August 3, 2004

Certified Mail – Return Receipt Requested

Gale A. Norton
Secretary of the Interior
Department of the Interior
1849 “C” Street, N.W.
Washington, D.C. 20240

Steven A. Williams, Director
U.S. Fish & Wildlife Service
1849 “C” Street, NW, M/S 3012
Washington, D.C. 20240

Re: Notice of Violations of Endangered Species Act: Illegal 12-Month Finding for Petition to List the West Coast Distinct Population Segment of the Fisher

Dear Secretary Norton and Director Stevens:

We are writing on behalf of the Center for Biological Diversity, Sierra Nevada Forest Protection Campaign, Environmental Protection Information Center, Klamath-Siskiyou Wildlands Center, Oregon Natural Resources Council and Natural Resources Defense Council to notify you of violations of Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533, by the United States Fish and Wildlife Service (“Service”) in determining that listing the west coast distinct population segment of the fisher is warranted but “precluded” by higher priority listing actions. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). The reasons for this notice are set out in greater detail below.

Background

A close relative of the mink, otter and marten, the fisher (Martes pennanti) has a long slender body with short legs, a triangular head with a sharp muzzle and large, rounded ears, and dark brown fur. Fishers have a diverse diet, including porcupines, birds, small mammals, insects, deer carrion, vegetation and fruit. Because they are the sole predator of porcupines, which eat trees, fishers have been reintroduced in many parts of the country by timber companies interested in controlling porcupine populations.

On the west coast, the fisher is reduced to two native populations – one in northern California and another in the southern Sierra Nevada – and a reintroduced population in the southern Oregon Cascades. The fisher’s historic distribution on the west coast included all of western Washington and Oregon, northwestern California and the Sierra Nevada.
The fisher has been eliminated from all of Washington, most of Oregon, and declined to roughly 50% of its historical range in California. Survey information indicates the fisher is likely extirpated in the central and northern Sierra Nevada, dividing the two remaining native populations. The southern Sierra Nevada population is believed to be at substantial risk of extinction due to several factors including isolation, small population size (almost certainly fewer than 500 individuals), low reproductive capacity and ongoing habitat loss. The northern California population is isolated from the larger continental population, and is threatened by habitat loss and fragmentation.

On December 5, 2000, the Service received a petition from the Center for Biological Diversity and other organizations to list the west coast population of the fisher as endangered under the ESA and to designate its critical habitat. On July 31, 2001, the Center and others filed suit in the United States District Court for the Northern District of California challenging the Service’s failure to make a timely initial finding as to whether the petition contained substantial information indicating that listing might be warranted, as required by 16 U.S.C. § 1533(b)(3)(A).

On April 4, 2003, that court found the Service to be in violation of the law and ordered the Service to make its initial finding for the fisher within 90 days. Center for Biological Diversity v. Norton, No. C 01-2106 SC (N.D. Cal., April 4, 2003). On July 10, 2003, the Service announced that the petition to list the west coast population of the fisher contained substantial information indicating that listing might be warranted. 68 Fed. Reg. 41169.

On April 3, 2004, the Service followed its positive initial finding with a determination that listing the west coast population of the fisher is “warranted, but precluded by higher priority listing actions.” This “12-month” finding was published in the Federal Register on April 8, 2004. 69 Fed. Reg. 18770.

Violations of Section 4(b)(3)(B)

Section 4(b)(3)(B) of the ESA provides:

Within 12 months after receiving a petition that is found . . . to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted . . .

(ii) The petitioned action is warranted . . .

(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 [the endangered species list or the threatened species list] and to remove from such lists species for which the protections of this chapter are no longer necessary.

16 U.S.C. § 1533(b)(3)(B) (emphasis added). It is clear from this statutory language that the Service may make a "warranted but precluded" finding only if it demonstrates that two conditions exist: first, that listing the species is precluded "by pending proposals to determine whether any species is an endangered species or a threatened species" (that is, by pending listing decisions); and second, that "expeditious progress is being made" in adding species to the endangered or threatened lists, or removing species from those lists. In addition, if the Service makes a warranted but precluded finding, the ESA requires that it "promptly" publish the finding in the Federal Register "together with a description and evaluation of the reasons and data on which the finding is based." Id. (emphasis added).

As the Ninth Circuit recently stated, "[t]he circumstances under which the Secretary may invoke [the warranted but precluded] excuse, however, are narrowly defined; Congress emphasized that providing for the ‘warranted but precluded’ designation was not designed to justify ‘the foot-dragging efforts of a delinquent agency.’” Center for Biological Diversity v. Norton, 254 F.3d 833, 838 (9th Cir. 2001) (citing to the ESA’s legislative history).

"Specifically," the court went on, "the Secretary must show that she is ‘actively working on other listings and delistings and must determine and publish a finding that such other work has resulted in pending proposals which actually precluded [her] proposing the petitioned action at that time.’ . . . For that reason, ‘the Secretary must determine and present evidence that she is, in fact, making expeditious progress in the process of listing and delisting other species.’” Id. (citing legislative history) (emphasis added).

The Service has failed to make either of the requisite findings to support its warranted but precluded determination for the fisher. First, the Service failed to demonstrate that timely promulgation of final regulation listing the fisher is in fact precluded by pending proposals to determine whether other species are endangered or threatened. The Service claims that “[d]uring Fiscal Year 2004, we must spend nearly all of our Listing Program funding to comply with listing actions required by court orders and judicially approved settlement.” 69 Fed. Reg. at 18792. However, this conclusory statement provides an insufficient basis for a warranted but precluded finding. See, e.g., Center for Biological Diversity v. Norton, No. 03-1111-AA (D. Or.
June 21, 2004) ("Simply stating that there isn’t enough money does not constitute ‘a description and evaluation’ of the reasons underlying [the Service’s] findings.").

Second, the Service neglected entirely to address the required second factor – that expeditious progress is being made in adding qualified species to the list. Although the Service recognized that it must make this demonstration, it breathes not a single word about what progress, if any, it is making in listing other species. Nor could the Service properly determine that it is making expeditious progress towards listing species. To the contrary, the Bush administration has protected the fewest species of any administration since passage of the ESA. Under the Bush administration, the Service has protected only 31 species. By comparison, the Clinton administration protected 394 species during its first term and the Bush Sr. administration protected 234 species. The Bush administration is also the only administration not to have listed a single species except in response to litigation.

The omissions detailed above render the Service’s 12-month finding for the fisher arbitrary, capricious and an abuse of discretion, in violation of the ESA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. In addition, the Service has failed to support its finding that the magnitude of threats to the fisher is “non-imminent.” 69 Fed. Reg. at 18792. To the contrary, the evidence in the record and 12-month finding itself demonstrate that the magnitude of the threats to the fisher is high and the overall immediacy of these threats is immediate. The Service’s failure to base its determination on the best available scientific data is arbitrary, capricious, and an abuse of discretion, in violation of the ESA and APA. See Friends of the Wild Swan v. United States Fish & Wildlife Serv., 945 F. Supp. 1388, 1396-1400 (D. Or. 1996) (holding that the Service’s determination that the Bull Trout faced only a “moderate” threat of extinction was unsupported by the record and therefore arbitrary and capricious).

Conclusion

The Service’s continued reluctance to take the action that the dire plight of the fisher demands – listing as an endangered species – has once again caused the Service to violate the ESA. If the Service does not remedy these violations, we intend to commence an appropriate action in United States District Court.

If you believe any of the foregoing to be in error, have any questions, or wish to discuss this matter, please do not hesitate to call us.

Sincerely,

[Signature]

Gregory C. Loarie
Earthjustice