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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

CENTER FOR BIOLOGICAL
DIVERSITY, a non-profit corporation,

Plaintiff,

v.

WILBUR ROSS, in his official
capacity as Secretary of Commerce;
NATIONAL MARINE FISHERIES
SERVICE, an agency of the U.S.
Department of Commerce,

Defendants.

Case No.:

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

I. INTRODUCTION

1. In this civil action for declaratory and injunctive relief, Plaintiff Center for Biological Diversity (the “Center”) challenges the failure of the

Secretary of Commerce and the National Marine Fisheries Service (collectively “NMFS”) to make a mandatory listing determination under the Endangered Species Act (“ESA”), 16 U.S.C. § 1533(b)(3)(B). Specifically, NMFS has failed to take required action on the Center’s petition to protect the cauliflower coral (*Pocillopora meandrina*), known as Ko‘a in Hawaiian, as a threatened or endangered species under the ESA. Compliance with this mandatory duty is necessary to ensure the continued survival and eventual recovery of this imperiled species.



A cauliflower coral colony (*Pocillopora meandrina*) inhabiting a coral reef within the Papahānaumokuākea Marine National Monument.
Credit: Mark Sullivan, United States Fish & Wildlife Service

2. Coral reefs are in crisis. The world has lost a third of its coral reefs due to climate change and other factors in the past 30 years. Ocean warming causes coral reefs to bleach and die.

3. In the summer months of 2019 — this year — Hawaiian waters reached the highest temperatures ever recorded, and scientists have warned that Hawai‘i’s corals may face severe bleaching. At the time of this complaint, bleaching has been reported on reefs around Hawai‘i, including degraded and dead cauliflower corals. A similar heat wave in 2015 caused half of Hawai‘i’s corals to bleach and caused widespread mortality.

4. Cauliflower corals have declined significantly in recent decades due to threats including climate change, habitat destruction, pollution, overfishing, and diseases. These sensitive corals are extremely susceptible to ocean warming and acidification caused by greenhouse gas pollution. Between 2014 and 2017, a massive warming-induced coral bleaching event swept across the planet killing millions of corals on hundreds of reefs from Hawai‘i to the Great Barrier Reef. As a result, cauliflower coral has substantially declined in recent years. Scientists predict that the frequency and severity of warming events in the Pacific will increase and are likely to cause stronger mass coral bleaching placing cauliflower coral at a high risk of extinction.

5. In light of the significant threats facing cauliflower coral, on March 14, 2018, the Center submitted a petition to list cauliflower coral as a threatened or endangered species under the ESA.

6. In response to the Center's petition, NMFS published a "positive" ninety-day finding, deciding that listing cauliflower coral as threatened or endangered may be warranted. National Marine Fisheries Service, Endangered and Threatened Wildlife; Positive 90-Day Finding on a Petition to List the Cauliflower Coral, *Pocillopora Meandrina*, 83 Fed. Reg. 47592 (Sept. 18, 2018).

7. While NMFS made the requisite initial, or "90-day" finding, NMFS failed to make the required 12-month finding by March 14, 2019. To date, NMFS has failed to do so, even though the ESA offers it no discretion to delay past the one-year mark. Accordingly, NMFS is in violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

8. The Center brings this action to compel NMFS to publish its 12-month finding for cauliflower coral by a date certain.

II. JURISDICTION AND VENUE

9. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g) (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (Administrative Procedure Act or "APA"), and 28 U.S.C. § 1361 (mandamus).

10. The relief sought is authorized by 28 U.S.C. § 2201 (declaratory judgment) and 28 U.S.C. § 2202 (injunctive relief), 16 U.S.C. § 1540(g) (ESA), 5 U.S.C. §§ 701-706 (APA).

11. By written notice sent on May 29, 2019, the Center informed Defendants of their violation more than sixty days prior to the filing of this Complaint, as required by the ESA. 16 U.S.C. § 1540(g)(2)(C). Despite receipt of the Center's notice letter, NMFS has failed to remedy its violation of the ESA.

12. Venue is proper in the U.S. District Court for the District of Hawai'i pursuant to 28 U.S.C. § 1391(e) as NMFS resides in this judicial district and cauliflower corals occur in this judicial district.

13. An actual, justiciable controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

14. The Center has no adequate remedy at law. NMFS' continuing failure to comply with the ESA will result in irreparable harm to cauliflower coral, to the Center and the Center's members, and to the public. No monetary damages or other legal remedy can adequately compensate the Center, its members, or the public for this harm.

15. The federal government has waived sovereign immunity in this action pursuant to 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

III. PARTIES

16. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the “Center”) is a non-profit 501(c)(3) membership corporation with offices throughout the United States, including Hawai‘i, and in La Paz, Mexico. Through science, policy, and environmental law, the Center is actively involved in species and habitat protection issues throughout the United States and abroad, including efforts related to cauliflower coral and the effective implementation of the ESA. The Center has more than 67,000 members throughout the United States, including Hawai‘i, with a direct interest in ensuring the survival and recovery of imperiled species such as cauliflower coral. The Center is highly invested in conserving fragile and impacted coral reef ecosystems and the marine species that depend on them. The Center’s members and staff have researched, studied, observed, and sought protection for cauliflower coral. In addition, the Center’s members and staff have visited and enjoyed waters and coral reefs where cauliflower corals occur, and they have sought out and observed cauliflower coral in Hawai‘i. The Center’s members and staff have plans to continue to visit and observe, or attempt to observe, cauliflower coral in the near future. The Center’s members and staff derive scientific, recreational, conservation, and aesthetic benefits from this coral’s existence in the wild. The Center’s members’ and staff’s enjoyment of the cauliflower coral is dependent on the continued existence of healthy, sustainable

populations in the wild. NMFS' failure to comply with ESA requirements directly harm these interests. The Center brings this action on behalf of itself and its adversely affected members.

17. The Center and its members are adversely affected or aggrieved by NMFS' inaction and are entitled to judicial review of such inaction within the meaning of the ESA and the Administrative Procedure Act. NMFS' failure to comply with the ESA's mandatory deadlines prevents the completion of the listing process and therefore the implementation of additional measures to protect cauliflower coral based on the listing. Without the additional protections that would be available subsequent to a favorable determination on the Center's petition, cauliflower corals are more likely to continue to decline and become extinct. The Center is therefore injured because Plaintiff's use and enjoyment of cauliflower corals are threatened by NMFS' violation of the ESA. NMFS' failure to comply with the ESA's deadlines has also resulted in informational and procedural injury to the Center, because the ESA affords the Center procedural and informational rights, including the right to a timely response to its petition and the opportunity to comment on and otherwise participate in the statutorily-mandated listing process triggered by the filing of a petition. NMFS' failure to timely process the Center's petition frustrates these rights. These are actual, concrete injuries to the Center, caused by NMFS' failure to comply with the ESA, its

implementing regulations, and the Administrative Procedure Act. The relief requested will fully redress those injuries.

18. Defendant Wilbur Ross is the Secretary of the Department of Commerce and is the federal official with final responsibility for making decisions and promulgating regulations required by and in accordance with the ESA for the cauliflower coral, including listing decisions. Secretary Ross is sued in his official capacity.

19. Defendant NMFS is an agency of the United States Government, within and under the jurisdiction of the Department of Commerce. Through delegation of authority from the Secretary of Commerce, NMFS administers and implements the ESA and is legally responsible for listing decisions for species such as the cauliflower coral.

IV. LEGAL BACKGROUND

20. The Endangered Species Act is a federal statute enacted to conserve threatened and endangered species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA is the most comprehensive legislation for the preservation of endangered species. The United States Supreme Court has concluded the ESA requires that endangered species be afforded the highest of priorities. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). Congress's intent, reflected in the plain language of the ESA, was to prevent

extinction and promote the recovery of imperiled species, regardless of the cost.

Id. At 184.

21. The ESA assigns responsibility to implement the statute with respect to marine species to the Secretary of Commerce, who in turn has delegated responsibility to NMFS.

22. Congress enacted the ESA to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). A species does not receive federal protection under the ESA until it is officially listed as “threatened” or “endangered.” Congress described the listing process as “[t]he cornerstone of effective implementation of the Endangered Species Act.” S. Rep. No. 418, 97th Cong., 2d Sess. at 10; *see also* H. Rep. No. 567, 97th Cong., 2d Sess. at 10 (describing section 4 of the ESA, 16 U.S.C. § 1533).

23. A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is “threatened” if it is “likely to become an endangered species within the foreseeable future.” *Id.* § 1532(20).

24. Once a species is listed as threatened or endangered, an array of statutory protections apply. For example, section 7 of the ESA requires all federal

agencies to ensure that their actions do not “jeopardize the continued existence” of any listed species. *Id.* § 1536(a)(2). Section 9 of the ESA prohibits, among other things, the unpermitted “take” of endangered species by “any person.” *Id.* §§ 1538(a)(1)(B), 1539. Additionally, the ESA also requires NMFS to designate “critical habitat” for listed species, *id.* § 1533(a)(3), and to “develop and implement” recovery plans for listed species. *Id.* § 1533(f).

25. To ensure the timely protection of species, Congress set forth detailed listing processes. These processes include mandatory, nondiscretionary deadlines for the required findings that NMFS must meet, so that species in need of protection do not languish in administrative purgatory.

26. Any interested person can begin the listing process by filing a petition to list a species with NMFS. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

27. Upon receipt of a petition to list a species, NMFS must “to the maximum extent practicable,” make a finding within 90 days as to whether the petition “presents substantial scientific or commercial information” indicating that the petitioned action may be warranted. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1).

28. Upon issuing a positive 90-day finding in response to a petition to list a species, NMFS must conduct a full review of the status of the species. 50 C.F.R. § 424.14. Upon completion of this status review, and within 12 months from the

date that the agency received the petition, NMFS must make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by other pending proposals for listing species, provided certain circumstances are present. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14 (b)(3).

29. If NMFS determines in the 12-month finding that the listing of the species is warranted, then the agency must publish in the Federal Register a proposed rule, for public comment, to list such species as endangered or threatened. 16 U.S.C. § 1533(b)(5).

30. Within one year of the publication of a proposed rule to list a species, the ESA requires NMFS to render a final determination on the proposal. 16 U.S.C. § 1533(b)(6)(A). At such time, the agency must either list the species, withdraw the proposal, or if there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. 16 U.S.C. § 1533(b)(6)(A)(i)(III), 1533(b)(6)(B)(i).

V. FACTUAL BACKGROUND

31. Cauliflower coral or Ko‘a (*Pocillopora meandrina*) is a relatively small upright bushy coral species found in shallow reefs of the tropical and subtropical Indian and Pacific Oceans. It has been among Hawai‘i’s most

abundant reef building corals. Cauliflower coral is usually cream, green, or pink in color; and it provides a shelter for crabs and small fish.

32. Ocean warming and acidification, caused by greenhouse gas emissions, has caused large-scale coral bleaching events resulting in unprecedented coral mortality and associated reef decline during the past decades. These mass bleaching events have increased in frequency, severity, and magnitude, and are projected to continue.

33. In its positive ninety-day finding, NMFS recognized that cauliflower coral is highly susceptible to threats such as elevated seawater temperature. The agency found that this species has “declined in abundance over the past 50 to 100 years across most, if not all, of its range, and that the decline has recently accelerated” due to ocean warming and subsequent warming-induced coral bleaching and mortality. 83 Fed. Reg. at 47,592.

34. In Hawai‘i, for example, NMFS noted that between 1999 to 2012, cauliflower coral “decreased in live coral cover by 36.1 percent” and that it “was one of the most severely affected reef coral species” in the consecutive 2014 and 2015 mass bleaching events. *Id.* Surveys conducted on the west coast of Hawai‘i Island in 2015 found that a startling 77.6 percent of the monitored cauliflower coral colonies suffered total post-bleaching mortality. *Id.*

35. Ocean warming and acidification pose the most serious short-and long-term threats to the survival of this coral species. These threats are already affecting this coral species. Scientists predict that the frequency and severity of these thermal stress events will continue to increase and likely cause stronger mass coral bleaching, placing cauliflower coral at an even higher risk of extinction.

36. On March 14, 2018, the Center submitted a petition to list cauliflower coral as a threatened or endangered species under the ESA. The petition outlined the threats to the species, including the threat described above. Additionally, the petition noted that localized sedimentation, land-based sourced pollution, sewage pollution, coastal development, tourism, marine debris, disease, predation, reef fisheries, the aquarium trade, and intensification of storms also threaten the survival of this vulnerable coral species.

37. Listing cauliflower coral as threatened or endangered under the ESA can help protect this vulnerable coral. The ESA would require that federal actions that may affect the corals consult with expert wildlife scientists to avoid jeopardy to the species. Thus, projects requiring federal permits, such as coastal development and military activities, would need to take steps to prevent harm to the corals. Federal actions that result in significant greenhouse gas pollution should also be required to evaluate their impacts on corals. The ESA also provides habitat protections and recovery planning that will help ensure management of the

species to promote its survival and recovery, including steps that will increase the coral's resilience to ocean warming and acidification.

38. On September 18, 2018, NMFS issued a positive 90-day finding that listing cauliflower coral as threatened or endangered "may be warranted based on the threat of ocean warming alone." 83 Fed. Reg. at 47,592. The notice stated:

We find that the petition and other readily available information in our files indicates that *P. meandrina* may warrant listing as a threatened species or an endangered species throughout its range. Thus, we will initiate a global status review of *P. meandrina* to determine whether listing it throughout its range is warranted. If not, we will determine if Hawaii constitutes [a significant portion of its range] and proceed accordingly.

Id.

39. After this finding, NMFS had one year under the ESA from the date it received the Petition to conduct a full status review and issue a 12-month finding on the listing. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14 (b)(3). The 12-month finding deadline, which NMFS has no discretion to extend, came and went on March 14, 2019. NMFS has yet to issue such a finding on the cauliflower coral petition.

40. On May 29, 2019, the Center sent NMFS a sixty-day notice of intent to sue over its failure to make the required findings on the Center's petition to list cauliflower coral as a threatened or endangered species. The required findings have not been made since that time.

VI. CLAIM FOR RELIEF

(Violation of Endangered Species Act and Administrative Procedure Act)

41. The Center re-alleges and incorporates by reference all allegations set forth in this Complaint, as though fully set forth below.

42. The ESA required NMFS to make a 12-month finding within twelve months of its receipt of the Center's petition to list the cauliflower coral as an endangered or threatened species under the ESA. 16 U.S.C. §1533(b)(3)(B). NMFS is in violation of this express statutory command.

43. Under the Administrative Procedure Act, a reviewing court "shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

44. NMFS' failure to make a 12-month finding on the Center's Petition to list the cauliflower coral is a violation of the ESA and its implementing regulations, 16 U.S.C. §§ 1533(b)(3)(B) & 1540(g), and constitutes agency action "unlawfully withheld or unreasonably delayed" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(1).

VII. PRAYER FOR RELIEF

For the reasons stated above, the Center respectfully requests that the Court grant the following relief.

1. Declare that NMFS violated the Endangered Species Act and Administrative Procedure Act by failing to timely make a 12-month finding in response to the cauliflower coral petition;
2. Order NMFS to make and publish in the Federal Register a 12-month finding under the Endangered Species Act on the cauliflower coral petition by a date certain;
3. Award Plaintiff its costs of litigation, including reasonable attorney fees; and
4. Grant Plaintiff such other relief as the Court deems just and proper.

DATE: October 10, 2019

Respectfully Submitted,

/s/ Maxx Phillips

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