

January 25, 2012

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Re: Center for Biological Diversity ("Center") and Save Our Springs Alliance
("SOS") Notice of Intent to Sue ("NOI") the U.S. Fish and Wildlife
Service ("Service") for Alleged Violations of the Endangered Species Act
("ESA")

Dear Ms. Adkins, Mr. Greenwald, and Mr. Bunch:

We represent the Williamson County Conservation Foundation (the "Foundation") in connection with a number of environmental matters, including the creation and implementation of the Williamson County Regional Habitat Conservation Plan. The purpose of this letter is to respond to your NOI dated January 9, 2012, addressed to the Honorable Kenneth Salazar, Secretary of the U.S. Department of the Interior, as well as others representing the Service. As further explained below, your NOI states that the Service must issue an emergency listing of the Jollyville Plateau salamander (*Eurycea tonkawae*) ("salamander") pursuant to the ESA. The Foundation is responding to your NOI because the salamander is located in southern Williamson County and therefore the Foundation would be affected by the outcome of this potential lawsuit. This letter is not intended to be a comprehensive response to your NOI, and the Foundation reserves any and all claims, defenses, and counterclaims that it may have in connection with this matter.

Your NOI asserts that the Service has violated ESA section 4 (b)(3)(C)(iii) by "failing to 'prevent a significant risk' to the 'well-being' of the salamander by 'mak[ing]"

prompt use of the authority' to issue an emergency regulation listing the salamander as threatened or endangered." Specifically, you assert that shaft leaks near salamander habitat in connection with the City of Austin's construction of Water Treatment Plant 4, compounded by the current Texas drought, have created a significant risk to the well-being of the salamander such that the Service is required to exercise its emergency listing power under ESA section 4 (b)(7). For the reasons explained below, we do not believe that you have raised a judicially reviewable claim against the Service. We also believe that the threatened lawsuit would cause the Center to be in violation of its previous settlement agreement with the Service, which has been approved by a federal court.

It is important to emphasize that an emergency listing of the salamander would suddenly disrupt and severely affect Williamson County's economic growth. The Foundation understands that the Service may list the salamander in the near future because it will issue a proposed listing rule or not warranted finding by the end of Fiscal Year 2012. However, further speeding up this decision through an emergency listing would too hastily impose stringent regulatory requirements and compound negative consequences on Williamson County's economic growth. An emergency listing of the salamander would be particularly devastating at a time when Williamson County is showing economic growth and producing jobs in a difficult national economy.

The NOI does not state a judicially reviewable claim.

The NOI asserts that the Service is in violation of the ESA due to its failure to initiate emergency listing for the salamander, but this claim is not judicially reviewable because the determination that an emergency exists is subjective and reserved to the specialized biological expertise of the Service. Under the citizen suit provision of ESA section 11(g)(1)(C), any person can commence a civil suit against the Secretary if he fails to perform "any act or duty under [ESA section 4] which is *not discretionary*." 16 U.S.C. § 1540(g)(1)(C) (emphasis added). Your letter asserts that the Secretary is in violation of ESA section 4 (b)(3)(C)(iii) for failing to initiate an emergency listing rule for the salamander, but this is not a reviewable claim because the determination as to whether an emergency exists is a discretionary act reserved solely to the Secretary and therefore not reviewable under the ESA.

Under ESA section 4, once the Service determines that listing a species is warranted but precluded by other higher priority actions, that species is placed on the candidate list and enjoys limited added protections, including the requirement that the Secretary "shall make prompt use of [its emergency listing authority] to prevent a significant risk to the well being of any [candidate] species." 16 U.S.C. § (b)(3)(C)(iii); *id.* § (b)(3)(B)(iii). The placement of the word "shall" in this provision indicates that the Secretary's only nondiscretionary obligation under this provision is a procedural one related to timing: he must *promptly* issue an emergency listing rule *if* he has determined that an emergency exists. The actual determination that an emergency exists, however, is for the Secretary alone to make.

Court decisions unequivocally support that the Secretary's determination as to the possible existence of an emergency is a discretionary act. As explained by the D.C. Circuit Court of Appeals:

Although [section 4(b)(7)] does permit the Secretary to list a species based upon an emergency posing a significant risk to the well-being of [that] species, that type of listing is expressly committed to the Secretary's discretion, the exercise of which is not structured by any statutorily prescribed criteria or procedures. The [citizen group] therefore had no statutory right to petition the Secretary for an emergency listing under [section 4(b)(7)], and had no right to a decision meeting any particular procedural or substantive standards.

Fund for Animals, Inc. v. Hogan, 428 F.3d 1059, 242-43 (D.C. Cir. 2005) (internal citations omitted). Other courts have similarly held that initiation of an emergency listing rule is at the sole discretion of the Secretary.¹

Here, the Service has determined that an emergency affecting the wellbeing of the salamander does not exist. Dr. Benjamin Tuggle, Regional Director of Region 2 of the Service, responded to SOS's petition to list and/or emergency list two distinct population segments of the salamander in a letter dated December 1, 2011. In that letter, Dr. Tuggle stated that no emergency exists with respect to the salamander. Dr. Tuggle also stated that the Service is currently reviewing the status of the salamander because it is required to complete a proposed listing rule by the end of Fiscal Year 2012. Although your letter asserts that "conditions have worsened for the salamander" since SOS's September 30, 2010 listing petition, the Service is well aware of current conditions since it is currently in the process of reviewing the salamander's status and the City has kept the Service fully apprised of its actions in connection with Water Treatment Plant 4. Therefore, because the Secretary has no obligation to promptly use his emergency listing powers when he has determined that no emergency exists, your claim that the Service is in violation of ESA section 4 is not judicially reviewable.

The theoretical suit would violate a previous court-approved settlement agreement.

On September 9, 2011, the U.S. District Court for the District of Columbia approved a settlement agreement between the Center and the Service, which made all terms of the agreement enforceable as an order of the Court.² The settlement agreement

¹ See *Institute for Wildlife Protection v. Norton*, 303 F.Supp.2d 1175, 1180 (W.D. Wash. 2003) (stating that "nothing about the language of [section 4(b)(7)] indicates, either directly or indirectly, that the Congress intended that the option of emergency listing was non-discretionary."); see also *American Bird Conservancy v. Kempthorne*, 2007 WL 2972548 at *7 (D.N.J. 2007) (stating that "[ESA section 4(b)(7)] places no mandatory duty upon the Secretary to exercise this 'emergency' procedure in any situation.>").

² See Order Granting Joint Motion for Approval of Settlement Agreement and Order of Dismissal of Center for Biological Diversity's Claims, *In re Endangered Species Act Section 4 Deadline Litigation* (D.D.C.).

requires the Service to make listing determinations for a large number of species on a specified schedule.³ In exchange, the Center agrees to end a number of current ESA section 4 lawsuits against the Service, as well as limit the number of new ESA section 4 lawsuits it will bring against the Service to no more than 10 each year.

The salamander is a species subject to the terms of the settlement and therefore the Center's entire suite of rights with respect to the salamander is embodied within the agreement. According to the settlement terms, the Service must submit a proposed listing rule or a not-warranted finding to the Federal Register for the salamander by the end of Fiscal Year 2012.⁴ The Service is abiding by the terms of the settlement agreement by currently reviewing the salamander's status and planning to issue a proposed listing rule or not warranted finding for the species by the end of this fiscal year. The settlement does not address emergency listings under ESA section 4 and does not state that the Center has reserved the right to make these types of lawsuits with respect to any species covered by the settlement. Therefore, if you do bring this suit, the Center will be in breach of contract under the settlement, as well as contempt of court as the settlement terms have been accepted by a court and are enforceable as a court order.

Thank you for your consideration of this response to your NOI.

Very truly yours,

Alan M. Glen

cc: The Honorable Kenneth Salazar (Secretary, U.S. Department of the Interior)
Dan Ashe (Director, U.S. Fish & Wildlife Service)
Dr. Benjamin Tuggle (Regional Director, Region 2, U.S. Fish & Wildlife Service)
Michelle Shaughnessy (Assistant Regional Director for Ecological Services,
Region 2, U.S. Fish & Wildlife Service)
Adam Zerrenner (Field Supervisor, Austin Ecological Services, U.S. Fish &
Wildlife Service)
Commissioner Lisa Birkman (Commissioner, Precinct 1, Williamson County)

2011), *available at*
http://www.fws.gov/endangered/improving_ESA/order_re_approval_of_CBD_agreement_.PDF.

³ See Stipulated Settlement Agreement, In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. 2011), *available at* http://www.fws.gov/endangered/improving_ESA/218963-v1-hhy_071211_exh_1_re_CBD.PDF.

⁴ *Id.* at 5, paragraph 3(b).

Commissioner Valerie Covey (Board President, Williamson County Conservation
Foundation; Commissioner, Precinct 3, Williamson County)
Gary Boyd (Environmental Program Coordinator, Williamson County
Conservation Foundation)