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Sent via Email and Certified Mail Return Receipt Requested

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Re: Notice of Violation of the Endangered Species Act for Failure to Develop a Recovery Plan for the Dusky Gopher Frog

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 a recovery plan for the dusky gopher frog (*Rana sevosa*). ¹

The Center for Biological Diversity (the "Center") is a national, nonprofit conservation organization with more than 450,000 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 dusky gopher frog, and the effective implementation of the ESA.

¹ The FWS's failure to develop and implement a recovery plan for this 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).

Gulf Restoration Network ("GRN") is a network of environmental, social justice, and citizens' groups and individuals committed to restoring the Gulf of Mexico to an ecologically and biologically sustainable condition. 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

Dusky Gopher Frog

The dusky gopher frog (*Rana sevosa*) is a highly imperiled amphibian species currently known from only four sites in Harrison and Jackson counties in southern Mississippi, with only one of these sites regularly showing reproduction by the frog. Spotlight Species Action Plan (May 6, 2009), *available at* http://ecos.fws.gov/docs/action_plans/doc3100.pdf (last visited Nov. 29, 2012). FWS has estimated that less than 100 adult Mississippi gopher frogs remain. *Id*. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events. In addition, regulatory mechanisms remain inadequate in removing the threat of habitat loss. *Id*.

The dusky gopher frog has been listed under the Endangered Species Act for over a decade. Specifically, the gopher frog was listed as an endangered species in December of 2001. 66 Fed. Reg. 62993 (Dec. 4, 2001). 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 designated critical habitat for the dusky gopher frog in June of 2012. 77 Fed. Reg. 35118 (June 12, 2012). The FWS has indicated that it is currently drafting a recovery plan for the gopher frog but no draft recovery plan has been released. Spotlight Species Action Plan (May 6, 2009), available at http://ecos.fws.gov/docs/action_plans/doc3100.pdf (last visited Nov. 29, 2012).

In sum, although the dusky gopher frog is extremely endangered and has been listed for approximately 11 years with finalized critical habitat, it lacks a recovery plan.

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.

² The species was at that time identified as the Mississippi gopher frog (*Rana capito sevosa*), a distinct population segment of the dusky gopher frog (*Rana capito*).

A recovery plan for the dusky gopher frog would provide a blueprint for actions that will promote recovery and identify goals for its conservation. Timely development and implementation of a recovery plan 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 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 the gopher frog a recovery priority number of 5. *See* U.S. Fish and Wildlife Service, Report to Congress on the Recovery of Threatened and Endangered Species: Fiscal Years 2009-2010, *available at* http://www.fws.gov/endangered/esa-library/pdf/Recovery_Report_2010.pdf (last visited Nov. 29, 2012). 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 a recovery plan would not promote the conservation of the dusky gopher frog, 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 Dec. 20, 2012).

The dusky gopher frog has been listed for approximately 11 years, but it lacks a recovery plan. The failure to develop and implement a recovery plan for this 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 the dusky gopher frog.

CONCLUSION

The FWS's failure to develop a recovery plan for dusky gopher frog violates the ESA. Continued delay is harming the prospects for recovery of this 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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Center for Biological Diversity

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