurisdiction.”); *id.* at 184 (noting that “[e]phemeral waterbodies also provide habitat to threatened and endangered species”).

<sup>7</sup> See 80 Fed. Reg. 37,054, 37,055 (June 29, 2015); see also Connectivity Report at ES-5 (finding that discharging pollutants into streams and wetlands can degrade the integrity of downstream waters); *id.* at 2-46 to 2-47 (finding that loss of wetlands increases pollutants in downstream waters).