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Re: Notice of Violations of the Endangered Species Act for Failure to Develop Recovery Plans for the Southern California Mountain Yellow-legged Frog and Three Populations of the California Tiger Salamander

On behalf of the Center for Biological Diversity and Jeff Miller, we hereby provide notice, pursuant to Section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g)(2)(A)(i), that the United States Fish and Wildlife Service (“FWS”) is in violation of Section 4(f) of the ESA, 16 U.S.C. § 1533(f), for failing to develop and implement recovery plans for the Southern California Distinct Population Segment (“DPS”) of the mountain yellow-legged frog and three DPSs of the California tiger salamander.¹

¹ The FWS’s failure to develop and implement recovery plans for these species also constitutes agency action unlawfully withheld or unreasonably delayed or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of the Administrative Procedure Act (“APA”). 5 U.S.C. §§ 706(1) & 706(2)(A).

The Center for Biological Diversity (the “Center”) is a national, nonprofit conservation organization with more than 320,000 members and online activists dedicated to the protection of endangered species and wild places. The Center and its members, including Jeff Miller, are concerned with the conservation of imperiled species, including the mountain yellow-legged frog and California tiger salamander, and the effective implementation of the ESA.

BACKGROUND

California Tiger Salamander

The California tiger salamander (*Ambystoma californiense*) is an amphibian in the family Ambystomatidae. It is a large, stocky, terrestrial salamander with a broad, rounded snout. This species is restricted to California and does not overlap with any other species of tiger salamander. California tiger salamanders are restricted to vernal pools and seasonal ponds in grassland and oak savannah plant communities in central California.

The primary cause of the decline of the California tiger salamander is the loss and fragmentation of habitat from human activities and the encroachment of nonnative predators. All of the populations of this species have been significantly reduced because of urban and agricultural development, land conversion, and other human-caused factors. Other threats include use of pesticides, loss of burrows from rodent control programs, and mortality from automobiles and off-road vehicles.

The ESA provides for the listing of distinct population segments (“DPSs”) of vertebrate species. *See* 61 Fed. Reg. 4725 (Feb. 7, 1996) (“Policy Regarding the Recognition of Distinct Vertebrate Segments Under the Endangered Species Act”). Three populations of California tiger salamander are protected under the ESA: Santa Barbara, Sonoma, and Central California (not including Santa Barbara DPS and Sonoma DPS).

Each of these populations has been listed for many years. In 2000, the FWS emergency listed the Santa Barbara population as an endangered DPS. 65 Fed. Reg. 3096 (Jan. 19, 2000); *see* 65 Fed. Reg. 57242 (Sept. 21, 2000) (final rule listing the DPS upon expiration of emergency rule). In 2002, the FWS emergency listed the Sonoma population as an endangered DPS. 67 Fed. Reg. 47726 (July 22, 2002); *see* 68 Fed. Reg. 13498 (March 19, 2003) (final rule listing the DPS upon expiration of emergency rule). In 2004, the FWS listed the Central California population of the California tiger salamander as a threatened DPS.² 69 Fed. Reg. 47211 (Aug. 4, 2004).

² At that time, the FWS reclassified the California tiger salamander as threatened throughout its range, removing the Santa Barbara and Sonoma populations as separately listed DPSs. 69 Fed. Reg. 47241. The Center initiated litigation, and in 2005, the court sustained the portion of the 2004 rule pertaining to listing the Central California tiger salamander as threatened and vacated the 2004 rule with regard to the Santa Barbara County and Sonoma County DPSs, reinstating

Although FWS did not designate critical habitat at the time of listing as the ESA requires, 16 U.S.C. § 1533(a)(3)(A)(i), FWS has since designated or proposed critical habitat for the three California tiger salamander populations. 70 Fed. Reg. 49379 (Aug. 23, 2005) (designating critical habitat for the Central California DPS); 69 Fed. Reg. 68568 (Nov. 24, 2004) (designating critical habitat for the Santa Barbara DPS); 76 Fed. Reg. 2863 (Jan. 18, 2011) (proposing critical habitat for the Sonoma DPS in response to litigation brought by the Center that challenged the previous designation). In addition, in 2010 the FWS completed a 5-year review for Santa Barbara DPS and noticed the initiation of a status review for the Sonoma DPS. 75 Fed. Reg. 28636 (May 21, 2010). FWS has not initiated a status review for the Central DPS.

Although the three California tiger salamander populations have been listed for years with finalized or proposed critical habitat, none have recovery plans. A recovery team was appointed in 2001 for the Santa Barbara DPS but has not met since March 2003. See U.S. Fish and Wildlife Service, California tiger salamander - Santa Barbara County DPS 5-Year Review (Nov. 14, 2009), available at http://ecos.fws.gov/docs/five_year_review/doc3223.pdf (last visited April 7, 2011).

Mountain Yellow-legged Frogs

The mountain yellow-legged frog (*Rana muscosa*) is in the family of true frogs, Ranidae, which consists of frogs that are more closely tied to water bodies for breeding and foraging than other frog or toad species. Mountain yellow-legged frogs are diurnal frogs, occupying rocky and shaded streams with cool waters originating from springs and snowmelt. Historically, mountain yellow-legged frogs in southern California lived across a wide elevation range and in a wide variety of wetland habitats, including lakes, rivers, creeks, ponds, and marshes.

Between the 1900's and today, the mountain yellow-legged frog has disappeared from nearly all of its former range in southern California. Mountain yellow-legged frogs are currently known to occur in isolated headwater streams in only a few areas in southern California. Most of these populations occur above a barrier, natural or artificial, which limits upstream movement by fish. Predation by introduced fish, primarily rainbow trout, is one of the best-documented causes of the decline of mountain yellow-legged frogs. Another primary threat is habitat alteration and degradation from recreation and other factors.

In 2002, FWS listed the Southern California DPS of the mountain yellow-legged frog as endangered. 67 Fed. Reg. 44382 (July 2, 2002). At the time of listing, FWS concluded that designating critical habitat was prudent but deferred the designation to focus on higher priority actions. In response to litigation filed by the Center, FWS designated critical habitat in 2006. 71 Fed. Reg. 54344 (Sept. 14, 2006). FWS initiated a status review of the species in 2010. 75 Fed. Reg. 28636 (May 21, 2010).

their prior listing as endangered. *Center for Biological Diversity v. United States Fish and Wildlife Service*, Case No. 3:04-cv-4324 WHA (N.D. Cal. Aug. 18, 2005).

The Southern California DPS of the mountain yellow-legged frog has no recovery plan even though it has been listed for years.

Recovery Planning

Recovery plans are at the heart of the recovery process. A recovery plan is a roadmap to how an endangered animal or plant species can eventually be secure from the risk of extinction and removed from the endangered species list. Indeed, scientific studies show that species with recovery plans are much more likely to recover than species without. Recovery plans for the southern California mountain yellow-legged frogs and the California tiger salamanders would provide a blueprint for actions that will promote recovery and identify goals for their conservation. Timely development and implementation of recovery plans is critical to many specific recovery actions, including designing and funding required studies and securing cooperation from other federal, state, regional, and local governmental and private entities.

The ESA provides that the FWS should give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity. 16 U.S.C. § 1533(f)(1)(A). To this end, the FWS has assigned each listed species a number, ranging from a high of 1C to a low of 18. The criteria on which the recovery priority number is based are degree of threat, recovery potential, taxonomic distinctiveness, and presence of an actual or imminent conflict between the species and development activities. A species' rank may be elevated by adding a "C" designation to its numerical rank to indicate that it is, or may be, in conflict with construction or other development projects, or other forms of economic activity. Species with a high priority rank (1, 1C, 2, 2C, 3, 3C) are those that are the most threatened and have the highest potential for recovery. Species with a low rank (16, 17, 18) are the least threatened and have low recovery potentials. *See* 48 Fed. Reg. 43098 (Sept. 21, 1983) (Endangered and Threatened Species Listing and Recovery Priority Guidelines).

The Southern California DPS of mountain yellow-legged frog is assigned a recovery priority number of 3 and the Sonoma and Santa Barbara DPSs of California tiger salamander are assigned a recovery priority number of 3C, both of which reflects high potential for recovery and threats that are high in magnitude and imminent. The Central DPS of the California tiger salamander has a moderate recovery priority number of 9C. *See* U.S. Fish and Wildlife Service, Report to Congress on the Recovery of Threatened and Endangered Species: Fiscal Years 2007-2008, available at http://www.fws.gov/endangered/esa-library/pdf/Recovery_Report_2008.pdf (last visited April 7, 2011). All of the DPSs of the California tiger salamander are threatened by construction or other development projects, as indicated by the "C" ranking.

ESA VIOLATION

The ESA imposes a mandatory duty upon FWS to develop and implement recovery plans for threatened and endangered species. It provides that "[t]he Secretary shall develop and

implement ... 'recovery plans' for the conservation and survival of endangered species and threatened species listed pursuant to [the ESA], unless he finds that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1). The FWS has not found that recovery plans would not promote the conservation of the southern California mountain yellow-legged frog or the California tiger salamander, nor would such findings be legally defensible. Moreover, FWS has developed a policy that recovery plans are to be developed within 2.5 years of a species' listing under the ESA. 59 Fed. Reg. 34272 (July 1, 1994).

The Southern California DPS of the mountain yellow-legged frog has been listed for nearly 9 years, Central DPS of the California tiger salamander for nearly 7 years, the Sonoma DPS for nearly 9 years, and the Santa Barbara DPS for over 11 years. Yet none have a recovery plan. The failure to develop and implement recovery plans for these species is a direct violation of a mandatory duty under the ESA. It also violates the FWS's own policy that recovery plans be developed within 2.5 years of a final listing. The delay is especially troublesome given the high recovery priority numbers assigned to the Southern California DPS of the mountain yellow-legged frog and the Sonoma and Santa Barbara DPSs of the California tiger salamander.

CONCLUSION

The FWS's failure to develop recovery plans for the Southern California DPS of the mountain yellow-legged frog and three DPSs of California tiger salamander violates the ESA. Continued delay is harming the prospects for recovery of these highly imperiled species. This delay is contrary to law, especially given the importance Congress has assigned to the protection of ESA listed species.

Within sixty days, if FWS does not act to correct the violations described in this letter or agree to discuss with us a schedule for completing the long-delayed recovery plans, the Center and Mr. Miller will pursue litigation against the agency. If you have any questions, or would like to discuss, please contact us.

Sincerely,



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