

January 20, 2016

Via Federal Express

The Honorable Sally Jewell
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Via Federal Express

The Honorable Benjamin Tuggle, Ph.D.
Southwest Regional Director
U.S. Fish and Wildlife Service
500 Gold Avenue, S.W.
Albuquerque, NM 87102

Via Federal Express

The Honorable Daniel M. Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

Re: Sixty-day notice of intent to sue for violation of section 4(b)(3)(A) of the Endangered Species Act, based on a failure to make a 90-day finding on the petition filed by American Stewards of Liberty, Independent Petroleum Association of America, the Texas Public Policy Foundation, and Steven W. Carothers to delist the American Burying Beetle

Dear Secretary Jewell, Director Ashe, and Regional Director Tuggle:

On behalf of the American Stewards of Liberty and other petitioners, we are informing you of our intent to file a civil suit against the U.S. Fish and Wildlife Service ("Service") pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g). We are providing this letter to you pursuant to the 60-day notice requirement of the citizen suit provision. Specifically, the basis for the intended lawsuit is that the Service has failed to timely make its required 90-day finding on the petition to delist the American Burying Beetle (*Nicrophorus americanus*) in accordance with ESA § 4(b)(3)(A).

Factual Background

The American Burying Beetle ("Beetle") is the largest of the carrion beetles (Coleoptera: Silphidae) in North America. The Service listed the Beetle as an endangered species (i.e., a species in danger of extinction throughout all or a significant portion of its range)

in 1989. In the agency's final listing rule, the Service stated "once widely distributed throughout eastern North America, this species has disappeared from most of its former range." Claims of a 90 percent reduction in the historical range of the species were the foundation of the Service's decision to list Beetle as endangered – yet scientifically defensible, range-wide studies of presence/absence or abundance have never been completed for this highly variable and eclectically distributed species. While anecdotal evidence of a historical decline in the range and distribution of the Beetle exists in the public record (likely related to the demise of the passenger pigeon and the expansion of modern agriculture around the turn of the 20th century, as postulated by Sikes and Raithel 2002), there is no evidence that Beetle is currently in danger of extinction across all or a significant portion of its contemporary range.

The known contemporary range, distribution, and abundance of Beetle is actually expanding with the application of increased and more effective survey effort, as well as the implementation of multiple captive breeding and reintroduction efforts. Furthermore, at the time of listing, the Service was unable to identify any actual threats to current populations of Beetle and more recent analyses of threats are based largely on speculation and surmise – not actual evidence of downward pressure on the current abundance or distribution of the species. Population and habitat viability modeling involving the Service's and other experts also indicates that all naturally occurring wild populations of Beetle are of sufficient size to be demographically viable for the foreseeable future.

On August 18, 2015, the American Stewards of Liberty, Independent Petroleum Association of America, the Texas Public Policy Foundation, and Steven W. Carothers filed a petition with the Service to delist the Beetle. Pursuant to ESA § 4(b)(3)(A), the Service was required to make a finding within 90 days as to whether the petitioned action may be warranted. Ninety days have passed since the petition was filed, and the Service has not published its determination. The petitioners have learned that, instead of spending resources on making its statutorily required 90-day finding, the Service has instead launched a five-year status review of the Beetle. The Service has sent letters to various third-parties requesting information on the Beetle for this five-year review with an intent to publish its findings in 2017.

Legal Background

Section 4 of the ESA authorizes individuals to petition the Secretary of the Interior to list, downlist, or delist a species. Once a petition has been filed with the Service, the Service is obligated to respond.¹ As stated in ESA § 4(b)(3)(A):

To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of Title 5, to add a species to, or to remove a species from, either of the lists published under

¹ The Secretary has delegated its authority under the ESA to the Service.

subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

If at this "90-day finding" stage the Service makes a positive determination that delisting may be warranted, ESA § 4(b)(3)(B) obligates the Service to

"[w]ithin 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, ...make one of the following findings:

- (i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.
- (ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).
- (iii) The petitioned action is warranted, but that--(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action . . . is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary, in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

16 U.S.C. § 1533(b)(3)(B). The Service has argued that a more cursory review of available information is required at the 90-day stage than when a 12-month finding occurs. See 80 Fed. Reg. 29,286, 29,290 (May 21, 2015) ("The 12-month finding is meant to be the more in-depth determination and follows a status review, while the 90-day finding is meant to be a *quicker evaluation of a more limited set of information*."). Once a proposed rule has been issued in conjunction with a positive 12-month finding, ESA § 4(b)(6)(A)(i)(I) requires that the Service, within one-year of the date of publication of the proposed rule, publish the final rule to implement its determination to delist the species.

ESA § 11(g) gives an express right for any person to "commence a civil suit on his own behalf ... against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under [Section 4] which is not discretionary with the Secretary." Therefore the ESA allows citizen suits for failures of the Service to meet its obligations under Section 4. The Service's failure to make a 90-day finding on the Beetle is such an instance.

The Service's Failure to Timely Make the Required Finding is in Violation of the ESA and Contrary to Public Policy

The failure to make a finding on the petition violates a binding obligation imposed on the Service pursuant to the ESA. It should not require so many hours to review those 27 pages (which, in accordance with Section 4 is the only document that the Service reviews for a 90-day determination)² such that the review could not be accomplished and the Service's determination published within the time frame prescribed by law.

The fact that species such as the Beetle remain listed exhausts resources exponentially more than the few hours it would take to review the petition and make a 90-day finding. The five-year review process is not a substitute for the listing process and does not alter the Service's obligations under the ESA. Moreover, it is evasive and confounding that the Service would commence a five-year review process under 50 C.F.R. § 424.21 while the petition, with its statutorily-prescribed timeframe, remains unaddressed. Such conduct violates the Service's own guidance. USFWS and NMFS. Endangered Species Petition Management Guidance p. 10 (July 1996) ("A petition finding (either 90-day or 12-month) must not be delayed to gather additional information or data."). Further, the Service does not appear to have published in the Federal Register its intention to conduct the five-year status review as required by 50 C.F.R. § 424.21 despite stating its intention clearly in the letters requesting information.

Conclusion

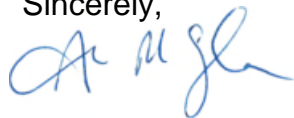
More than ninety days have passed since the petitioners filed the petition to delist the Beetle. The Service has not published the 90-day finding it was required to make in accordance with Section 4(b)(3)(A). The Service's sole duty at this juncture is to review the petition and make a determination whether the petition presents substantial scientific or commercial information indicating that delisting may be warranted. The Service is obligated to and has the resources to review the 27 page petition and make such a finding within the timeframe prescribed by law. Pursuant to ESA § 11(g), the American Stewards of Liberty and other potential parties intend to commence a civil suit

² We recognize that USFWS and the National Marine Fisheries Services ("NMFS") have proposed amendments to its listing regulations that would clarify that USFWS and NMFS may consider, in addition to the petition, information that is readily available in the relevant agency's possession at the time it makes a 90-day finding. 80 Fed. Reg. 29,286, 29,290 (May 21, 2015). The proposed amendments do not go so far as to expand the USFWS' scope of review to include the solicitation of additional information at the 90-day stage, nor do they change the basic import of our statement.

Secretary Jewell, Director Ashe, and Regional Director Tuggle
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based on the Service's failure to make its required 90-day finding. If the Service does not make the required finding for the Beetle within the next 60 days, we intend to file suit.

Sincerely,

A handwritten signature in blue ink, appearing to read "A M Glen". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Alan M. Glen
of Nossaman LLP

Patterson, Mandy

From: trackingupdates@fedex.com
Sent: Thursday, January 21, 2016 9:57 AM
To: Patterson, Mandy
Subject: FedEx Shipment 782206725315 Delivered

This tracking update has been requested by:

Company Name: Nossaman LLP
Name: Amanda Patterson
E-mail: apatterson@nossaman.com

Message: PSShip eMail Notification

Our records indicate that the following shipment has been delivered:

Reference: 501774.0001.AP1
Ship (P/U) date: Jan 20, 2016
Delivery date: Jan 21, 2016 10:55 am
Sign for by: Signature Release on file
Delivery location: WASHINGTON, DC
Delivery date: Thu, 1/21/2016 10:55 am
Service type: FedEx Priority Overnight
Packaging type: FedEx Envelope
Number of pieces: 1
Weight: 0.50 lb.
Special handling/Services: No Signature Required
Deliver Weekday

Tracking number: 782206725315

Shipper Information	Recipient Information
Amanda Patterson	Sally Jewell
Nossaman LLP	U.S. Department of the Interior
919 Congress Avenue	1849 C ST NW
Suite 1050	WASHINGTON
Austin	DC
TX	US
US	20240
78701	

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From: trackingupdates@fedex.com
Sent: Thursday, January 21, 2016 10:27 AM
To: Patterson, Mandy
Subject: FedEx Shipment 782206759725 Delivered

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Company Name: Nossaman LLP
Name: Amanda Patterson
E-mail: apatterson@nossaman.com

Message: PSShip eMail Notification

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Reference: 501774.0001.AP1
Ship (P/U) date: Jan 20, 2016
Delivery date: Jan 21, 2016 11:25 am
Sign for by: Signature Release on file
Delivery location: WASHINGTON, DC
Delivery date: Thu, 1/21/2016 11:25 am
Service type: FedEx Priority Overnight
Packaging type: FedEx Envelope
Number of pieces: 1
Weight: 0.50 lb.
Special handling/Services: No Signature Required
Deliver Weekday

Tracking number: 782206759725

Shipper Information	Recipient Information
Amanda Patterson	Daniel M. Ashe
Nossaman LLP	U.S. Fish and Wildlife Service
919 Congress Avenue	1849 C ST NW
Suite 1050	WASHINGTON
Austin	DC
TX	US
US	20240
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Company Name: Nossaman LLP
Name: Amanda Patterson
E-mail: apatterson@nossaman.com

Message: PSShip eMail Notification

Our records indicate that the following shipment has been delivered:

Reference: 501774.0001.AP1
Ship (P/U) date: Jan 20, 2016
Delivery date: Jan 21, 2016 10:21 am
Sign for by: S.GARCIA
Delivery location: ALBUQUERQUE, NM
Delivered to: Receptionist/Front Desk
Delivery date: Thu, 1/21/2016 10:21 am
Service type: FedEx Priority Overnight
Packaging type: FedEx Envelope
Number of pieces: 1
Weight: 0.50 lb.
Special handling/Services: No Signature Required
Deliver Weekday

Tracking number: 782206781164

Shipper Information	Recipient Information
Amanda Patterson	Benjamin Tuggle
Nossaman LLP	U.S. Fish and Wildlife Service
919 Congress Avenue	500 GOLD AVE SW
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