

Maxx Phillips (HI Bar No. 10032)  
CENTER FOR BIOLOGICAL DIVERSITY  
1188 Bishop Street, Suite 2412  
Honolulu, HI 96813  
Phone: (808) 284-0007  
Email: mphilips@biologicaldiversity.org

Brian Segee (CA Bar No. 200795), *pro hac vice application forthcoming*  
CENTER FOR BIOLOGICAL DIVERSITY  
660 S. Figueroa St., Suite 1000  
Los Angeles, CA 90017  
Phone: (805) 750-8852  
Email: bsegee@biologicaldiversity.org

*Attorneys for Plaintiff*

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

CENTER FOR BIOLOGICAL DIVERSITY,  
a non-profit corporation,

*Plaintiff,*

v.

DEB HAALAND, in her official  
capacity as Secretary of the Interior; U.S.  
FISH AND WILDLIFE SERVICE, an agency  
of the U.S. Department of the Interior;

and

MARTHA WILLIAMS, in her official  
capacity as the Director of the U.S. Fish and  
Wildlife Service;

*Defendants.*

Case No.:

**COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF**

## 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 the Interior and the U.S. Fish and Wildlife Service (collectively, “the Service”) to designate critical habitat for forty-nine species of plants and animals in Hawai‘i, as required under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. The Service’s failure to timely designate critical habitat after listing these species as endangered violates its mandatory duty under the ESA. See 16 U.S.C. § 1533(a)(3)(A)(i). This unlawful delay deprives these imperiled species of vitally important protections in their most essential habitat areas. Compliance with this mandatory and non-discretionary duty is necessary to ensure the continued survival and eventual recovery of these vulnerable species.

2. On September 30, 2016, the Service listed forty-nine species from the Hawaiian Islands as endangered. 81 Fed. Reg. 67,786 (Sept. 30, 2016). The 2016 listing included 39 species of plants: *Asplenium diellaciniatum*, *Calamagrostis expansa* (Maui reedgrass), *Cyanea kauaulaensis*, *Cyclosorus boydiae* (kupukupu makali‘i), *Cyperus neokunthianus*, *Cyrtandra hematos* (ha‘iwale), *Deparia kaalaana*, *Dryopteris glabra* var. *pusilla* (hohiu), *Exocarpos menziesii* (heau), *Festuca hawaiiensis*, *Gardenia remyi* (nānū), *Huperzia stemmermanniae*,

*Hypolepis hawaiiensis* var. *mauiensis* (olua), *Joinvillea ascendens* ssp. *ascendens* (‘ohe), *Kadua fluviatilis* (kamapua‘a), *Kadua haupuensis*, *Labordia lorenciana*, *Lepidium orbiculare* (‘ānaunau), *Microlepidia strigosa* var. *mauiensis*, *Myrsine fosbergii* (kōlea), *Nothocestrum latifolium* (‘aiea), *Ochrosia haleakalae* (hōlei), *Phyllostegia brevidens*, *Phyllostegia helleri*, *Phyllostegia stachyoides*, *Portulaca villosa* (‘ihi), *Pritchardia bakeri* (Baker’s loulu), *Pseudognaphalium sandwicense* var. *molokaiense* (‘ena‘ena), *Ranunculus hawaiiensis* (makou), *Ranunculus mauiensis* (makou), *Sanicula sandwicensis*, *Santalum involutum* (‘iliahi), *Schiedea diffusa* ssp. *diffusa*, *Schiedea pubescens* (ma‘oli‘oli), *Sicyos lanceoloideus* (‘ānunu), *Sicyos macrophyllus* (‘ānunu), *Solanum nelsonii* (pōpolo), *Stenogyne kaalae* ssp. *sherffii*, and *Wikstroemia skottsbergiana* (‘ākia). Id.

Further, the 2016 listing included 10 animal species at risk for extinction:

*Oceanodroma castro*, (Band-rumped storm-petrel), *Hylaeus anthracinus* (Yellow-faced bee), *Hylaeus assimulans* (Yellow-faced bee), *Hylaeus facilis* (Yellow-faced bee), *Hylaeus hiliaris* (Yellow-faced bee), *Hylaeus kuakea* (Yellow-faced bee), *Hylaeus longiceps* (Yellow-faced bee), *Hylaeus mana* (Yellow-faced bee), *Megalagrion xanthomelas* (Orangeblack Hawaiian damselfly), and *Procaris hawaiiiana* (Anchialine pool shrimp). Id.

3. When the Service lists a species as endangered or threatened, the ESA mandates that the Service shall concurrently “designate any habitat of such species which is then considered to be critical habitat.” 16 U.S.C. § 1533(a)(3)(A)(i). Under limited circumstances, the Service may extend that deadline to no more than one additional year. Id. § 1533(b)(6)(C)(ii).

4. Despite this non-discretionary statutory mandate, the Service has not, to date, designated critical habitat for any of the above listed species, as required by § 1533 of the ESA.

5. These forty-nine plants and animals are only found in the Hawaiian Islands and each has a limited range within this already restricted geographic area. 81 Fed. Reg. 67,826. The Service’s failure to designate critical habitat is all the more egregious due to the fact that it has recognized that these species’ already restricted habitats are being degraded or lost entirely due to “urbanization; nonnative feral ungulates (hoofed mammals, e.g., pigs, goats, axis deer, black-tailed deer, mouflon, and cattle); nonnative plants; wildfire; and water extraction.” Id. at 67,786.

6. The continued survival and eventual recovery of these forty-nine endangered species remains at risk until the Service fulfills its mandatory statutory duty to designate critical habitat.

7. The Service's failure to timely designate critical habitat for these forty-nine species of plants and animals in Hawai'i violates section 4 of the ESA, 16 U.S.C. §§ 1533(a)(3)(A)(i), (b)(6)(C). Accordingly, the Center brings this action against the Service to (1) secure declaratory relief that the Service's failure to timely designate critical habitat is unlawful, and (2) compel performance of its mandatory duties to designate critical habitat according to a timeline established by the court.

### **JURISDICTION AND VENUE**

8. The court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g) (action arising under the ESA and its citizen suit provision), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1361 (mandamus).

9. The declaratory judgment and injunctive relief sought is authorized by 28 U.S.C. §§ 2201–2202 (Declaratory Judgment Act), and 16 U.S.C. § 1540(g) (citizen suit provision of the ESA).

10. By written notice sent on May 25, 2022, the Center informed Defendants of their violation more than sixty days prior to the filing of this Complaint, as required by the ESA. See 16 U.S.C. § 1540(g)(2). Despite receipt of the Center's notice letter, the Service has failed to remedy its violation of the ESA.

11. Venue is proper in the U.S. District Court for the District of Hawai‘i pursuant to 28 U.S.C. § 1391(e)(1)(B) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

12. An actual, justiciable controversy exists between the parties within the meaning of the Declaratory Judgment Act. See 28 U.S.C. § 2201.

13. The Center has no adequate remedy at law. The Service’s continuing failure to comply with the ESA will result in irreparable harm to these 10 species of animals and 39 species of plants in Hawai‘i, to the Center and the Center’s members, and to the public. No monetary damages or other legal remedies can adequately compensate the Center, its members, or the public for this harm.

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

### **PARTIES**

15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3) conservation organization with more than 84,000 members, including members who reside in Hawai‘i. Ensuring the survival and recovery of threatened and endangered species is at the core of the Center’s mission. Through science, policy, and environmental law, the Center is actively involved in species and habitat protection issues throughout the United States, including efforts related to

the Hawai‘i’s imperiled plant and animal species, and the effective implementation of the ESA. The Center is highly dedicated to conserving fragile and impacted ecosystems and the species that depend on them in Hawai‘i. The Center’s members and staff have researched, studied, observed, and sought protection for these thirty-nine species of plants and 10 species of animals in Hawai‘i. In addition, the Center’s members and staff are either from or have visited and enjoyed Hawai‘i where these forty-nine species occur, and they have sought out and observed these species in the Hawaiian Islands. The Center’s members and staff have plans to continue to visit and observe, or attempt to observe, these species in the future. The Center’s members and staff derive scientific, recreational, cultural, conservation, spiritual, educational, and aesthetic benefits from these forty-nine species of plants’ and animals’ existence in the wild.

16. For example, one member of the Center, is a scientist who has sought out, observed, cataloged, photographed, and researched these plant and animal species in Hawai‘i. He is concerned about the pressing need to conserve these species’ critical habitat.

17. The Center’s members’ and staff’s enjoyment of these forty-nine species of plants and animals is dependent on the continued existence of healthy, sustainable populations in the wild. The Service’s failure to designate critical

habitat for these forty-nine species of plants and animals directly harms these interests. The Center brings this action on behalf of itself and its adversely affected members.

18. The Center and its members are adversely affected or aggrieved by the Service's inaction and are entitled to judicial review of such inaction under the ESA. The Service's failure to comply with the ESA's nondiscretionary deadlines to designate critical habitat for these forty-nine species denies these threatened and endangered plants and animals vital protections that are necessary for their survival and recovery. Without the additional protections provided by the designation of critical habitat, these forty-nine species of plants and animals are more likely to continue to decline and become extinct. The Center's members and staff are therefore injured because their use and enjoyment of these forty-nine species of plants and animals are threatened by the Service's violations of the ESA. The above-described scientific, cultural, aesthetic, recreational, spiritual, educational, conservational, and other interests of the Center and its members have been, are being, and unless the Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' continued failure to comply with their obligations under the ESA. The relief sought in this case will redress these injuries.



19. The Service's 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 comment on and otherwise participate in the statutorily mandated critical habitat processes triggered by an ESA listing. The Service's failure to timely designate critical habitat frustrates these rights. These are actual, concrete injuries to the Center, caused by the Service's failure to comply with the ESA, its implementing regulations. 50 C.F.R. pt. 424. The relief requested will fully redress those injuries.

20. Defendant DEBRA HAALAND is the Secretary of the United States Department of the Interior and is the federal official with final responsibility for making decisions and promulgating regulations required by and in accordance with the ESA, including the timely designation of critical habitat, and for complying with all other federal laws applicable to the Department of the Interior. Secretary Debra Haaland is sued in her official capacity.

21. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency of the United States Government, within and under the jurisdiction of the Department of the Interior. Through delegation of authority from the Secretary of the Interior, the Service administers and implements the ESA for non-marine wildlife. 50 C.F.R. §

402.01(b). This authority encompasses timely compliance with the ESA’s mandatory deadlines to designate critical habitat.

22. Defendant MARTHA WILLIAMS is the Director (“Director”) of the U.S. Fish and Wildlife Service and is the federal official responsible for the administration and the implementation of the ESA and APA in timely designating the critical habitat of an endangered or threatened species. The Director is sued in her official capacity.

### **LEGAL BACKGROUND**

23. The Supreme Court has declared that the Endangered Species Act “represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978). As the Court recognized, “Congress intended endangered species to be afforded the highest of priorities.” Id. at 174. Accordingly, the purpose of the ESA is 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).

24. The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened

species to the point at which the measures provided pursuant to this chapter are no longer necessary.” Id. § 1532(3). Thus, the ultimate goal of the ESA is not only to temporarily save endangered and threatened species from extinction but to recover these species to the point where they no longer need ESA protection.

25. To that end, the ESA requires the Service to protect imperiled species by listing them as “endangered” or “threatened” when they meet the statutory listing criteria. Id. § 1533(a)(1). A species is endangered if it “is in danger of extinction throughout all or a significant portion of its range.” Id. § 1532(6). A species is threatened if it is “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20).

26. Once a species is listed, it receives a host of important protections designed to prevent its extinction and aid its recovery, including one of the most crucial protections—safeguards for its “critical habitat.” Id. § 1533(a)(3)(A).

27. Concurrent with listing a species, the ESA requires the designation of critical habitat. Id. § 1533(a)(3)(A)(i) (“The Secretary . . . shall, concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat.”); see also id. § 1533(b)(6)(C).

28. In limited circumstances, the Service may extend the designation of critical habitat for no more than one year. If the Secretary finds that critical habitat is “not determinable” at the time of listing, it “may extend the one-year period . . . by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.” Id. § 1533(b)(6)(C)(ii).

29. Critical habitat means “the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 [of the ESA], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection;” and unoccupied areas “essential for the conservation of the species.” Id. § 1532(5); see also 50 C.F.R. § 424.12(b).

30. Congress recognized the importance of habitat protections to the conservation and recovery of endangered species. The legislative history of the ESA clearly demonstrates Congress understood the importance of timely critical habitat designation in conserving listed species:

[C]lassifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species’ continued existence . . . . If the protection

of endangered and threatened species depends in large measure on the preservation of the species' habitat, then *the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.*

H.R. Rep. No. 94-887, at 3 (1976) (emphasis added).

31. Time has proven the wisdom of Congress' requirement that the Service designate critical habitat for listed species. Studies demonstrate that species with critical habitat are more than twice as likely to be in recovery than those without it.

32. The ESA does not safeguard a species' critical habitat until the Service designates it. Therefore, it is imperative that the Service meticulously follow the ESA's procedures and deadlines to ensure it designates critical habitat in a timely manner.

33. The ESA imposes an "affirmative duty" on all federal agencies to conserve listed species. It provides that federal agencies shall "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species . . . ." 16 U.S.C. § 1536(a)(1).

34. Federal agencies must ensure through consultation with the Service that any action federal agencies authorize, fund, or carry out will not "jeopardize the continued existence of any [ESA-listed] species." *Id.* § 1536(a)(2). For

species with critical habitat, each federal agency must additionally guarantee that its actions will not “result in the destruction or adverse modification” of that habitat. Id.

35. The ESA’s citizen suit provision provides for judicial review where the Service has failed to perform a mandatory duty under ESA section 4. Id. § 1540(g)(1)(C).

### **FACTUAL BACKGROUND**

36. On September 30, 2016, the Service listed forty-nine species from the Hawaiian Islands as endangered: *Asplenium diellaciniatum*, *Calamagrostis expansa* (Maui reedgrass), *Cyanea kauaulaensis*, *Cyclosorus boydiae* (kupukupu makali‘i), *Cyperus neokunthianus*, *Cyrtandra hematos* (ha‘iwale), *Deparia kaalaana*, *Dryopteris glabra* var. *pusilla* (hohiu), *Exocarpos menziesii* (heau), *Festuca hawaiiensis*, *Gardenia remyi* (nānū), *Huperzia stemmermanniae*, *Hylaeus anthracinus* (Yellow-faced bee), *Hylaeus assimulans* (Yellow-faced bee), *Hylaeus facilis* (Yellow-faced bee), *Hylaeus hilaris* (Yellow-faced bee), *Hylaeus kuakea* (Yellow-faced bee), *Hylaeus longiceps* (Yellow-faced bee), *Hylaeus mana* (Yellow-faced bee), *Hypolepis hawaiiensis* var. *mauiensis* (olua), *Joinvillea ascendens* ssp. *ascendens* (‘ohe), *Kadua fluviatilis* (kamapua‘a), *Kadua haupuensis*, *Labordia lorenciana*, *Lepidium orbiculare* (‘ānaunau), *Megalagrion xanthomelas*

(Orangeblack Hawaiian damselfly), *Microlepidia strigosa* var. *mauiensis*, *Myrsine fosbergii* (kōlea), *Nothocestrum latifolium* (‘aiea), *Oceanodroma castro*, (Band-rumped storm-petrel), *Ochrosia haleakalae* (hōlei), *Phyllostegia brevidens*, *Phyllostegia helleri*, *Phyllostegia stachyoides*, *Portulaca villosa* (‘ihi), *Pritchardia bakeri* (Baker’s loulu), *Procaris hawaiana* (Anchialine pool shrimp), *Pseudognaphalium sandwicense* var. *molokaiense* (‘ena‘ena), *Ranunculus hawaiiensis* (makou), *Ranunculus mauiensis* (makou), *Sanicula sandwicensis*, *Santalum involutum* (‘iliahi), *Schiedea diffusa* ssp. *diffusa*, *Schiedea pubescens* (ma‘oli‘oli), *Sicyos lanceoloideus* (‘ānunu), *Sicyos macrophyllus* (‘ānunu), *Solanum nelsonii* (pōpōlo), *Stenogyne kaalae* ssp. *sherffii*, and *Wikstroemia skottsbergiana* (‘ākia). 81 Fed. Reg. 67,786 (Sept. 30, 2016). The ESA requires critical habitat designation concurrently with this listing determination, except under limited circumstances. 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(A); see also id. § 1533(b)(6)(C)(i)-(ii).

37. The Service failed to designate critical habitat concurrently with its September 30, 2016, rule listing these forty-nine species as endangered and threatened. 81 Fed. Reg. 67,786. Since the Service found critical habitat was not determinable at that time, the Service had until September 30, 2017, to publish final critical habitat designations. See 16 U.S.C. § 1533(b)(6)(C)(i-ii). However,

the Service has yet to designate critical habitat for any of these forty-nine Hawaiian species.

38. The Service’s failure is inexcusable as it has recognized that each listed species was threatened with the finality of extinction due to every reason warranted for listing, including numerous threats to their habitat. 81 Fed. Reg. 67,786. Habitat loss and degradation were thoroughly cited by the Service as significant threats to the longevity of these species. Id. at 67,786, 67,792–67,823. The limited habitat available to these species is threatened by loss and degradation “due to urbanization; nonnative feral ungulates (hoofed mammals, e.g., pigs, goats, axis deer, black-tailed deer, mouflon, and cattle); nonnative plants; wildfire; and water extraction.” Id. at 67,786.

39. Further, habitat loss and degradation are expected to be exacerbated by climate change through sea level rise and coastal inundation. Id. at 67,787.

40. This ongoing habitat destruction, in addition to other serious threats, leaves these highly endemic species in danger of extinction throughout all or a significant portion of their range. Id. at 67,786.

41. The Service’s delay in designating critical habitat for these forty-nine Hawaiian species violates its non-discretionary duties under the ESA, deprives



these imperiled species of protections to which they are legally entitled, and inexcusably leaves them at increased risk of extinction.

### **CLAIM FOR RELIEF**

#### **Violation of Endangered Species Act in Failing to Designate Critical Habitat**

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

43. Under section 4 of the ESA, the Service has a mandatory, non-discretionary duty to designate critical habitat for the forty-nine species concurrently with its listing decision. See 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C). Under limited circumstances, the Service may extend that deadline to no more than one additional year. Id. § 1533 § (b)(6)(A)(ii), (C)(ii).

44. To date, five years after the listing, the Service has failed to designate nor has the Service proposed critical habitat for these forty-nine Hawaiian species.

45. The Service's failure to timely designate critical habitat for these forty-nine Hawaiian species violates section 4 of the ESA. Id. § 1533.

**REQUEST FOR RELIEF**

The Center respectfully requests that the Court grant the following relief:

1. Declare that the Service is in violation of section 4(a) of the ESA by failing to timely designate critical habitat for each of the forty-nine Hawaiian species, 16 U.S.C. § 1533(a).
2. Order the Service to propose and finalize critical habitat rules for these forty-nine Hawaiian species by dates certain;
3. Award the Center its reasonable fees, costs, and expenses associated with this litigation pursuant to 16 U.S.C. § 1540(g)(4), or the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and
4. Grant such other and further relief as the Court deems just and proper to remedy the Service's violations of law.

DATE: August 11, 2022

Respectfully Submitted,

*/s/ Maxx Phillips*

Maxx Phillips (HI Bar No. 10032)  
CENTER FOR BIOLOGICAL DIVERSITY  
1188 Bishop Street, Suite 2412  
Honolulu, HI 96813  
Phone: (808) 284-0007

Email: [mphillips@biologicaldiversity.org](mailto:mphillips@biologicaldiversity.org)

Brian Segee (CA Bar No. 200795),  
*pro hac vice application forthcoming*  
CENTER FOR BIOLOGICAL DIVERSITY  
660 S. Figueroa St., Suite 1000  
Los Angeles, CA 90017  
Phone: (805) 750-8852  
Email: [bsegee@biologicaldiversity.org](mailto:bsegee@biologicaldiversity.org)

*Attorneys for Plaintiff*