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October 1, 2020

Via Certified Mail, Return Receipt Requested

The Honorable Andrew R. Wheeler
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable David Bernhardt
Secretary
United States Department of the Interior
1849 C Street, NW
Washington, DC 20240

Re: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act: Failure to Consult

Dear Administrator Wheeler and Secretary Bernhardt:

On behalf of South Carolina Coastal Conservation League, South Carolina Native Plant Society, Amigos Bravos, Natural Resources Defense Council, Savannah Riverkeeper, and Waterkeeper Alliance (collectively, “Conservation Groups”), this letter provides notice of our intent to sue the Environmental Protection Agency (“EPA”) for violating the Endangered Species Act, 16 U.S.C. §§ 1531-1544, in promulgating *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) (codified at 40 C.F.R. 121) (“401 Rule” or “Rule”).

The 401 Rule would prevent states from imposing conditions on section 401 certifications that protect endangered and threatened species and their habitats, such as installing fish ladders, preserving instream flows, reducing sediment pollution caused by upland activity, requiring the protection or relocation of species populations, and protecting designated habitat of species. If states are no longer able to impose these conditions, endangered or threatened species and their habitats will suffer. And if the Rule’s restrictive timing provisions lead to the waiver of state certification, or its unlawful federal agency veto blocks state decisions, there would be no conditions in place at all to protect species and their habitats.

Because the 401 Rule “may affect” species that are listed as endangered or threatened under the Endangered Species Act, EPA violated Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536, and its implementing regulations, 50 C.F.R. Part 402, by failing to (1) consult with the United States Fish and Wildlife Service and the National Marine Fisheries Service before finalizing the Rule; and (2) “insure” that the 401 Rule does not jeopardize listed species or adversely modify critical habitat. If EPA does not fulfill these obligations within the

next 60 days, Conservation Groups intend to file suit and seek appropriate declaratory and injunctive relief.

I. EPA failed to initiate formal consultation as the Endangered Species Act requires.

Section 7(a)(2) of the Endangered Species Act requires “[e]ach Federal agency,” in consultation with the appropriate wildlife agency, 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 adversely modify a species’ critical habitat.¹ When a federal agency’s proposed discretionary action “may affect listed species or critical habitat,” the agency must initiate formal consultation with the United States Fish and Wildlife Service and the National Marine Fisheries Service (NOAA Fisheries).² There are two exceptions to the consultation requirement, neither of which applies here: (1) the preparation of a biological assessment or informal consultation shows that the agency action is not likely to adversely affect listed species or critical habitat; or (2) a preliminary biological opinion issued after early consultation is confirmed as the final biological opinion.³

The “may affect” threshold for triggering the consultation duty under Section 7(a)(2) is “low.”⁴ “Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement[.]”⁵ In analyzing the effects of the agency action, the agencies must consider “all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action.”⁶ The analysis must examine not only future agency action, but also “future State or private activities . . . that are reasonably certain to occur within the action area of the Federal action subject to consultation.”⁷ All of this means that an agency avoids the consultation requirement for a proposed discretionary action *only if* it determines that its action will have “no effect” on threatened or endangered species or critical habitat.⁸

¹ 16 U.S.C. § 1536(a)(2).

² 50 C.F.R. §§ 402.03, 402.14(a). The National Marine Fisheries Service (NOAA Fisheries) (with respect to marine species) and the United States Fish and Wildlife Service (for other species) share responsibility for administering the ESA. *See* 50 C.F.R. § 402.01(b); *Interagency Cooperation—Endangered Species Act of 1973, as Amended*, 51 Fed. Reg. 19,926, 19,926 (June 3, 1986).

³ 50 C.F.R. § 402.14(a)-(b); *see also Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1034 (D.C. Cir. 2008).

⁴ *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011); *see also Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc) (“[A]ctions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are ‘not likely’ to do so—require at least some consultation under the ESA.”).

⁵ 51 Fed. Reg. at 19,949.

⁶ 50 C.F.R. § 402.02.

⁷ *Id.*

⁸ *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 475 (D.C. Cir. 2009) (“If the agency determines that its action will not affect any listed species or critical habitat, . . . then it is not required to consult with NMFS or Fish and Wildlife.”).

Despite these requirements, EPA failed to prepare a biological assessment or conduct informal consultation to determine whether the 401 Rule “may affect” listed species or critical habitat. Its failure to make that determination, coupled with its failure to initiate formal consultation prior to finalizing the 401 Rule, is a violation of Section 7(a)(2) of the ESA.

II. EPA violated the Endangered Species Act by failing to “insure” that the 401 Rule will not jeopardize listed species or the habitats on which they depend.

By removing a critical tool that states use to protect habitat (such as streams, lakes, rivers, wetlands, and habitat near those waters), the 401 Rule removes longstanding protections on which ESA-listed species depend. States have relied on section 401 certifications to ensure that some of the country’s largest, and potentially most destructive, projects do not degrade state waters. States achieve this protection by ensuring that those projects comply with “appropriate requirements” under state law such as riparian buffers, erosion and sedimentation controls, chloride monitoring, mitigation, fish and wildlife protection, drinking water protections, fish ladders, flow requirements, adaptive management, and other measures. If states are no longer able to impose these conditions, or if their decisions are unlawfully deemed waived or vetoed under the Rule, endangered or threatened species and their habitats will likely suffer.

Indeed, numerous endangered and threatened species that the Conservation Groups work to protect have benefitted from conditions set by section 401 certifications, including the following. These are only illustrative examples; there are undoubtedly many others across the nation:

1. The Bunched Arrowhead (Sagittaria fasciculata)

The bunched arrowhead is an endangered species under federal law with a global ranking of G1, indicating a critically imperiled species.⁹ It is one of the rarest plants in the Piedmont, and only occurs naturally within five square miles of Travelers Rest, South Carolina, and near East Flat Rock, North Carolina. It normally exists in rare Piedmont seepage forests, and it requires a steady flow of cool, clean water. The principal threats to the continued survival of this species are habitat degradation, clearing and draining of habitat, water withdrawal, and change in water-flow rates.

South Carolina 401 certification conditions on an Army Corps of Engineers permit recently protected the bunched arrowhead from a commercial development in Greenville County that would have greatly harmed this species. The South Carolina Native Plant Society submitted a comment letter to the South Carolina Department of Health and Environmental Control on the 401 certification application for this project noting that it would eliminate the wetlands upon which this species depends and therefore the population of the plant. The resulting 401 certification contained numerous conditions, terms, and requirements to protect the bunched arrowhead. Some of these conditions would not be allowed under the new 401 Rule. In the future, there will be additional federal permits for other developments and activities that impact the bunched arrowhead and its habitat in this area, and area that is subject to significant development pressure. Conditions like those contained in the prior permit will not be possible under the new Rule.

⁹ U.S. Fish and Wildlife Service, *Bunched Arrowhead Recovery Plan* (1983).

2. *Shortnose Sturgeon* (*Acipenser brevirostrum*)

The shortnose sturgeon once inhabited coastal rivers all along the eastern seaboard.¹⁰ It relies on headwaters for spawning and spends the rest of its time in estuaries. The shortnose sturgeon was historically used as a food source by native populations and settlers alike, making it overfished by the late 1800s. Since 1967 it has been listed as endangered.¹¹ As a result, the shortnose sturgeon is no longer used as a food source; however, the species remains highly vulnerable to bycatch in commercial fishing, increased industrial use of habitat, and decreased water quality. Despite its large historical range, the species is now only found in a few areas in the mid-Atlantic.¹²

The shortnose sturgeon is currently protected by section 401 conditions for the Savannah Harbor Expansion Project. Savannah Riverkeeper worked with the Army Corps of Engineers and other state and federal government agencies, as well as the Cities of Augusta and North Augusta, to secure 401 conditions that protect this endangered species, including conditions that require the permittee, the Georgia Ports Authority, to provide funding to operate and maintain the project's oxygen injection system, which mitigates reductions in dissolved oxygen levels and therefore protects the endangered shortnose sturgeon as well as the Atlantic sturgeon. These protections would not have been possible if Savannah Riverkeeper did not have access to the full scope of conditions section 401 allows, and if South Carolina and Georgia had not had the full time allotted by law to consider information and public input before issuing their decisions.

3. *The Red-cockaded Woodpecker* (*Picoides borealis*)

Red-cockaded woodpeckers were once common throughout the longleaf pine ecosystem, but they are now endangered and are only found in a patchy distribution from Virginia south to Florida and west to Arkansas, Oklahoma, and Texas. Red-cockaded woodpeckers prefer longleaf pine forests, but those forests have been extensively logged and replaced with other pine species that take years to mature to the level at which they become habitable for the woodpeckers.¹³

The South Carolina Coastal Conservation League has submitted multiple comments calling for 401 conditions to protect endangered species, including the red-cockaded woodpecker, from impacts associated with the planned Cainhoy Plantation, a 9,375 acre tract development located within the City of Charleston and Berkeley County. This property is adjacent to the Francis Marion National Forest and contains extensive mature loblolly and longleaf pine forest areas that provide important habitat for sixteen red-cockaded woodpecker colonies. The Rule would reduce the League's ability to urge South Carolina to use its 401 authority to protect endangered species like red-cockaded woodpeckers.

4. *Pondberry* (*Lindera melissifolia*)

¹⁰ NOAA, Shortnose Sturgeon, <https://www.fisheries.noaa.gov/species/shortnose-sturgeon> (last visited Sept. 24, 2020) (“NOAA Shortnose Sturgeon Factsheet”).

¹¹ Native Fish and Wildlife: Endangered Species, 32 Fed. Reg. 4,001 (Mar. 11, 1967).

¹² NOAA Shortnose Sturgeon Factsheet.

¹³ U.S. Fish and Wildlife Service, Red-cockaded Woodpecker Recovery, <https://www.fws.gov/rcwrecovery/rcw.html> (last visited Sept. 24, 2020).

The pondberry, a deciduous shrub, was listed as endangered in 1986. It is found in wetland habitats such as bottomland and hardwoods forests, and on the edges of sinks, ponds, and other depressions in the more coastal sites. In North Carolina, the pondberry is found only in Sampson County and Cumberland County. Other populations have been located in South Carolina, Georgia, Alabama, Mississippi, Arkansas and Missouri. The most significant threats to the pondberry are drainage ditching and subsequent conversion of its habitat to other uses.¹⁴

As with the red-cockaded woodpecker, the South Carolina Coastal Conservation League is pushing for protections for the pondberry from impacts stemming from the planned Cainhoy Plantation. The South Carolina Department of Natural Resources found six occurrences of pondberry within the Cainhoy area. The Rule would prohibit certification conditions that could protect the pondberry.

5. *Relict Trillium* (*Trillium reliquum*)

Relict trillium, a perennial, flowering, herbaceous plant, was listed as endangered in 1988. It is only found in Alabama, Georgia, and South Carolina. Relict trillium is typically found in mature undisturbed hardwood stands. The most significant threats to the species are loss of habitat to development, conversion of habitat to agricultural use, and timber harvest.¹⁵

Savannah Riverkeeper will participate in the upcoming 401 certification process for the Stevens Creek dam relicensing, and will advocate for conditions to minimize the harm of the Stevens Creek dam project on this endangered plant.

6. *Dwarf-flowered Heartleaf* (*Hexastylis naniflora*)

Dwarf-flowered heartleaf is a flowering plant listed as threatened under federal law that is found in just 11 counties in the Piedmont region, straddling North and South Carolina. The main threat to the dwarf-flowered heartleaf is habitat loss from construction and agriculture. Because of this, surveys required for 404 permits and 401 certifications commonly include investigations to locate any populations of the plant. The South Carolina Native Plant Society and its members have worked to protect the plant and its habitat. Section 401 conditions in federal permits have required habitat within developments to be set aside for this rare plant, and the Society has worked with a homeowners association to protect the plants located in a development. South Carolina Native Plant Society and its members expect future developments to threaten the dwarf-flowered heartleaf, plan to participate in the 401 process and permitting process for any such developments, and rely on South Carolina to condition permits on protecting this plant.

III. Unless EPA cures its violation of the Endangered Species Act within 60 days, the Conservation Groups intend to file a lawsuit to protect the above and other endangered and threatened species.

The 401 Rule “may affect” threatened and endangered species and the habitats on which they depend; therefore, EPA was required to initiate consultation prior to promulgating the Rule. EPA did not initiate that consultation. Its failure to do so was a violation of Section 7 of

¹⁴ U.S. Fish and Wildlife Service, Recovery Plan for Pondberry (*Lindera rnelissifolia*) (1993).

¹⁵ U.S. Fish and Wildlife Service, Recovery Plan for Relict Trillium (*Trillium reliquum*) (1990).

the Endangered Species Act. This letter notifies EPA that if it fails to cure these violations within 60 days of receipt of this letter, South Carolina Coastal Conservation League, South Carolina Native Plant Society, Amigos Bravos, Natural Resources Defense Council, Savannah Riverkeeper, and Waterkeeper Alliance intend to file a lawsuit for declaratory and injunctive relief.

If you have any questions regarding this letter, or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel at the Southern Environmental Law Center, (919) 967-1450 or fholleman@selcnc.org. We request that EPA respond to this letter within 60 days. Please be advised that if required to file suit, the Conservation Groups intend to seek declaratory and injunctive relief in United States District Court. In addition, upon the successful prosecution of this suit, the Conservation Groups intend to seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of the Endangered Species Act, 16 U.S.C. 1540(g), and such other relief as the Court deems appropriate.

Sincerely,

A handwritten signature in blue ink that reads "Frank Holleman". The signature is written in a cursive style with a large initial "F".

Frank Holleman
Leslie Griffith
Brooks Pearson
Southern Environmental Law Center