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April 1, 2009

**By Certified Mail and E-mail**

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United States Department of the Interior  
1849 C Street, N.W.  
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Rowan Gould, Acting Director  
United States Fish & Wildlife Service  
1849 C Street, N.W.  
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**Re: Sixty-Day Notice of Violations of the Endangered Species Act  
In Connection With the Delisting of the West Virginia Northern  
Flying Squirrel**

On behalf of Friends of Blackwater, the Wilderness Society, the Center for Biological Diversity, Heartwood, the Southern Appalachian Forest Coalition, and WildSouth, we hereby provide notice, pursuant to section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), that the Fish and Wildlife Service’s (“FWS”) decision to delist the West Virginia Northern Flying Squirrel (“WVNFS”) violates the ESA section 4 requirements to base delisting decisions on objective, measurable recovery criteria set forth in a formal recovery plan, 16 U.S.C. § 1533(f)(1)(B)(ii), and to make listing and delisting decisions on the basis of the best available scientific data, 16 U.S.C. § 1533(b)(1)(A). The delisting decision is also politically motivated and fatally tainted by non-biological considerations, as were virtually all delisting and other ESA decisions under the Bush Administration.



As a preliminary matter, this letter fully incorporates by reference the April 23, 2007 detailed comments submitted to the FWS on behalf of sixteen conservation organizations. The Wilderness Society et al., Comments on the Proposed Rule to Remove the Virginia Northern Flying Squirrel from the Federal List of Endangered and Threatened Wildlife (Apr. 23, 2007) (“Attachment 1”).

## **Background**

### **A. Endangered Species Act**

Section 4 of the ESA governs the listing and delisting of endangered species. 16 U.S.C. § 1533. Listing of a species occurs when the Secretary of the Interior makes an objective determination that a species is endangered or threatened because of any one of five factors. Id. § 1533(a)(1). The five listing criteria considered by the Secretary include: (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; and (5) other natural or manmade factors affecting its continued existence. All listing determinations must be made “solely on the basis of the best scientific and commercial data available.” Id. § 1533(b)(1)(A).

Once listed, a species is afforded protection under the ESA to ensure its continued existence, with the ultimate goal of recovery. As such, the FWS is required to “develop and implement recovery plans for the conservation and survival” of any listed species. Id. § 1533(f)(1). Among other things, every recovery plan must incorporate “objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list.” Id. § 1533(f)(1)(B). These measurable recovery criteria are the means by which the agency determines whether a species has recovered to the point of eligibility for downlisting or delisting. As such, these recovery criteria must address each of the five statutory listing criteria to ensure that minimization of specific known threats is part of the recovery process. Because of the importance of such plans, recovery plans can only be revised after “public notice and an opportunity for public review and comment,” and after the FWS considers any comments from the public. Id. § 1533(f)(4)-(5).

Additionally, the ESA requires the FWS to conduct a five-year review of each listed species to determine whether any change in status is needed – *i.e.*, whether the species should be uplisted, downlisted, or delisted. Id. § 1533(c)(2). Determinations made in five-year reviews must be made in accordance with the five listing criteria and must be made on the basis of the best available science. Id. Further, any determination to change the status of a species resulting from such a review must be based on whether the species is recovering or has recovered by satisfying the objective, measurable criteria listed in a species’ recovery plan.

## **B. The West Virginia Northern Flying Squirrel and the WVNFS Recovery Plan**

The West Virginia Northern Flying Squirrel (WVNFS) is a subspecies of the Northern Flying Squirrel (*Glaucomys sabrinus*). It is a small, nocturnal gliding mammal, 260-305 millimeters in total length and 90-140 grams in weight, possessing a long, broad, flattened tail, prominent eyes, and dense, silky fur. The distinctive patagia (fully furred and cartilaged folds of skin between the wrists and ankles), along with the broad tail, create a large surface area forming the structural basis for the squirrel's characteristic gliding motion. Adults are gray with a brownish or reddish wash on their backs, and grayish-white fur on their front sides.

The WVNFS is found in high-elevation coniferous and mixed coniferous/hardwood forests, consisting primarily of red spruce, fir, mature beech, sugar maple, red maple, hemlock, and black cherry trees. It is active year-round and nests in trees. The greatest continuing threat to the WVNFS, and the primary reason for its precipitous decline, is the destruction, fragmentation, and alteration of habitat caused by logging, mineral extraction, recreational or other forms of development, pollution, introduced tree pests, and disturbances from anthropogenic climate change.

Pursuant to 16 U.S.C. § 1533(a), the FWS listed the WVNFS as endangered in 1985. 50 Fed. Reg. 26999 (July 1, 1985). In 1990, the FWS issued a Recovery Plan for the squirrel. U.S. Fish and Wildlife Service, Appalachian Northern Flying Squirrels Recovery Plan (1990), available at [http://ecos.fws.gov/docs/recovery\\_plan/900924c.pdf](http://ecos.fws.gov/docs/recovery_plan/900924c.pdf) (Recovery Plan). The WVNFS Recovery Plan provides for the implementation of a four-part strategy for species recovery, including ensuring that “areas found to support this species or especially favorable habitat conditions . . . receive adequate protection from human-related disturbance.” Id. at 16. The WVNFS Recovery Plan incorporates objective, measurable criteria on which the FWS must base any decision to downlist or delist the species. To downlist the species from endangered to threatened, the Plan's recovery criteria require (1) that populations are stable or expanding for ten years in at least 80% of designated Geographic Recovery Areas (“GRA”), (2) sufficient life history data are available to permit effective management, and (3) GRAs are managed for squirrels in perpetuity. Id. at 18. In addition to the above factors that must be satisfied for downlisting, delisting of the species can only occur when “the existence of the high elevation forests on which the squirrels depend is not itself threatened by introduced pests . . . or by environmental pollutants.” Id.

The Recovery Plan was amended in 2001 to provide additional protection for the WVNFS. U.S. Fish and Wildlife Service, Appalachian Northern Flying Squirrels, Recovery Plan Update, Amendment to Appendix A (2001) (“Updated Recovery Plan”). In particular, the Updated Plan amended Appendix A, Guidelines for Habitat Identification and Management for *Glaucomys sabrinus fuscus*. Prior to the amendment, the Plan had provided that the presence of the WVNFS in a particular project area should be determined by either placing and monitoring nest boxes or live trapping, and that areas where squirrels were not specifically found could be treated as unoccupied and suitable for project development. Id. at 3. Based on years of data

collection, however, the FWS and other Recovery Plan collaborators determined that this approach likely did not protect the WVNFS as much as it should have because the WVNFS is less likely to use nest boxes or enter traps in good quality habitat due to the natural presence of den sites and an abundance of suitable food. The Amendment to the Guidelines for Habitat Identification and Management of the WVNFS thus underscored that “protection of suitable WVNFS habitat, whether or not the squirrel’s presence can be demonstrated, is needed. Recovery of the WVNFS must go beyond protecting only those areas where the squirrel can be located through trapping and nest box placement and monitoring.” *Id.* at 4. Thus, the guidelines are designed to “protect[] suitable habitat even if not known to be presently occupied.” *Id.*

According to the updated Recovery Plan, suitable WVNFS habitat includes areas approximately 2600 to 4600 feet above mean sea level “typified by a mixed and highly variable overstory species composition of American beech, yellow birch, black cherry, sugar maple, red spruce and eastern hemlock.” *Id.* at 5. In addition, the update provided that “[s]uitable habitat includes buffers of approximately 150 feet and corridors to provide linkages for habitat areas where deemed necessary to prevent barriers to movement.” *Id.* As recently as 2004, the FWS testified before Congress that the Plan’s recovery criteria had not been satisfied. *See* U.S. Fish and Wildlife Service, West Virginia Northern Flying Squirrel: 5-Year Review: Summary and Evaluation, at 2 (April 2006), available at <http://www.fws.gov/northeast/pdf/flysqrev.pdf> (“Five-Year Review”) (noting in congressional testimony that only 51-75% of the recovery criteria had been satisfied by 2004).

### **C. The FWS’s Five-Year Review of the WVNFS**

Pursuant to 16 U.S.C. § 1533(c)(2), the FWS undertook a five-year review of the status of the WVNFS that resulted in the release of the final five-year review in April 2006. *Id.* In its five-year review, the FWS determined that the WVNFS Recovery Plan was no longer adequate to measure the recovery efforts of the WVNFS. *Id.* at 4. The FWS offered two rationales for the inadequacy: (1) the Plan was outdated because it was developed fifteen years earlier and (2) the Plan was no longer adequate because the recovery criteria were not threat-based and aimed at addressing the five statutory listing criteria. *Id.* at 4-6.

However, the FWS did not embark on a process for updating the Recovery Plan or for addressing any perceived inadequacies as a precursor to making any decision on delisting. Rather, the FWS simply dispensed with the WVNFS Recovery Plan and the only existing recovery criteria for the species, and instead purported to analyze the status of the species in light of updated information that “compare[d] current conditions to known conditions at the time of listing.” *Id.* at 5-6. While the five-year review examined the five listing factors in its analysis of the species’ status, *id.* at 11-17, the review lacked any discussion or analysis of the species’ status with regard to any objective, measurable recovery criteria. On this basis, the five-year review concluded that the FWS should delist the WVNFS and set in motion the delisting process.

## **D. The FWS's Delisting Decision**

Based on the five-year review, the FWS promulgated a proposed rule in December 2006 that sought to delist the WVNFS. See Proposed Rule to Remove the Virginia Northern Flying Squirrel from the Federal List of Endangered and Threatened Wildlife, 71 Fed. Reg. 75924 (Dec. 19, 2006); Proposed Rule; Extension of Comment Period, 72 Fed. Reg. 7852 (Feb. 21, 2007). The FWS received nearly 5,000 comments from scientists and other members of the public opposed to delisting of this species because of the inherent threats it faces. See Final Rule Removing the Virginia Northern Flying Squirrel From the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 50226, 50227 (Aug. 26, 2008). On October 9, 2007, the FWS proposed a post-delisting monitoring plan for the species. See Draft Post-Delisting Monitoring Plan for the Virginia Northern Flying Squirrel, 72 Fed. Reg. 57346 (Oct. 9, 2007). On August 26, 2008, the FWS published its final rule delisting the WVNFS, which included the FWS's final post-delisting monitoring plan. 73 Fed. Reg. 50226. In its final rule, the FWS claimed that the delisting is "based on a review of the best available scientific and commercial data, which indicate that the subspecies is no longer endangered or threatened with extinction, or likely to become so within the foreseeable future." Id. at 50226. Both the proposed rule and the final rule echo the FWS's determination in the five-year review that the WVNFS Recovery Plan is no longer adequate and thus not part of the FWS's delisting analysis.

### **Discussion**

#### **A. The FWS Cannot Dispense with its Obligation to Base a Delisting Decision on Recovery Criteria Adopted in a Recovery Plan**

As discussed above, recovery plans must incorporate "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list." 16 U.S.C. § 1533(f)(1)(B). Recovery plans can only be revised after "public notice and an opportunity for public review and comment," and after the FWS considers any comments from the public. Id. § 1533(f)(4)-(5). Recovery plans are the legally mandated tools used by the FWS to determine whether a species is recovering or has recovered, which in certain circumstances would lead the agency to downlist or delist a species. Here, the FWS published the WVNFS Recovery Plan in 1990, which provided very specific recovery criteria for the WVNFS and methods of minimizing threats to the species to further the goal of recovery.

In 2001, not long before the FWS initiated its five-year review of the WVNFS, the FWS amended portions of the WVNFS Recovery Plan. See Updated Recovery Plan. Providing additional protection for the WVNFS, the 2001 amendment strengthened the recovery goals of the plan and underscored that "protection of suitable WVNFS habitat, whether or not the squirrel's presence can be demonstrated, is needed." Id. at 4. This amendment not only validated that the 1990 WVNFS Recovery Plan was up-to-date and based on the best available science at that time, but also bolstered the protections afforded to the species by strengthening the provisions found in the original Plan. Id. In fact, the FWS's five-year review acknowledged that

“the recovery criteria as they apply to [the WVNFS] were deemed objective, measurable, and adequate when the plan was . . . updated in 2001.” Five-Year Review at 4. Thus, as of 2001, the FWS deemed the recovery criteria in the WVNFS Recovery Plan as sufficient under the ESA.

By April 2006, however, the FWS took the position in its five-year review that the Plan was no longer adequate because of the age of the WVNFS Recovery Plan. Five-Year Review at 4. Considering that the five-year review process commenced no later than 2002 (and because internal documents in 2002 referred to this not as a review but instead as “an effort . . . to assess the potential for delisting of WVNFS”), the FWS’s assertion of the Plan’s inadequacy, just one year after affirming the Plan’s adequacy in 2001, was a dramatic and unexplained reversal of the FWS’s 2001 position that the recovery criteria were objective, measurable, and biologically supportable. The FWS’s primary rationale for asserting inadequacy of the Plan in its five-year review was that the Plan “was developed over fifteen years ago and needs updating.” Five-Year Review at 4.

However, at no time either in its five-year review or during the agency’s subsequent delisting process did the FWS propose any updated WVNFS Recovery Plan on which the agency could base any determination regarding the listing status of the species. Assuming that the WVNFS Recovery Plan was inadequate and outdated in 2006 as the FWS now asserts, the ESA compelled the agency to revise the Plan in accordance with the best available scientific data, 16 U.S.C. § 1533, before embarking on any process of delisting. Such a revision can only occur after “public notice and an opportunity for public review and comment,” and after the FWS considers any comments from the public. Id. § 1533(f)(4)-(5). Here, the FWS did not revise the WVNFS Recovery Plan and did not solicit public input after the agency determined that the Plan was inadequate in its five-year review. To the contrary, the FWS pushed forward with the rulemaking process to delist the WVNFS without considering any recovery plan or any underlying objective, measurable recovery criteria for the species as part of its determination that delisting was appropriate.

The practical effect of the FWS’s new and dramatic position in its five-year review and subsequent delisting decision to label the WVNFS Recovery Plan as inadequate, while not proposing a revised Plan subject to public scrutiny, was that the FWS unilaterally dispensed with the explicit ESA requirement that the agency utilize recovery plans to objectively and measurably determine the legal status of endangered and threatened species. The dispensation of this statutory obligation, however, clearly undermines the goals and language of the Endangered Species Act. As such, this is a patent violation of section 4 of the ESA, as made clear by federal courts that have analyzed the FWS’s obligation to prepare recovery plans and the specific role of these plans in the process of determining whether listed species have recovered to the point where delisting may be considered. See Fund for Animals v. Babbitt, 903 F. Supp. 96 (D.D.C. 1995); Defenders of Wildlife v. Norton, 130 F. Supp. 2d 121 (D.D.C. 2001).

In short, contrary to the FWS’s assertion in delisting the WVNFS, it is not the case that “recovery may be achieved without all criteria [in a recovery plan] being fully met.” 73 Fed.

Reg. 50226. Rather, the statute is explicit in providing that delisting must be based on appropriate recovery criteria embodied in a recovery plan. Accordingly, here, if the FWS wanted to consider proceeding with delisting, it was obligated to either apply the existing WVNFS Recovery Plan or to adopt a new Plan that complied with the Endangered Species Act. Because the FWS failed to undertake one of the only two lawful options available under the ESA, the delisting decision is a blatant violation of the statute's section 4 obligations.

## **B. The Delisting Decision is Not Based on the Best Available Science**

In addition to the FWS's patent ESA violation when it dispensed with the statutory requirement to base delisting decisions on measurable recovery criteria in a formal recovery plan, the FWS independently violated section 4 of the Act by failing to base its delisting decision on "the best available scientific . . . data." See 16 U.S.C. § 1533(b)(1)(A). This failure is best illustrated by the lack of intermediate steps considered by the FWS in its delisting decision and by the inadequate scope and analysis of impacts analyzed in the delisting decision.

First, while raising concerns with the age of the WVNFS Recovery Plan, the FWS has provided no rationale for entirely abandoning the 1990 recovery criteria after forcefully endorsing such criteria in both 1990 and as recently as 2001 as critical tools to measure recovery of the species. While some of the recovery criteria's underlying science might warrant updating, any revision of the criteria or any decision regarding the status of the species must at least build on the FWS-endorsed criteria that as recently as 2001 served as the best gauge of the species' recovery efforts. For example, the WVNFS Recovery Plan explicitly defines the downlisting criteria and delisting criteria separately, indicating that the FWS foresaw downlisting as the appropriate intermediate recovery step when it developed the 1990 Plan. See Recovery Plan at 18. In its delisting decision, however, the FWS made no mention of downlisting or other intermediate options short of delisting that might be undertaken to ensure recovery of the WVNFS. Even assuming that the FWS is correct that the WVNFS is showing some progress towards recovery – despite grave threats to the species' continued existence – the agency cannot circumvent appropriate intermediate recovery steps in order to satisfy the agency's patently result-oriented desire to delist the species. Such a sidestepping of the best available science to produce a desired result is contrary to the statutory obligations imposed by the ESA. In fact, because of ongoing threats, leading WVNFS experts have implored the FWS to at least consider downlisting to threatened status in lieu of delisting because "a complete delisting is premature and ill-advised." See, e.g., Dr. Peter D. Weigl, Comments on the Proposed Rule to Remove the West Virginia Northern Flying Squirrel from the Federal List of Endangered and Threatened Wildlife (Mar. 30, 2007) ("Attachment 2"); Dr. John F. Pagels, Comments on the Proposed Rule to Remove the West Virginia Northern Flying Squirrel from the Federal List of Endangered and Threatened Wildlife (Mar. 27, 2007) ("Attachment 3"). Despite such advice from scientific experts, the FWS has entirely abandoned intermediate recovery options for the WVNFS and has provided no rationale for this dramatic reversal, thereby violating section 4 of the ESA.

Second, the FWS's delisting decision did not incorporate appropriate methodologies or assess the full scope of impacts and threats to the WVNFS. See, e.g., Dr. Robert L. Smith, A Critique of the Proposed Delisting of the West Virginia Northern Flying Squirrel (March 2008) ("Attachment 4"). As to methodology, there are numerous problems with the methods and statistical compilations used to determine that populations of the WVNFS are "persistent" within its range. See The Wilderness Society, Comments at 9-16. Specifically, FWS and other federal government employees indicated in internal correspondence that the term "persistence" was selected precisely to obscure the fact that the FWS proposed delisting of the WVNFS without sufficient data of the species' population size or trend. Further, in terms of scope, there are many critical issues that both the five-year review and the delisting decision fail to address sufficiently. Some of these ongoing and cumulative impacts that are inadequately addressed by the FWS are: climate change and global warming, private land development, highway development, and energy development. See id. at 27-39. Although the FWS denies that these activities will have any impact on the WVNFS that warrants continued protection under the ESA, 73 Fed. Reg. at 50234, there is insufficient discussion in the final delisting rule on the individual or cumulative impacts of such activities on the continued survival of the WVNFS. As is clearly evident in the short time period since the delisting, these activities are already resulting in substantial on-the-ground impacts to the species. Thus, no sooner was the ink dry on the delisting decision, than private developers and other proponents of the delisting were destroying large swaths of the squirrel's sensitive habitat due to the absence of ESA obligations.<sup>1</sup>

Based on the foregoing, it is clear that the WVNFS delisting decision, like the vast majority of ESA decisions made by the Bush Administration, was motivated by less than the best available science because of the atmosphere created by top Interior Department appointees that encouraged delisting as many species as possible during the administration's reign (the FWS pushed the final WVNFS delisting rule through despite the insufficiency of data to support delisting, publishing the final rule a mere nine weeks before the 2008 presidential election). The

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<sup>1</sup> As a listed species, the WVNFS was afforded certain protections under the ESA, including the requirement of a habitat conservation plan in instances where the FWS authorized an incidental take of the species. 16 U.S.C. § 1539(a)(2)(A). Pursuant to this provision, activities such as residential and commercial development by Snowshoe Mountain Resort and logging in WVNFS habitat by Allegheny Wood Products required habitat conservation plans that, among other things, ensured both the minimization and mitigation of the impacts of any incidental taking and that any such taking would not "appreciably reduce the likelihood of the survival or recovery of the species in the wild." Id. Because the WVNFS was delisted on August 26, 2008, this and other provisions of the ESA no longer afford vital protections to the species. As such, both Snowshoe Mountain Resort and Allegheny Wood Products have noticeably watered down their conservation plans, likely resulting in significant impacts to the WVNFS and its sensitive habitat. Additionally, the Bureau of Land Management has indicated its plans to move forward with the leasing of public lands in WVNFS habitat for oil and gas exploration.

evidence that the delisting of the WVNFS was politically motivated can be gleaned from the FWS's result-oriented desire to delist this species despite the fact that the WVNFS had not met the measurable recovery criteria for delisting, much less downlisting, as of 2004. Thus, the only way for the FWS to achieve the desired result was to dramatically reverse course by abandoning the WVNFS Recovery Plan, which the agency never bothered to revise through the appropriate notice and comment process, and to subsequently make a delisting determination without considering the best scientific data available – all in blatant disregard for the ESA. This is the approach of an agency hell-bent on delisting rather than an agency guided by the “institutionalized caution” with which Congress intended the FWS to manage listed species. See Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978).

### Conclusion

The FWS's decision to delist the West Virginia Northern Flying Squirrel violates section 4 of the ESA by failing to base its delisting decision on objective, measurable recovery criteria found in a formal recovery plan and by failing to base its decision on the best available science.

Please do not hesitate to contact us if you wish to discuss this matter or have any questions concerning this letter. If we do not hear from you, we will assume that no changes will be made and will consider all available avenues, including litigation, to conserve the endangered WVNFS in accordance with the requirements of the Endangered Species Act.

Sincerely,



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