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Re: Notice of Violation of the Endangered Species Act for Failure to Develop Recovery Plans for the Reticulated Flatwoods Salamander and the Frosted Flatwoods Salamander

On behalf of the Center for Biological Diversity and Gulf Restoration Network, 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 reticulated flatwoods salamander (*Ambystoma bishopi*) and the frosted flatwoods salamander (*Ambystoma cingulatum*).¹

The Center for Biological Diversity (the “Center”) is a national, nonprofit conservation organization with more than 825,000 members and online activists dedicated to the protection of endangered species and wild places. The Center and its members are concerned with the conservation of imperiled species, including the flatwoods salamanders, and the effective implementation of the ESA.

Gulf Restoration Network (“GRN”) is a network of environmental, social justice, and citizens’ groups and individuals committed to empowering people to protect and restore the natural resources of the Gulf for future generations. GRN was formed in 1994 to advance environmental protection, raise awareness of environmental issues in Gulf States and to increase communication and coordination of member activities across the region.

BACKGROUND

Flatwoods Salamanders

The reticulated (*Ambystoma bishopi*) and frosted (*Ambystoma cingulatum*) flatwoods salamanders are highly imperiled amphibian species located in the lower southeastern coastal

¹ The FWS’s failure to develop and implement a recovery plan 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).

plain. Although the reticulated flatwoods salamander historically occurred in Alabama, Florida, and Georgia, this species has not been observed in Alabama since 1981. 74 Fed. Reg. 6700 (Feb. 10, 2009). As of 2009, this species was known to occur in only 20 populations in Florida and Georgia. *Id.* In the 2009 listing rule, the frosted flatwoods salamander (*Ambystoma cingulatum*) was reported to occur in 25 populations throughout Florida, Georgia, and South Carolina. *Id.* However, most recent survey data indicates that this inventory greatly overestimates the actual number of extant flatwoods salamander populations. The frosted flatwoods salamander, in particular, appears to have continued to experience marked declines throughout its range.²

Field surveys indicate that, in over a decade, reproduction has only been documented in three of the 12 known populations of frosted flatwoods salamander in the Atlantic Coastal Plain Clade (the genetically distinct eastern portion of the species' range). Pauly et al. (2012); Bevelhimer et al. (2008). This species has not been documented in peninsular Florida since 1998 and may now be extinct there. Enge et al. (2014). At St. Marks National Wildlife Refuge, considered one of the remaining strongholds for the frosted flatwoods salamander, surveys done during good conditions in 2014 indicate marked declines. *Id.* The species was detected in only five of 25 known wetlands and no larvae were found in the easternmost population of the refuge. *Id.*

For the reticulated flatwoods salamander, some of the 20 populations identified in the listing rule were inferred from the capture of a single individual and thus do not indicate a robust population. 74 Fed. Reg. 6700 (Feb. 10, 2009). 14 (70 percent) of these populations are supported by only one breeding pond, making their future extremely tenuous due to a variety of natural environmental fluctuations, before even accounting for manmade threats such as habitat destruction and degradation. *Id.* In recent surveys during the exceptionally wet winter of 2014, the reticulated flatwoods salamander was found at seven of 25 known ponds and four new ponds at Eglin Air Force Base and at only one of 13 known ponds at Hurlburt Field. Enge et al. (2014). A lack of recent observations of these species in the western portions of Eglin and Hurlburt may indicate local population extinction. *Id.*

The most significant historical threat for both species is the loss of the majority of their habitats. *Id.* Fire suppression is the main reason that much of the remaining longleaf pine flatwoods habitat is severely degraded. *Id.* Habitat loss and degradation continue to threaten these species, as well as a variety of other localized threats such as incompatible forest management, ORV use, drought, and disease. *Id.* Fire continues to be a large issue for these species because, even where prescribed burns are utilized as a management tool, their effect will continue to degrade the quality of habitat for flatwoods salamanders if they are done with

² Enge, Kevin M., et al. "Survey of winter-breeding amphibian species: final report." Florida Fish and Wildlife Commission (December 31, 2014): 136 pp; Pauly, Gregory B., et al. "Conservation and genetics of the frosted flatwoods salamander (*Ambystoma cingulatum*) on the Atlantic coastal plain." *Conservation Genetics* 13.1 (2012): 1-7; Bevelhimer, Mark S. et al. "Final Report: Maximizing sampling efficiency and minimizing uncertainty in presence/absence classification of rare salamander populations." Strategic Environmental Research and Development Program (October 31, 2008): 142 pp.

improper frequency or during the wrong season. Enge et al. (2014). For example, many years of conducting fires primarily during the dormant season at St. Marks National Wildlife Refuge (SMNWR) has resulted in marginal quality upland habitat for flatwoods salamanders.³ *Id.* Ephemeral wetlands are typically wet during dormant-season fires and therefore do not burn, leading to shrub and sawgrass encroachment, as seen at SMNWR, which renders the ponds unsuitable as breeding sites.⁴ *Id.*

The flatwoods salamander was first listed under the Endangered Species Act over 15 years ago. Specifically, the flatwoods salamander (*Ambystoma cingulatum*) was listed as a threatened species in 1999. 64 Fed. Reg. 15691 (Apr. 1, 1999). The FWS did not designate critical habitat at the time of listing as the ESA requires, 16 U.S.C. § 1533(a)(3)(A)(i), but in response to a lawsuit brought by the Center for Biological Diversity and its allies, FWS published a proposed rule to designate critical habitat for the flatwoods salamander in February of 2007. 72 Fed. Reg. 5856 (Feb. 7, 2007). After publication of the proposed rule, new information became available about the species, resulting in a consensus in the scientific community for a taxonomic reclassification of the flatwoods salamander into two distinct species: the frosted flatwoods salamander (*Ambystoma cingulatum*) and the reticulated flatwoods salamander (*Ambystoma bishopi*). The FWS agreed with this reclassification and in 2009 the FWS finalized its determination of a continued listing of the frosted flatwoods salamander as a threatened species, and an endangered status for the reticulated flatwoods salamander. 74 Fed. Reg. 6700 (Feb. 10, 2009). At the same time, the FWS finalized its designation of critical habitat for both species. *Id.*

In sum, although the flatwoods salamanders are extremely endangered and have been listed for approximately 16 years with finalized critical habitat, they lack recovery plans.

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, research by the Center has found that the status of species with dedicated recovery plans for two or more years is far more likely to be improving than of those without.

Recovery plans for flatwoods salamanders would provide a blueprint for actions that will promote recovery and identify goals for their conservation. Timely development and implementation of recovery plans are 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.

³ Dormant-season fires may even directly kill flatwoods salamander adults and eggs, and reduce protective vegetative cover for eggs and larvae. *Id.*

⁴ Ephemeral wetlands are typically dry in the growing season of late spring or early summer, when these areas historically burned as a result of lightning-ignited fires. *Id.*

The ESA provides that the FWS should give priority in developing recovery plans 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 FWS assigned both species of flatwoods salamanders a recovery priority number of five. *See* U.S. Fish and Wildlife Service, Report to Congress on the Recovery of Threatened and Endangered Species: Fiscal Years 2011-2012, available at http://www.fws.gov/endangered/esa-library/pdf/Recovery_Report_FY2011-2012.pdf (last visited Feb. 23, 2015). This number reflects a high degree of threat with low recovery potential.

ESA VIOLATION

The ESA imposes a mandatory duty upon the 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 this section, 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 flatwoods salamanders, nor would such a finding 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), available at <http://www.fws.gov/endangered/laws-policies/policy-recovery.html> (last visited Feb. 23, 2015).

The flatwoods salamanders have been listed for approximately 16 years, but they lack recovery plans. 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 priority number (5) assigned to both species of flatwoods salamanders and recent surveys showing continuing declines.

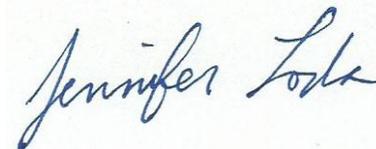
CONCLUSION

The FWS's failure to develop a recovery plan for the reticulated flatwoods salamander and the frosted flatwoods 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 violation described in this letter or agree to discuss with us a schedule for completing the long-delayed recovery plans, the Center and GRN will pursue litigation against the agency. If you have any questions, or would like to discuss, please contact us.

Sincerely,



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