



January 28, 2009

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VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

RE: Notice of Violation of Section 4 of the Endangered Species Act Relating to Eight Southwestern Species

Dear Secretary and Director,

On behalf of WildEarth Guardians, I write to inform you that you are in violation of Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1533(a)(1)(A-E), 1533(b)(1)(A), and 1533(b)(3)(A), by denying our petition to list eight species:

1. Cylindrical Vertigo (*Vertigo binneyana*)
2. McCart’s Whitlow-wort (*Paronychia maccartii*)
3. Watson’s False-clappia (*Pseudoclappia watsonii*)
4. Nueces Crayfish (*Procambarus nueces*)
5. A Stonefly (*Isoperla jewetti*)
6. A Mayfly (*Fallceon eatoni*)
7. *Donrichardsia macroneuron*
8. Many-flowered Unicorn-plant (*Proboscidea spicata*)

This letter is provided to you pursuant to the 60-day notice requirement of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g)(2)(C).

The U.S. Fish and Wildlife Service denied these eight species ESA protection by issuing a negative 90-day petition finding. 74 Fed. Reg. 419-427 (January 6, 2009). In this decision, the Service devised a classification scheme. The Service assigned species to Category A if it

believed that our petitions¹ and the underlying NatureServe database contained “only minimal information about each species, and in some cases no more information than the name of the species.” 74 Fed. Reg. 419 at 421. The Service assigned the Cylindrical Vertigo (*Vertigo binneyana*), Mccart’s Whitlow-wort (*Paronychia maccartii*), and Watson’s False-clappia (*Pseudoclappia watsonii*) to Category A. The Service’s conclusion that the petitions presented no information about these species is incorrect. The NatureServe database and our emergency petition (filed June 12, 2008)² provided the following information on the status of these three species:

Cylindrical Vertigo (*Vertigo binneyana*)

NatureServe: this mollusk is ranked critically imperiled. No current populations are known, and it is currently known to exist only in historical literature and museum records. It possibly exists in Alberta, Canada. Otherwise, it may be extinct. Historically, it occurred in Iowa, Kansas, Montana, New Mexico, British Columbia, Manitoba, and Ontario.

Emergency petition: this species is not protected in any of the state wildlife plans for the U.S. states in which it historically occurred. Drought is cited as a threat in New Mexico to other members of its genus. Threats to the species include lack of adequate regulatory protections (either state or federal) and the risk of total extirpation given that no populations are known to exist.

Mccart’s Whitlow-wort (*Paronychia maccartii*)

NatureServe: this flowering plant is ranked critically imperiled. It is known from a single location in Webb County, Texas. It has not been found since 1962 despite subsequent searches.

Emergency petition: this plant was included in the Smithsonian Institution’s list of endangered plant species submitted to the Service in 1975. It was a Category-2 candidate for listing in from 1990-1996, but was removed from the candidate list in 1996, along with over 2,000 other species. A threat to the species includes the risk of total extirpation given that no populations are known to exist.

Watson’s False-clappia (*Pseudoclappia watsonii*)

NatureServe: this flowering plant is ranked critically imperiled. It is known from only 2 collections made in western Texas in the 1970s. It has not been seen since.

Emergency petition: this species is threatened with total extirpation given that no populations are known to exist.

The Service assigned species to Category B if it believed that our petition and the underlying NatureServe database:

¹WildEarth Guardians submitted two ESA listing petitions for each of the eight species at issue. Our first petition, dated June 18, 2007, requested ESA listing for 475 species in the Service’s Southwest Region. Our second petition, dated June 12, 2008, requested emergency ESA listing for 32 species, 21 of which occur in the Southwest Region. These 21 species were a subset of the 475-species petition. The 8 species at issue are a subset of those 21 species. The Service has not issued a 90-day finding regarding the other 13 southwestern species for which we requested emergency listing.

²Much of the NatureServe information was described in WildEarth Guardians’ emergency petition. We therefore only present here information in the emergency petition that was additive to each species’ NatureServe account.

contained basic information on the range of the species, based on some level of survey effort. Habitat was frequently mentioned as well as other aspects of the species' biology, such as food habitats. Population size or abundance, if addressed, was rarely quantified, and the database instead used descriptors such as large, small, or numerous. The available information we reviewed did not address specific threats to the species.

74 Fed. Reg. 419 at 421.

The Service assigned Nueces Crayfish (*Procambarus nueces*), the stonefly (*Isoperla jewetti*), the mayfly (*Fallceon eatoni*), the moss *Donrichardsia macroneuron*, and the Many-flowered Unicorn-plant (*Proboscidea spicata*) to Category B. In assigning these species to Category B the Service ignored the information presented in our petitions. NatureServe accounts and our request for emergency listing provided the following information on the status of these five species:

Nueces Crayfish (*Procambarus nueces*)

NatureServe: this crayfish is ranked critically imperiled. It is known from one site, a tributary of the Nueces River in Atascosa County, Texas. Subsequent surveys found no other specimens nearby. There are only six known specimens, and its global abundance is estimated at 1-1,000 individuals. It is ranked by IUCN as critically endangered. Its single location is not protected, and NatureServe recommends protection of that population.

Emergency Petition: The Texas Parks and Wildlife Department describes its only location as a small sluggish stream tributary to the Nueces River. The American Fisheries Society classifies this species as endangered. We identified multiple threats to this species, including a risk of extinction due to only 1 known population, as well as threats of development, erosion, fragmentation, human disturbance, hurricanes, flood events, pollution, and lack of protection.

A Stonefly (*Isoperla jewetti*)

NatureServe: this stonefly is reported from Colorado, New Mexico, and Texas. The Colorado (Huerfano County) and Texas (El Paso County) locations have been searched extensively with no success. Six nymph specimens were collected in Radium Springs, Dona Ana County, New Mexico in 1978 and 1980, but NatureServe reports that this species may be extinct. The Texas site was completely destroyed by agriculture.

Emergency Petition: As of 2005, there were no known individuals. New Mexico's state wildlife strategy lists the species as of greatest conservation need and describes it as declining and vulnerable. Threats to the species include habitat loss from agriculture and a risk of extinction due to no known populations.

A Mayfly (*Fallceon eatoni*)

NatureServe: this mayfly was originally collected over 100 years ago and was redescribed from northern Sonora, Mexico in 1934, but was then not seen again until 2005 when a single specimen was collected in Salt River Canyon, Gila County,

Arizona. The number of populations is “[u]nknown, but likely very few,” with one site currently known (Salt River Canyon).

Emergency Petition: this mayfly is not covered under any state wildlife plan, as it is only known to occur in Arizona, whose state wildlife plan does not protect insects. It is threatened by inadequate regulatory protections (either state or federal) and the risk of total extirpation from its small numbers.

Donrichardsia macroneuron

NatureServe: this moss is known only from one occurrence, on the boulders in the water of Seven Hundred Springs in Edwards County, Texas. It has survived at this spring only because the spring has not yet dried up. It may be represented by just a single clone. There are no potential sites downstream for the growth of this species. The NatureServe account states, “The prognosis for continued survival of the rare endemic is therefore not good.” This species comprises a monotypic genus.

Emergency Petition: threats include spring-drying, drought, and extirpation given that it is not only limited to one population, it is limited to one clone. The IUCN classifies this species as vulnerable, reports that only one locality remains, and list threats of development, dam construction, and water pollution. If this species goes extinct, an entire genus would vanish.

Many-flowered Unicorn-plant (*Proboscidea spicata*)

NatureServe: this flowering plant is only known to occur in Trans-Pecos, Texas, and Coahuila, Mexico. It has not been relocated since 1967 despite searches in the late 1970s.

Emergency Petition: this plant was a Category-2 candidate for ESA listing from 1990-1996, but was removed from the candidate list in 1996, along with over 2,000 other species. It is threatened with extirpation given its low number of known populations (currently none).

The Service argued in its finding that our petitions and the NatureServe species accounts failed to indicate threats to these species. The ESA considers the following factors in determining whether a species qualifies for listing:

- A. The present or threatened destruction, modification, or curtailment of habitat or range;
- B. Overutilization for commercial, recreational, scientific, or educational purposes;
- C. Disease or predation;
- D. The inadequacy of existing regulatory mechanisms; and
- E. Other natural or manmade factors affecting its continued existence.

See 16 U.S.C. § 1533(a)(1)(A-E). We discussed in the request for emergency listing how species that occur in only one current known location (or no known locations), are vulnerable to systematic pressures or random/stochastic events causing total extirpation or extinction. While the Service considered this threat under Factor E, it found:

While we recognize that many of the species contained within the NatureServe database have limited distribution or small population size, limited distribution and population size were not identified as threats faced by the [sic] any of the 270 species in the petition, including all available references and the NatureServe species files and these two factors alone without elaboration may not be substantial information that may warrant listing under the Act.

74 Fed. Reg. 419 at 427.

This defies commonsense. How can the absence of any known populations of the Cylindrical Vertigo, and the fact that it is feared to be globally extirpated, not be a threat to this species? How can the absence of any known populations of McCart's Whitlow-wort since 1962, despite subsequent searches, not be a threat to this species? How can the fact that Watson's False-clappia has not been seen since the 1970s not be a threat to this species? How can the Nueces Crayfish's known occurrence in only one small sluggish stream, with a total population of 1-1,000 individuals, not be a threat to this species? How can the absence of any known specimens of the stonefly *Isoperla jewetti* not be a threat to this species? How can the Service conclude that the mayfly *Fallceon eatoni* does not merit further review for ESA protection when, between 1934-2005, it was not known whether it continued to exist anywhere on the planet, and is now only known from one location in Arizona? How can the existence of a single clone of the moss *Donrichardsia macroneuron* at a single spring not be a threat to this species? How can the absence of any known individuals of the Many-flowered Unicorn Plant since 1967, despite subsequent searches, not be a threat to this species?

Moreover, the Service is demanding additional information before it takes protective action, in contravention of the ESA requirement that listing decisions be based "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). The available information for the species at issue clearly shows that they are endangered or threatened: they are all ranked by NatureServe as critically imperiled, contain one or no known populations, and are all threatened by their limited population numbers and a lack of adequate regulations (whether state or federal protection). They therefore qualify for listing under the criteria outlined in the ESA. 16 U.S.C. § 1533(a)(1)(A-E).

The Service ignored additional information regarding threats that our petitions and NatureServe's species accounts provided. For Factor A, habitat loss and degradation, the Service wrote,

...no information was presented on threats to the species or their habitats; therefore we find the petition, including all available references and the NatureServe species files, does not present substantial information that the present or threatened destruction, modification, or curtailment of the species' habitat or range is a threat...

74 Fed. Reg. 419 at 426.

However, Table 2 in WildEarth Guardians' emergency petition shows quite clearly that Factor A affects *Isoperla jewetti* (habitat conversion to agriculture) and *Donrichardsia*

macroneuron (spring drying, development, dam construction, water pollution). NatureServe and our request for emergency listing further demonstrate habitat threats to the Cylindrical Vertigo (drought) and the Nueces Crayfish (development, erosion, fragmentation, human disturbance, hurricanes, flood events, and pollution).

The Service also concluded that for Factor D, lack of adequate regulatory mechanisms,

The petition discusses the lack of protection under the Act for the petitioned species, stating that unless a species is listed as threatened or endangered under the Act, it receives no protections from the statute. The petition provides no information addressing any other State or Federal regulations, and no information about the inadequacy of existing regulatory mechanisms.

74 Fed. Reg. 419 at 426.

However, Table 2 of our emergency petition clearly described how Factor D is a threat to *Fallceon eatoni*, Cylindrical Vertigo, and Nueces Crayfish. In addition, the NatureServe database and our petitions indicate that all eight species are threatened by small population numbers. In the face of this threat, the lack of federal protection must be considered by the Service as a lack of adequate regulatory mechanisms.

If you do not reverse your negative 90-day findings for these eight species and immediately commence status reviews to determine if they in fact warrant listing, WildEarth Guardians intends to file suit to force you to do so. However, this is not our preference. The purpose of the 60-day notice provision in the ESA is for violators of the law to come into compliance, therefore avoiding the need for litigation. Please contact me if you have any questions or if you would like to discuss this matter.

Sincerely,

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