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February 22, 2017

Via Federal Express

K. Jack Haugrud
Acting Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Via Federal Express

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

Via Federal Express

Jim Kurth
Acting 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)(B) of the Endangered Species Act, based on U.S. Fish and Wildlife Service failure to make a 12-month finding on the petition of American Stewards of Liberty, the Independent Petroleum Association of America, and the Texas Public Policy Foundation to remove the American burying beetle from the list of endangered species

Dear Acting Secretary Haugrud, Acting Director Kurth, and Regional Director Tuggle:

On behalf of the American Stewards of Liberty and the Independent Petroleum Association of America, we write to inform 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 provide this letter to you pursuant to the 60-day notice requirement of the ESA citizen suit provision. Specifically, the basis for the intended lawsuit is that the Service has failed to timely make its required 12-month finding on the petition to delist the American burying beetle (*Nicrophorus americanus*) in accordance with 16 U.S.C. § 1533(b)(3)(B).

While we recognize the current regulatory freeze instituted by the January 30, 2017, Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, we believe that the Service’s issuance of a determination on the petition to delist the American burying beetle would not constitute a “new regulation.” A negative 12-month finding on the petition would result in maintenance of the status quo regarding the species, and a positive 12-month finding would be followed by a deregulatory action removing the species from the endangered list. Service promulgation of a rule to delist a species would effectively eliminate an existing regulatory burden, and we believe that this is consistent with the February 2, 2017, White House Memorandum: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled “Reducing Regulation and Controlling Regulatory Costs.” The Interim

Guidance clarifies that, in general, agencies “may comply with those requirements by issuing two ‘deregulatory’ actions . . . for each new significant regulatory action that imposes costs.” Species delistings provide cost savings to the Service and to the regulated community by eliminating unnecessary regulation of a broad range of activities. Therefore, such delisting rules are accurately considered deregulatory actions for which related cost savings may be used to offset significant regulatory actions that impose costs. Additionally, because Service action on the petition is “otherwise required by law” (see Executive Order sec. 2(b)) (and because the Interim Guidance clarifies that “agencies may proceed with significant regulatory actions that need to be finalized in order to comply with an imminent statutory or judicial deadline even if they are not able to identify offsetting regulatory actions by the time of issuance”), even if the issuance of a 12-month finding or the promulgation of a delisting rule were considered to be a “significant regulatory action” that was not a “deregulatory action,” such Service actions would not be prohibited by the Executive Order due to the ESA’s clear statutory deadlines for responses to listing petitions.

The agency action sought by this NOI—publication of an overdue determination on whether delisting of the American burying beetle is warranted based on the petition—is a clear example of an agency action that should be excepted from the freeze. In the event of a positive 12-month finding (i.e., that the Service determines that delisting is warranted), the Service’s subsequent promulgation of a rule removing the species from the list of endangered and threatened species is likewise an example of an agency action that should be excepted from the freeze. Such exceptions for deregulatory actions compelled by statutory deadlines are contemplated by and appropriate under the Interim Guidance, which would allow for satisfactory resolution of this issue inherited from the prior Administration.

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 Service’s final listing rule, the Service stated that, “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 the 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 the Beetle is currently in danger of extinction across all or a significant portion of its current range.

The known current range, distribution, and abundance of the 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 the Beetle, and more recent analyses of threats are based largely on speculation and surmise rather than actual evidence of downward pressure on the current abundance or distribution of the species. Population and habitat viability modeling conducted by the Services and other experts also

indicates that all naturally occurring wild populations of the Beetle are of sufficient size to be demographically viable for the foreseeable future.

On August 18, 2015, the American Stewards of Liberty, the Independent Petroleum Association of America, and the Texas Public Policy Foundation (together, "Petitioners") filed with the Service a petition to delist the Beetle based upon original listing in error. Pursuant to ESA section 4, 16 U.S.C. § 1533(b)(3)(A), the Service was required to make a finding within 90 days as to whether the petitioned action may be warranted. Following the Service's failure to reach a timely 90-day finding, on January 20, 2016, Petitioners filed a Notice of Intent to sue for violation of the 90-day finding requirement. On March 16, 2016, the Service reached a positive 90-day finding on the delisting petition, determining that the petitioned action may be warranted and initiating a status review for the Beetle. 81 Fed. Reg. 14058, 14062 (Mar. 16, 2016). Under the listing determination deadlines established by the ESA, 16 U.S.C. §§ 1533(b)(3)(A)–(B), regardless of the date of the preliminary "90-day finding" on whether a petitioned action may be warranted, the deadline for a 12-month finding of whether the petitioned action is warranted remains in place. Thus, the Service failed to reach a timely 12-month finding regarding whether delisting of the Beetle as of August 18, 2016.

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. As stated in 16 U.S.C. § 1533(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 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 the Service makes a positive determination that delisting may be warranted at this "90-day finding" stage, then 16 U.S.C. § 1533(b)(3)(B) obligates the Service:

[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.

Once the Service issues a proposed rule to effectuate a positive 12-month finding that the petitioned action is warranted, 16 U.S.C. § 1533(b)(6)(A)(i)(I) requires that the Service, within one year of the date of publication of the proposed regulation, publish the final regulation to implement its determination to delist the species.

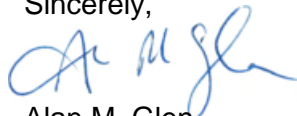
ESA section 11, 16 U.S.C. § 1540(g), gives an express right for any person to “commence a civil suit on his own behalf . . . against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under [Section 4] which is not discretionary with the Secretary.” Therefore, the ESA authorizes citizen suits alleging a failure of the Service to meet its obligations under Section 4. The Service’s failure to reach a timely 12-month finding on the petition to delist the Beetle is such an instance.

Conclusion

Maintenance of the Beetle on the list of endangered species is not warranted under the listing criteria of the Endangered Species Act, and the original listing of the Beetle was in error. In March 2016, the Service determined that the delisting of the Beetle may be warranted, yet the Service has failed to publish the requisite 12-month finding announcing its determination of whether delisting of the species is warranted. If the Service does not publish a finding of whether delisting of the Beetle is warranted within the next 60 days, we intend to file suit. We believe that the agency determination we seek is consistent with the Executive Order and Interim Guidance, as the petitioned-for action is compelled by statutory deadlines, is deregulatory in nature, and would provide cost savings if the petition is determined by the Service to warrant a delisting action.

Please feel free to contact me in the event you have any questions regarding this matter.

Sincerely,



Alan M. Glen
Nossaman LLP