



June 10, 2020

*Via Email and Certified Mail, Return Receipt Requested*

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**Re: Supplemental Notice of violations of the Endangered Species Act regarding EPA's suspension of the Enforcement and Compliance Assurance Program**

Dear Sirs/Madams:

This letter serves as a supplemental notice of intent to sue pursuant to 16 U.S.C. § 1540(g) on behalf of the Center for Biological Diversity, Waterkeeper Alliance, Inc. and Riverkeeper, Inc. (together, the “Conservation Groups”) to the U.S. Environmental Protection Agency (“EPA”) regarding violations of the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (“ESA”), in connection with the EPA’s March 26, 2020 Memorandum titled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program” setting forth a policy regarding suspension of EPA enforcement of environmental legal obligations during the COVID-19 pandemic (the “non-enforcement policy”).

The Center previously served a notice of intent letter upon EPA, dated April 21, 2020, for its lack of compliance with Section 7 of the ESA in the issuance of the non-enforcement policy.

That notice of intent, which is attached hereto and incorporated herein by reference, specifies how EPA's suspension of monitoring, reporting and enforcement under its Enforcement and Compliance Assurance Program pursuant to the non-enforcement policy will needlessly place endangered and threatened species at risk, in violation of Section 7 of the ESA, and that EPA has failed to take necessary and reasonable actions to address those impacts in the manner required by the ESA.

The EPA has not responded to that notice letter, and the Conservation Groups remain concerned that the agency has failed to ensure that the non-enforcement policy will not result in jeopardy to listed species, as the ESA requires. Furthermore, the Conservation Groups have now received responses to FOIA requests from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the "Services") confirming that EPA has failed to even discuss the non-enforcement policy with those wildlife agencies, or in any way attempt to comply with its clear duties under ESA Section 7.

Again, there can be no doubt that EPA's non-enforcement policy triggers the agency's Section 7 consultation obligations. EPA has taken discretionary action that effectively authorizes regulated entities to forego routine compliance monitoring, integrity testing, sampling, lab analysis, training, and reporting or certification where the affected companies maintain that such actions are "not reasonably practicable due to COVID-19." The suspension of monitoring and reporting requirements under the Clean Water Act, Clean Air Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, and Emergency Planning and Community Right-to-Know Act creates an immediate and serious risk to imperiled wildlife. That risk is heightened by EPA's broad invitation to regulated industries to suspend monitoring and reporting without public disclosure and without adequate justification or oversight.

As set forth in the prior notice letter, EPA's indefinite suspension of monitoring and reporting obligations poses distinct threats to species affected by EPA-issued permits. As an additional example, we note the potential for harm to listed species in the Hudson River from suspension of monitoring and reporting requirements under the Clean Water Act's pretreatment program for industrial and commercial wastewater discharges. This program requires certain facilities to remove conventional and toxic pollutants before discharging wastewater to treatment plants, and to report on the amounts and concentrations of such pollutants. *See* 40 C.F.R. § 403.12. Strict adherence to these requirements is essential for ensuring that listed species are protected, including endangered shortnose and Atlantic sturgeon. For instance, the Westchester County Yonkers Joint Wastewater Treatment Plant (SPDES Permit No. #NY0026689) receives flow from 18 significant industrial users before ultimately discharging into the Hudson River. Those sources include three metal finishers that have previously been found out of compliance for cyanide discharges; a pharmaceutical manufacturer that has had violations for zinc and oil & grease; and a scrap metal facility that has also had violations for oil & grease discharges. Absent

monitoring and reporting under the non-enforcement policy, the status and extent of discharges from these facilities, and the resulting impacts to imperiled fish species in the Hudson River, will remain unknown. Consequently, the suspension of monitoring and reporting requirements under the non-enforcement policy and the wholesale abandonment of enforcement penalties for non-compliance clearly meets the ESA's low "may affect" threshold for triggering the agency's Section 7 obligations.

While the Conservation Groups recognize certain measures to protect public health may be necessary in light of the pandemic, that certainly does not mean EPA may ignore its vitally important ESA Section 7 duties. The EPA's failure to engage in any Section 7 consultation, or even to follow the Services' "emergency consultation" protocol, is alarming, given that other federal agencies, such as FEMA, have engaged in that process regarding responses to COVID-19.<sup>1</sup> Regardless, the Conservation Groups remain concerned that the non-enforcement policy does not even require regulated entities to gather the necessary information once the policy is revoked to initiate formal consultation after the emergency has passed. This makes it impossible for the EPA to determine whether listed species have been adversely affected, which undermines the required Section 7 process that is vital for ensuring that imperiled species and their critical habitat are not jeopardized by EPA's actions.

The Conservation Groups therefore formally put EPA on notice that it is in violation of Section 7 of the ESA. We once again request that EPA advise us of what steps it is taking to comply with Section 7 of the ESA while the non-enforcement policy is in effect, and what actions it will take going forward to ensure that species have not been and will not be jeopardized and appropriate remediation actions are taken to address harm to listed species from the EPA's suspension of monitoring, reporting and enforcement during the COVID-19 pandemic. If an adequate explanation is not forthcoming, the Conservation Groups will have no choice but to invoke judicial remedies to enforce the EPA's crucial Section 7 obligations.

We look forward to your prompt response.

Sincerely,

/s/ Jared Margolis  
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<sup>1</sup> See 50 C.F.R. § 402.05; ESA Section 7 Consultation Handbook at 8-3.

/s/ Daniel E. Estrin

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