



March 21, 2008

SENT VIA EMAIL AND UPS OVERNIGHT DELIVERY

Secretary Carlos M. Gutierrez
U.S. Department of Commerce
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Room 5516
Washington, DC 20230
Email: cgutierrez@doc.gov

Mr. James Balsiger, Acting Director
National Marine Fisheries Service/NOAA Fisheries
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Silver Springs, MD 20910
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RE: Sixty Day Notice of Intent to Sue Over Violations of Section 4 of the Endangered Species Act; Failure to Make a 90-Day Finding on the Petition to List the Ribbon Seal under the Endangered Species Act

Dear Mr. Gutierrez and Mr. Balsiger:

I am writing on behalf of the Center for Biological Diversity (“the Center”) to inform you that we intend to commence an action against the U.S. Department of Commerce and the National Marine Fisheries Service/NOAA Fisheries (collectively, “Fisheries Service”) for violations of the Endangered Species Act, 16 U.S.C. §§1531-1544 (“ESA”), and the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (“APA”). This letter is provided to you pursuant to the 60-day notice requirement of the ESA’s citizen suit provision. 16 U.S.C. § 1540(g)(2). The reasons for this notice are set forth fully below.

On December 20, 2007, the Center submitted a formal, detailed petition to the ribbon seal (*Phoca Fasciata*) under the ESA (“Petition”) via email and UPS overnight delivery. The Petition was received on December 20, 2007. The Fisheries Service is in violation of the law because it has failed to make the required determination of whether listing the ribbon seal under the ESA “may be warranted” pursuant to ESA Section 4.

No matter how imperiled a species might be, it does not receive any protection under the ESA until it is officially listed as threatened or endangered. As a result, Congress aptly

described Section 4 of the ESA, 16 U.S.C. §1533, the section that sets out the process for listing species, as “[t]he cornerstone of effective implementation of the Endangered Species Act” S. Rep. No. 418, 97th Cong., 2d Sess. at 10; see also H. Rep. No. 567, 97th Cong., 2d Sess. at 10. Section 4 sets forth a detailed process by which the Secretary of Commerce through his designee the Fisheries Service adds to the list of threatened and endangered species. 16 U.S.C. §1533. The listing process can begin either by citizen petition or by internal Fisheries Service processes. In either case, strict timelines apply once the process is initiated. In most cases, as here, the process begins when a petition for listing is received by the Fisheries Service. 16 U.S.C. §1533(b)(3)(A).

Upon receipt of a petition to list a species under the ESA, the Fisheries Service must determine whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* The Service must make this initial, “90-Day Finding,” “[t]o the maximum extent practicable, within 90 days after receiving the petition.” *Id.* If the Fisheries Service determines that the petition presents substantial information that a listing may be warranted, it must “promptly commence a review of the status of the species” to determine whether listing is (1) warranted, (2) not warranted, or (3) warranted but precluded by other pending proposals that require immediate attention. 16 U.S.C. § 1533(b)(3)(B). This finding, known as the 12-Month Finding, is due “within 12 months after receiving a petition.” *Id.* The Fisheries Service has no discretion to extend time allotted for the 12-Month Finding.

If the 12-Month Finding concludes that listing is warranted, the Fisheries Service must simultaneously publish a proposed rule to list the species in the Federal Register. 16 U.S.C. § 1533(b)(3)(B)(ii). Within 12 months of publishing the proposed rule, the Fisheries Service must make a final listing determination for the species. At this point, the Fisheries Service must either publish a final rule listing the species, publish a withdrawal of the proposal, or in the rare instance where there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i) & 1533(b)(6)(B)(i).

The Petition to list the ribbon seal was filed on December 20, 2007 by email and UPS overnight delivery, and received by the Fisheries Service on December 20, 2007. Over ninety days have now passed, and the Fisheries Service has yet to issue the required 90-Day Finding. The Fisheries Service is therefore in violation of the ESA and APA for failing to make this required finding.

On Thursday, March 13, the Fisheries Services posted a press release to its website entitled “NOAA to Study Ice Seals for Possible Listing under Endangered Species Act.” Exhibit 1. The press release stated, in part “In late December 2007, the San-Francisco-based Center for Biological Diversity petitioned NOAA’s Fisheries Service to list the ribbon seal as threatened or endangered under the Endangered Species Act. Their petition states that global warming threatens ribbon seals with extinction because of the rapid melt of sea ice habitat. The agency decided the petition provided enough information to indicate that action may be warranted under

the law.” When the Center requested a copy of the 90-day finding, the Center was told that the press release had been posted in error, and that the 90-day finding had not yet in fact been issued. The press release was subsequently removed from the website.

Posting a press release on its website announcing the positive 90-day finding on the ribbon seal petition indicates that the Fisheries Service has finished its work on the 90-day finding. The Fisheries Service cannot credibly claim that it would not be practicable to complete the 90-day finding immediately, given that as of March 13, 2008, it had already done so.

As detailed in the Petition, the overarching threat to the ribbon seal is global warming caused by society’s emissions of carbon dioxide and other greenhouse gases. The administration has renounced the Kyoto Protocol and has yet to adopt any meaningful plan for reducing greenhouse gases. As a result, the United States is responsible for over 20% of the world’s total greenhouse gas emissions and United States emissions continue to grow. Atmospheric carbon dioxide concentrations now stand at approximately 385 parts per million (“ppm”), up from a pre-industrial revolution concentration of 280 ppm, and are rising at more than 2 ppm per year. Thus, the threat to the ribbon seal from global warming has increased since the filing of the petition, and will continue to do so. The ribbon seal, the Center and its members, and the public are entitled to timely processing of the Petition within the deadlines set by Congress.

The Fisheries Service’s failure to comply with the ESA’s deadlines for processing the Petition deprives the ribbon seal of statutorily mandated protection vitally necessary for its survival. Any further delay by the Fisheries Service in response to the petition frustrates the intent of the ESA, because the likelihood of survival and recovery of the species is reduced due to continued harm to the species from global warming and other threats detailed in the Petition.

The Center’s members and staff are vitally concerned about and actively involved in the protection of the ribbon seal and its habitat. The Center’s members and staff engage in professional, recreational, aesthetic and scientific activities involving this species and its habitat, including observing and attempting to observe the species. On their behalf I urge you to take prompt action to protect the species under the ESA.

If the Fisheries Service does not act promptly to correct the above violations, we intend to pursue legal action. An appropriate remedy would be to promptly issue and publish in the Federal Register a 90-Day Finding on the Petition. If you have any questions, or would like to discuss this matter further, please contact Kassie Siegel at (760) 366-2232 x302.

Sincerely,



Kassie R. Siegel, Climate, Air, and Energy Program Director
Center for Biological Diversity

March 21, 2008

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P.O. Box 549
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NOAA NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

UNITED STATES DEPARTMENT OF COMMERCE

NOAA to Study Ice Seals for Possible Listing Under Endangered Species Act

March 13, 2008

[NOAA's Fisheries Service](#) has accepted a petition from a California environmental group seeking protection under the Endangered Species Act for an ice seal called the "ribbon seal" that inhabits Alaska's Bering Sea.

"In addition reviewing the ribbon seal, we are also preparing status reviews on bearded, spotted and ringed seals for possible listing," said Doug Mecum, Acting Administrator for the [Alaska Region of NOAA Fisheries Service](#). "While the four species of ice seals in Alaska all utilize various types of sea ice habitats, they use the ice in different ways. Therefore, careful status reviews of each species is warranted."

NOAA's Fisheries Service has until the end of this year to prepare a status review and make a decision whether to list the ribbon seals, so that species will be the initial focus of NOAA experts. Status reviews of the other three species of ice seals will be completed after the ribbon seal review.



Ribbon seal.

+ [High Resolution](#) (Credit: NOAA)

In late December 2007, the San-Francisco-based Center for Biological Diversity petitioned NOAA's Fisheries Service to list the ribbon seal as threatened or endangered under the Endangered Species Act. Their petition states that global warming threatens ribbon seals with extinction because of the rapid melt of sea ice habitat. The agency decided the petition provided enough information to indicate that action may be warranted under the law.



Ribbon seal with pup.

+ [High Resolution](#) (Credit: NOAA)

NOAA's finding was based, in part, on predicted changes in ribbon seals' sea ice habitat as a result of global climate change, the high allowable seal harvest set by the Russian federation in recent years, the potential impacts of oil and gas development and production in both the United States and Russia and the potential impacts of commercial fisheries and climate change on ribbon seal prey distribution and abundance.

Ribbon seals use the marginal sea ice zone in the Bering and Okhotsk Seas for reproduction, molting and as a resting platform. In the summer and fall, they forage in the Bering and Chuckchi seas.

[NOAA's National Marine Fisheries Service](#) (NOAA's Fisheries Service) is dedicated to protecting and preserving our nation's living marine resources through scientific research, management, enforcement, and the conservation of marine mammals and other protected marine species and their habitat.

The National Oceanic and Atmospheric Administration, an agency of the U.S. Commerce Department, is dedicated to enhancing economic security and national safety through the prediction and research of weather and climate-related events and information service delivery for transportation, and by providing environmental stewardship of our nation's coastal and marine resources. Through the emerging Global Earth Observation System of Systems ([GEOSS](#)), NOAA is working with its federal partners, more than 70 countries and the European Commission to develop a global monitoring network that is as integrated as the planet it observes, predicts and protects.