



SAN FRANCISCO BAY AREA OFFICE

*Protecting endangered species and wild places through science, policy, education, and environmental law.*

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January 29, 2003

William T. Hogarth, Ph.D.  
Assistant Administrator for Fisheries  
National Marine Fisheries Service  
1315 East West Highway, SSMC3  
Silver Spring, MD 20910

Secretary Don Evans  
Office of the Secretary, Room 5854  
U.S. Department of Commerce  
14th & Constitution Ave. NW  
Washington, DC 20230

Bob Lohn  
Regional Administrator  
Southwest Regional Office  
National Marine Fisheries Service  
7600 Sand Point Way NE  
Seattle, WA 98115-0070

**RE: Sixty Day Notice of Intent to Sue Over Violations of Section 4 of the Endangered Species Act; Illegal Not Warranted Finding on the Petition to List the North American Green Sturgeon (*Acipenser medirostris*).**

This letter serves as a 60 day notice of intent to sue the National Marine Fisheries Service (“NMFS”) for violations of the Endangered Species Act, 16 U.S.C. §§1531-1544 (“ESA”). NMFS has illegally made a ‘not warranted’ finding on the petition to list the North American green sturgeon. This not warranted finding violates the ESA and is arbitrary, capricious, and in violation of the Administrative Procedure Act, 5 U.S.C. §706 *et. seq.* This letter is provided pursuant to the 60 day notice requirement of the citizen suit provision of the ESA on behalf of the Center for Biological Diversity, the Environmental Protection Information Center, and Oregon Natural Resources Council to the extent such notice is deemed necessary by a court. 16 U.S.C. §1540(g). The reasons for this letter are explained more fully below.

On June 12, 2001, NMFS received a petition to list the North American green sturgeon as endangered under the ESA from the Environmental Protection Information Center, Center for Biological Diversity, and WaterKeepers Northern California. The petition provided a summary of the best available science indicating that the species is endangered, and requested that NMFS designate critical habitat concurrent with listing.

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Pursuant to 16 U.S.C. §1533(b)(3)(A), within 90 days after receiving the petition, NMFS was required to make a finding as to whether the petition presented substantial scientific or commercial information indicating that the listing might be warranted. NMFS made this 90 day finding and initiated a status review of the North American green sturgeon on December 14, 2001 (66 Fed. Reg. 64,793).

Once NMFS found that the petitioned action might be warranted, the ESA required NMFS to make a 12-month finding. NMFS made this 12-month finding on the petition on January 29, 2003, publishing in the Federal Register a “not warranted” determination for two distinct population segments of North American green sturgeon. 12-month finding on a Petition to List North American green sturgeon as a Threatened or Endangered Species, 68 Fed. Reg. 4,433 (Jan. 29, 2003). This determination was arbitrary, capricious, and not in accordance with law.

### **NMFS’ DECISION NOT TO LIST THE GREEN STURGEON WAS NOT BASED ON THE BEST AVAILABLE SCIENCE**

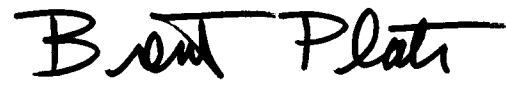
NMFS determination is inconsistent with the ESA’s requirement that species be listed based on the best available science. The ESA requires NMFS to make all listing determinations solely on the basis of the “best scientific and commercial data available.” 16 U.S.C. §1533(b)(1)(A). Economic, political, or any other non-biological issues may not properly be considered. See, e.g., Northern Spotted Owl v. Hodel, 716 F.Supp. 479, 480 (W.D. Wash. 1988). The data cited in the petition conclusively show the green sturgeon must be listed by NMFS under this criteria. NMFS’ 12-month finding published on January 29, 2003 does not do so.

### **NMFS’ DECISION NOT TO LIST THE GREEN STURGEON WAS INCONSISTENT WITH THE FIVE FACTOR ANALYSIS REQUIRED BY THE ESA**

NMFS is required to determine, based solely on the basis of the best scientific and commercial data available, whether the North American green sturgeon is endangered or threatened because of any of the following factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence. 16 U.S.C. §1533(a)(1) and 1533(b). The petition conclusively showed that all five factors are imperiling the North American green sturgeon. NMFS’ 12-month decision is thus illegal and must be corrected.

If NMFS does not act within sixty days to correct the above violations, the Center for Biological Diversity and others plan to pursue legal action. An appropriate remedy would be to issue a proposed rule to list the green sturgeon as endangered and simultaneously publish a proposed rule to designate critical habitat for the species. If you have any questions, or would like to discuss this matter further, please contact me at (510) 663-0616.

Sincerely,

A handwritten signature in black ink that reads "Brent Plater". The signature is written in a cursive style with a long horizontal line extending from the end of the word "Plater".

Brent Plater  
Attorney at Law

