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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 Houston Toad

On behalf of the Center for Biological Diversity, 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 (“Service”) is in violation of Section 4(f) of the ESA, 16 U.S.C. § 1533(f), for its failure to develop and implement a legally valid recovery plan for the endangered Houston toad (Bufo houstonensis) nearly fifty years since the species first received protections.

The Center for Biological Diversity (the “Center”) is a national, nonprofit conservation organization with more than 1.6 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 Houston toad, and the effective implementation of the ESA.

BACKGROUND

I. The Endangered Species Act

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”1 It was enacted to “provide a program for the conservation of . . . endangered species and threatened species” and to “provide a means by which the ecosystems upon which endangered species and threatened species depend may be conserved.”2 Once listed as “endangered” or “threatened” under the ESA, a species is entitled to the ESA’s substantive protections, and federal agencies assume duties to conserve it.

Section 4(f) of the ESA directs the Service to develop and implement recovery plans for the “conservation and survival” of listed species unless the agency finds that “such a plan will not

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promote the conservation of the species.”\textsuperscript{3} The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which measure provided pursuant to this Act are no longer necessary.”\textsuperscript{4}

Each recovery plan must include, to the maximum extent practicable, “a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species; objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and estimates of the time required and the cost to carry out those measures needed to achieve the plan’s goal and to achieve intermediate steps toward that goal.”\textsuperscript{5}

The ESA also provides an “affirmative duty” for federal agencies to conserve listed species in section 7(a)(1). It provides that all federal agencies shall “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed . . . .” 16 U.S.C. § 1536(a)(1).

II. The Endangered Houston Toad

Nearly 50 years ago, the Houston toad was the first frog species listed under the Endangered Species Conservation Act of 1969, the precursor to the Endangered Species Act of 1973.\textsuperscript{6} The Houston toad has continued to decline across its range since listing, and habitat loss and fragmentation continue to occur throughout the toad’s range.\textsuperscript{7}

The Houston toad is a two to three and a half inch long toad found only in Texas. The toad is a habitat specialist, appearing to prefer habitats with deep sandy soils and forest cover that are near breeding ponds.\textsuperscript{8} Breeding pool characteristics vary and can be shallow, but water must persist for at least 60 days for successful reproduction.\textsuperscript{9}

The Houston toad historically ranged across the central coastal region of Texas, but disappeared from the Houston area (Harris, Fort Bend and Liberty counties) during the 1960s, likely due to

\textsuperscript{3} Id. § 1533(f).
\textsuperscript{4} Id. § 1532(3).
\textsuperscript{5} Id. § 1533(f)(1)(B)(i)-(iii).
\textsuperscript{9} Id.
the combination of rapid urban expansion and a prolonged drought.\textsuperscript{10} The species is now thought to be extirpated in these three counties.\textsuperscript{11}

In the rest of its range, researchers have seen the Houston toad decline precipitously since the 1980s. While surveyors reported 30 to 1,000 Houston toads per breeding pond in Bastrop County in the 1980s, that estimate declined to only 2,000 toads total for the entire county by 1994. And by 2003 surveyors estimated that only 100-200 individuals survived in Bastrop County. Extensive surveys for Houston toads conducted in seven counties in 2011 resulted in detections of only 12 individuals across all counties. Only Bastrop (9), Austin (1), and Burleson (1), and Lavaca (1) counties had Houston toads detected in these surveys.

At Griffith League Ranch in Bastrop County, one of the primary recovery sites for the toad, results from headstarting efforts appeared positive in 2010.\textsuperscript{12} However, the area subsequently experienced extreme drought conditions and a high-severity wildfire in 2011, which resulted in no documentations of reproductive activity that year. Subsequent intensive surveys at the Ranch resulted in detections of Houston toads but in much lower numbers: 2 individuals in 2011, 13 in 2012, and 5 in 2013.\textsuperscript{13}

\section*{III. The Houston Toad’s Outdated and Legally Inadequate 1984 Recovery Plan}

The U.S. Fish and Wildlife Service developed a document styled as a “Recovery Plan” for the Houston toad in 1984.\textsuperscript{14} No revisions or updates to the recovery plan have been made in the intervening 35 years, despite new information learned about the toad and the failure of the plan to include recovery criteria.

In November 2011, the Service published its first five-year review for the Houston toad, more than forty years after the toad was protected.\textsuperscript{15} The Service noted that the 1984 recovery plan “does not reflect the most up-to-date information on the species’ biology, nor does it address all five listing factors that are relevant to the species.”\textsuperscript{16} For example, the 1984 Recovery Plan describes the Houston toad’s historical distribution as only spanning seven counties, but range-wide surveys from 1989-1992 resulted in the detection of the toad in five new counties, and the toad was subsequently detected in Lee County.\textsuperscript{17}

\textsuperscript{10} 2011 Five-Year Review.
\textsuperscript{13} Id.
\textsuperscript{15} 2011 Five-Year Review.
\textsuperscript{16} Id.
In the 2011 five-year review, the Service also acknowledged that “there are no recovery criteria in the 1984 Recovery Plan. Instead, the 1984 plan details a series of recovery goals,” and explains that “an updated recovery plan that includes objective, measurable criteria is needed.”\textsuperscript{18} The Service’s “Recommendations for Future Actions” in the five-year review include the need for “[a]n updated recovery plan that includes objective, measurable recovery criteria.”\textsuperscript{19} Although the 2011 review explains that the Service was “working with a recovery team to develop a new recovery strategy for the Houston toad and beg[a]n drafting an updated recovery plan,” no such plan has been released to date.\textsuperscript{20}

The Service subsequently published a five-year review for the toad in 2018, but this document failed to address the need for an updated recovery plan.\textsuperscript{21} This cursory review simply concluded that “[t]he evaluation of threats affecting the species under the factors in 4(a)(1) of the Act and analysis of the status of the species in our 2011 5-year review remains an accurate reflection of the species current status.”\textsuperscript{22}

**ESA VIOLATION**

In 2011, the Service explicitly acknowledged that its 1984 Recovery Plan does not reflect the best available science, does not address all five listing factors that are relevant to the species, and does not contain measurable, objective recovery criteria. The Service’s failure to update the plan violates Section 4(f) of the ESA. 16 U.S.C. § 1533(f). That provision provides, in pertinent part, that the Service “shall develop and implement plans [] for the conservation and survival of endangered species and threatened species . . .” \textit{Id.} § 1533(f)(1). Such plans “shall, to the maximum extent practicable . . . incorporate [] objective, measurable [recovery] criteria” and “such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the listed species.” \textit{Id.} § 1533(f)(1)(B). Where, as here, the Service itself has acknowledged that the existing plan is badly outdated, fails to address the full extent of the species’ range and relevant information about the species’ biology, section 4(f)(1) imposes an obligation on the Service to “develop and implement” a plan that will in fact provide for the “conservation and survival” of the species.

The Service also admits that the 1984 Recovery Plan fails to provide the legally required “objective, measurable criteria” for recovery. Accordingly, to date the Service has never fulfilled the ESA’s basic requirement that it “shall develop and implement” a legally compliant recovery plan for the Houston toad. 16 U.S.C. § 1533(f)(1). This violates the Service’s mandatory duty under section 4(f) of the ESA, as well as the obligation of all federal agencies to “utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species . . . .” \textit{Id.} § 1536(a)(1).

\textsuperscript{18} 2011 Five-Year Review.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} U.S. Fish and Wildlife Service. 2018. Houston toad (\textit{Bufo houstonensis}) 5-year review: summary and evaluation. Austin Ecological Services Field Office, Austin, Texas. 1 p
\textsuperscript{22} \textit{Id.}
CONCLUSION

If the Service does not act to correct the violation described in this letter within sixty days, the Center will pursue litigation in U.S. District Court. If you wish to discuss this matter or believe this notice is in error, please contact Jennifer Loda at the number below.

Sincerely,

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