



June 29, 2020

Sent via Email and Certified Mail

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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 Healthy Gulf (formerly 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” or “Service”) 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 1.7 million 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.

Healthy Gulf is a nonprofit organization whose purpose is to collaborate with and serve communities who love the Gulf of Mexico by providing research, communications and coalition-building tools needed to reverse the long-pattern of over exploitation of the Gulf’s natural resources.

BACKGROUND

Flatwoods Salamanders

The reticulated (*Ambystoma bishopi*) and frosted (*Ambystoma cingulatum*) flatwoods salamanders are highly imperiled amphibian species located in the lower southeastern coastal plain. The flatwoods salamander was first listed under the Endangered Species Act over 20 years ago; specifically, the flatwoods salamander (*Ambystoma cingulatum*) was listed as a threatened

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).

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, FWS finalized its designation of critical habitat for both species. *Id.* Both species continue to be highly imperiled: a 2017 report found an overall loss of 89.3% of individual historical breeding sites for both species combined.² Frosted Flatwoods Salamander 5-Year Review at 22.

The most significant historical threat for both species is the loss their longleaf pine/slash pine flatwoods terrestrial habitat as well as their breeding habitats. *Id.* at 14. Fire suppression along with exclusion of prescribed fires and an increase in drought conditions are the primary reasons that much of the remaining longleaf pine flatwoods habitat is severely degraded. *Id.* at 12. 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.* at 16. 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 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.*

Although the reticulated flatwoods salamander historically occurred in Alabama, Florida, and Georgia, this species has not been observed in Alabama since 1981.⁵ Reticulated Flatwoods Salamander 5-Year Review at 12. According to the 2015 5-year review for the reticulated flatwoods salamander, this species is now known to occur in only six populations in Florida and

² U.S. Fish and Wildlife Service. 2019. Frosted flatwoods salamander (*Ambystoma cingulatum*) 5-year review: summary and evaluation. Panama City Field Office, Panama City, Florida. 37 pp. (hereinafter “Frosted Flatwoods Salamander 5-Year Review”)

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.*

⁵ U.S. Fish and Wildlife Service. 2015. Reticulated flatwoods salamander (*Ambystoma bishopi*) 5-year review: summary and evaluation. Panama City Field Office, Panama City, Florida. 46pp. (hereinafter “Reticulated Flatwoods Salamander 5-Year Review”)

Georgia, and one of those populations, at NOLF Holley in Florida, has not been detected since 2011. *Id.* at 10-11. This is a substantial decrease from the 20 populations originally reported in 2009 listing rule. *See* 74 Fed. Reg. 6700 (Feb. 10, 2009). In the 2009 listing rule, FWS reported that 14 (70 percent) of these populations were 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 surveys during the exceptionally wet winter of 2014, the reticulated flatwoods salamander was found at only 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).⁶ A lack of recent observations of these species in the western portions of Eglin and Hurlburt may indicate local population extinction. *Id.*

In its 2009 listing rule, the frosted flatwoods salamander (*Ambystoma cingulatum*) was reported to occur in 25 populations throughout Florida, Georgia, and South Carolina. 74 Fed. Reg. 6700 (Feb. 10, 2009). However, 2014-2015 survey data conducted on public lands indicates that only nine populations are currently known to exist, and one of these populations, at Francis Marion National Forest, has not been detected since 2010. Frosted Flatwoods Salamander 5-Year Review at 2. Evaluation of private land populations since the final rule in 2009 have been limited. *Id.* Regardless, the frosted flatwoods salamander has continued to experience marked declines throughout its range.⁷ 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.* And the prospects for recovery are currently low in much of the frosted flatwoods salamander's historic habitat, as nearly 40% of the land categorized as critical habitat is not currently suitable for breeding for this species. *Id.* at 21

The frosted flatwoods salamander's prospects for survival and recovery worsened in October 2018, when St. Marks National Wildlife Refuge was hit by Hurricane Michael, a Category 5 hurricane that landed along the Florida Panhandle and flooded many areas of the

⁶ Enge, Kevin M., et al. "Survey of winter-breeding amphibian species: final report." Florida Fish and Wildlife Commission (December 31, 2014): 136 pp

⁷ 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.

refuge with seawater pushed inland by the storm surge.⁸ Frosted Flatwoods Salamander 5-Year Review at 14. This resulted in seawater inundation of some of the ponds used for breeding by the frosted flatwoods salamander. *Id.* Following this event, USGS partners described frosted flatwood salamander individuals as underweight and indicated that the 2019 breeding season for the species appears to be a near complete failure considering the drastic changes in water salinity, water levels, and damage to plant cover in the ponds. *Id.* The impacts of Hurricane Michael on what have been called the two “strongholds” for the frosted flatwoods salamander, SMNWR and Apalachicola National Forest, in addition to a 59% decline of this species’ populations between 2010 and 2015, show the frosted flatwoods salamander is at high risk for extinction. *See id.* at 14, 22. FWS acknowledged the further declines of the frosted flatwoods salamander towards extinction with a recommendation to uplist the species from threatened to endangered in its recently-published 5-Year Review. *Id.* at 22.

In sum, although the reticulated and frosted flatwoods salamanders are extremely endangered and continue to decline, despite being protected under the ESA for over 20 years, they still 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.

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.

⁸ Hurricane Michael also impacted the Apalachicola National Forest, but researchers are still investigating the effects on the Forest’s frosted flatwoods salamander populations. Frosted Flatwoods Salamander 5-Year Review at 14

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 the reticulated and frosted flatwoods salamanders recovery priority numbers of two in their most recent 5-Year Review documents. Reticulated Flatwoods Salamander 5-Year Review; Frosted Flatwoods Salamander 5-Year Review. This number reflects a high degree of threat with high recovery potential.

INFORMAL AGREEMENT

On March 26, 2015, the Center and Healthy Gulf submitted a notice letter to the U.S. Fish and Wildlife and U.S. Department of Interior regarding their violation of the Endangered Species Act for failing to provide Recovery Plans for the reticulated and frosted flatwoods salamanders. This letter resulted in discussions between the Service and the Center and Healthy Gulf that gave rise to an informal agreement in which the Service committed to timelines for draft and final recovery plans for both species, as well as other actions. (Exhibit 1). The FWS described its commitments in a letter dated August 22, 2016, to submit notices to the Federal Register announcing the availability of the Draft Recovery Plans for *A. bishopi* in May 2017 and *A. cingulatum* in late 2017, and to publish the final recovery plans 12 to 18 months later.

To date, it has been more than 20 years since the FWS first listed the flatwoods salamanders under the ESA, and approximately three years since the time by which the agency had agreed to publish its draft recovery plans for both species. Nor does it appear that the Service has any plans to complete and publish the draft and final recovery plans for the flatwoods salamanders in the near future, as neither are included in the Service's National Recovery Plan Workplan for fiscal years 2020-2022.⁹

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

⁹ U.S. Fish and Wildlife Service. 2020. National Workplan to Complete Recovery Plans for Species Listed Under the Endangered Species Act: Fiscal Years 2020–2022 (January 2020 version). Available at <https://www.fws.gov/endangered/esa-library/pdf/Recovery-Plan-Workplan-FY20-FY22.pdf> (Last Accessed June 11, 2020).

are to be developed within 2.5 years of a species' listing under the ESA. 59 Fed. Reg. 34272 (July 1, 1994).¹⁰

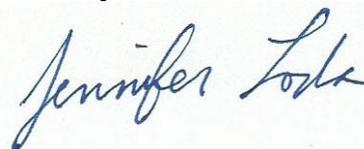
The flatwoods salamanders have been listed for over 20 years, but they lack recovery plans. The failure to develop and implement recovery plans for these species is a direct violation of a mandatory duty under the ESA. It also violates the FWS's own policy that recovery plans be developed within 2.5 years of a final listing. The delay is especially troublesome given the high priority number (2) assigned to both species of flatwoods salamanders and recent surveys showing continuing declines.

CONCLUSION

The FWS's failure to develop a recovery plans 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 and recovery of ESA listed species.

After 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 Healthy Gulf will pursue litigation against the agency. If you have any questions, or would like to discuss, please contact us.

Sincerely,



Jennifer Loda
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Cynthia Sarthou
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¹⁰ Available at <http://www.fws.gov/endangered/laws-policies/policy-recovery.html> (last visited June 9, 2020).

Cc via email:

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EXHIBIT 1



United States Department of the Interior

FISH AND WILDLIFE SERVICE

1875 Century Boulevard
Atlanta, Georgia 30345

AUG 22 2016

In Reply Refer To:
FWS/R4/ES

Ms. Jennifer L. Loda
Amphibian and Reptile Staff Attorney
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, California 94612

Dear Ms. Loda,

This letter is in response to your request on behalf of the Center for Biological Diversity (CBD) to provide you with a schedule of the U.S. Fish and Wildlife Service's (Service) intended timelines to complete the Draft Recovery Plans for the frosted flatwoods salamander (*Ambystoma cingulatum*) and reticulated flatwoods salamander (*A. bishopi*).

The Service proposes to draft separate recovery plans for each species, to more clearly describe the similarities and particularly the differences in recovery needs and challenges for each. The recovery plans will include findings from field work performed throughout this current breeding season. Our projected schedule for plan completion is as follows:

Projected Schedule of Plan Completion

- On July 18-19, 2016, we will have the second formal recovery team meeting to finalize our recovery criteria and the strategies, cost estimates, and actions to achieve these criteria. This meeting was originally suggested for late May, but was rescheduled to allow the team time to gather and incorporate this past breeding season's data from all of our partners prior to the submission of the final drafts.
- Following the meeting, the Service and recovery team will draft the Species Status Assessment and recovery strategies, criteria, and actions sections of the Recovery Plan and use this information in the Recovery Implementation Strategy.
- We intend to submit to the Federal Register the notice announcing the availability of the Draft Recovery Plan for *A. bishopi* in May 2017, and the notice announcing the availability of the Draft Recovery Plan for *A. cingulatum* in late 2017.
- Following review of comments on the draft recovery plans and revisions, we plan to publish the final recovery plans within 12 to 18 months of the release of the draft plans.

Please note that our ability to meet these deadlines may vary depending on workload, staffing, budget, the volume of comments, and other factors. We will continue to provide you quarterly

updates, via email from the Panama City Field Office project leader, on our progress toward producing draft recovery plans and on our continued conservation of the species.

Thank you again for your concern for the recovery of these two species. If you have any questions, please feel free to contact Catherine Phillips, Panama City Project Leader, at (850) 769-0552 ext. 246 or catherine_phillips@fws.gov, or Lisa Ellis, Deputy Chief, Division of Restoration and Recovery, at (404) 679-7089 or lisa_ellis@fws.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Leopoldo Miranda", with a large, sweeping flourish extending to the left.

Leopoldo Miranda
Assistant Regional Director