



Environmental and Animal Defense

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May 21, 2020

VIA EMAIL AND CERTIFIED MAIL

Andrew Wheeler  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Ave. NW  
Mail Code: 1101A  
Washington, DC 20460  
[Wheeler.andrew@epa.gov](mailto:Wheeler.andrew@epa.gov)

Re: Sixty Day Notice of Violations of the Endangered Species Act, relating to EPA's delegation of authority to the State of Colorado

Dear Administrator Wheeler:

This letter services as a 60-day notice of intent to sue the U.S. Environmental Protection Agency ("EPA") from Environmental and Animal Defense ("eaDefense"), Alexa Carreno, and other interested parties for the EPA's failure to comply with the Endangered Species Act. This letter is being provided to you pursuant to the 60-day notice requirement of the citizen suit provision of the Endangered Species Act. 16 U.S.C. § 1540(g)(2)(A).

The EPA has violated the Endangered Species Act through its authorization of National Pollutant Discharge Elimination System permitting under the Federal Water Pollution Control Act (33 U.S.C. §1342) to the State of Colorado; specifically, the State of Colorado Department of Public Health ("CDPHE") and Environment has delegated authority to issue permits of discharge of stormwater associated with construction activities pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. § 1251 et. seq). CDPHE has issued a Master General Permit for Stormwater Discharges Associated with Construction Activities on November 1, 2018 (COR400000) ("General Permit"). Under the General Permit, CDPHE has issued a site-specific permit authorizing the owner and operator of Forest Lakes Residential Development, LLC, located in El Paso County, Colorado, to discharge

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stormwater into South Beaver Creek, Beaver Creek, Monument Creek, Fountain Creek, and the Arkansas River (COR407128) ("Forest Lakes Permit").

The Forest Lakes Permit was issued without consideration of federally protected Endangered Species, namely, the Preble's Meadow Jumping Mouse, which inhabits the riparian area at the permitted site. By and through its delegated authority, permitting stormwater discharge into Preble's Meadow Jumping Mouse habitat, including its critical habitat, without consideration, analysis, or consultation, the EPA has violated the Endangered Species Act, pursuant to 16 U.S.C. § 1536(a)(2).

The Endangered Species Act requires that "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." 16 U.S.C. § 1536 (a)(2).

The EPA has not insured that its authorization of a stormwater discharge permit for the Forest Lakes Permit is not likely to affect the Preble's Meadow Jumping Mouse. There was no informal consultation, nor issuance of a biological opinion or biological assessment by the U.S. Fish and Wildlife Service, and certainly no application for an exemption from the requirements of the Endangered Species Act.

Even with respect to programs for permits allowing discharge of pollutants into waters, which permits are authorized under 33 USCS § 1342, Environmental Protection Agency can delegate responsibilities to states without surrendering its ultimate authority over such programs as well as over individual permit actions. *E. I. Du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 97 S. Ct. 965, 51 L. Ed. 2d 204, 9 Env't Rep. Cas. (BNA) 1753, 7 Env'tl. L. Rep. 20191 (1977).

The EPA is liable and continues to have ultimate authority over permits granted through state-delegated programs, including the CDPHE-issued General Permit and Forest Lakes Permit. Neither of these permits have considered impacts to the Preble's Meadow Jumping Mouse, whose critical habitat is at the site of the Forest Lakes Permit. The EPA is statutorily obligated to abide by the Endangered Species Act when authorizing actions and has failed to do so in this instance.

Preliminary ground clearing construction activities have begun at the Forest Lakes Permit site, which makes this action timely and its impacts ongoing. Ongoing

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construction only contributes to the potential for jeopardy to the Preble's Meadow Jumping Mouse and adverse impacts to its critical habitat. The full impacts to the mouse are currently unknown because the property owners refuse access to concerned citizens wishing to evaluate the mouse and the EPA has not evaluated the impacts of issuing the permit at all.

Accordingly, the EPA is in violation of the law and have abrogated their duty to ensure that any action authorized by the EPA does not jeopardize the protection of threatened and endangered species occurs and that such action does not result in the destruction or adverse modification of critical habitat.

If the EPA does not revoke the Forest Lakes Permit in order to allow for the appropriate and required consideration, which includes consultation with the U.S. Fish and Wildlife Service regarding the Preble's Meadow Jumping Mouse and its critical habitat at the Forest Lakes Permit site, or contact us to discuss how the EPA plans to correct this violation within the next sixty days, we intend to file suit. Please contact me if you have any questions or if you would like to discuss this matter.

Sincerely,

/s/ Alexa Carreno, Esq.

Alexa Carreno, Esq.  
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CC:

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