

April 5, 2004

Gail Norton
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240
(Fax) 202-208-6956

Dave Allen
Region 1 Director
U.S. Fish and Wildlife Service
911 NE 11th Avenue
Portland, Oregon 97232-4181
(Fax) 503-872-2716

Steve Williams
Director, Fish and Wildlife Service
U.S. Department of the Interior
1849 C. Street, NW
Washington, D.C. 20240
(Fax) 202-208-6965
Sent by Fax and Certified Mail

RE: Sixty-day notice of violation of section 4(b)(3)(A) and (B) and (6)(A) of the Endangered Species Act, relating to petitions to list the Taylor's checkerspot (*Euphydryas editha taylori*), Mardon skipper (*Polites mardon*) and island marble (*Euchloe ausonides insulanus*), as threatened or endangered species.

Dear Secretary Norton, Mr. Williams and Mr. Allen:

Pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g)(2), the Xerces Society, Center for Biological Diversity, Gifford Pinchot Task Force, The Northwest Environmental Defense Center, Northwest Ecosystem Alliance, Friends of the San Juans, and the Oregon Natural Resources Council, and other interested parties, hereby give notice of intent to sue you after 60 days for your failure to adequately respond to our petitions to list the Taylor's checkerspot (*Euphydryas editha taylori*), Mardon skipper (*Polites mardon*) and island marble (*Euchloe ausonides insulanus*), three imperiled butterflies, as threatened or endangered species. You have violated the ESA by failing to make the required 90-day finding, as well as the 12-month finding on the petition. Section 4 (b)(3)(A) of the ESA requires you make, within 90 days of receipt of the petition and to the maximum extent practicable, an initial finding as to whether the petition presents substantial information indicating that the petitioned action may be warranted 16 U.S.C. § 1533 (b)(3)(A). Moreover, section 4(b)(3)(B) requires that the Secretary make a finding within 12 months of the receipt of the petition indicating that listing is warranted, not warranted, or warranted but precluded.

Petitions to list the Taylor's checkerspot, Mardon skipper and island marble as threatened or endangered species were filed with the U.S. Fish and Wildlife Service on December 10, 2002. ESA section 4(b)(3)(A) requires that within 90 days of receiving a petition, the Secretary make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned listing may be warranted. 16 U.S.C. § 1533(b)(3)(A). Accordingly, the 90-day finding was due on or about March 10, 2003. As of the date of this letter (over two years since FWS received the petition), no 90-day finding has been made. Moreover, since it has been over 12 months since you received the petition, you have violated the ESA by failing to make a 12-month finding.

Additionally, you have violated the ESA by failing to make the required 90-day and 12-month findings for the Taylor's Checkerspot and Mardon Skipper, two candidate species, and failing to publish these findings. According to a January 22, 2003 letter from Rowan W. Gould, acknowledging receipt of the petition, FWS considers these candidate species as having been subject to both a positive 90-day finding and a "warranted but precluded" 12-month finding, with the Candidate Notice of Review constituting publication of these required findings. Two courts have struck down such a line of reasoning. In American Lands Alliance v. Norton, the U.S. District Court for the District of Columbia stated:

[U]pon examining the plain language of the ESA and the legislative history that preceded the enactment of the 1982 amendments to the ESA, it is apparent that Congress intended to afford priority status to public petitions to list a species as "endangered" or "threatened." And to accomplish this objective, Congress has established a scheme which mandates that if a petition is filed by the public, the Secretary is required to publish a preliminary finding within ninety days, to the maximum extent practicable, detailing whether there exists substantial information that supports, or fails to support, the listing of a species. American Lands Alliance v. Norton, 242 F.Supp.2d 1, 16 (D.D.C. 2003).

The court went on to hold that you cannot avoid complying with mandatory, nondiscretionary deadlines in responding to ESA petitions by placing a species on the candidate list. See also Center for Biological Diversity v. Norton, 254 F.3d 833 (9th Cir. 2001). Accordingly, candidate notices of review are inadequate warranted but precluded findings.

We are providing this letter to you pursuant to the 60-day notice requirement of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g)(2)(C). You have not made the required 90-day and 12-month findings on the petitions, and thus you are in violation of the ESA and existing case law. If you do not make the required finding on these butterflies within the next sixty days, we intend to file suit in order to compel you to do so. Please inform us immediately if you intend to make the required 90-day or 12-month finding within the next few months. Feel free to contact the undersigned at the phone and address listed on this letterhead to discuss this matter.

Thank you for your time and attention to this matter. If you believe any of the above information is incorrect, or if you would like to discuss a reasonable timeframe within which you might take action concerning these butterflies, please contact the undersigned at the address or phone indicated on this letterhead.

Sincerely,

Scott Hoffman Black
Executive Director
The Xerces Society

Cc: Scott McCarthy, Chief, Division of listing and Candidate Conservation Region 1, U.S. Fish and Wildlife
Mikki Collins, Endangered Species Division, Oregon Fish and Wildlife
All signatory organizations