



Via Electronic and Certified Mail

December 3, 2018

Ryan Zinke
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
exsec@ios.doi.gov

Amy Lueders
Southwest Regional Director
Southwest Regional Office
U.S. Fish and Wildlife Service
P.O. Box 1306
Albuquerque, NM 87103-1306
RDLueders@fws.gov

Jim Kurth
Deputy Director of Operations
and Acting Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240
Jim_Kurth@fws.gov

Adam Zerrenner
Field Supervisor
Austin Ecological Services Field Office
U.S. Fish and Wildlife Service
10711 Burnet Rd., Ste. 200
Austin, TX 78758
Adam_Zerrenner@fws.gov

**RE: Sixty-day Notice of Intent to Sue for Violations of the Endangered Species Act
Relating to Failure to Designate Critical Habitat for the Georgetown Salamander and the
Salado Salamander**

Dear Sirs and Madam,

In accordance with Section 11(g) of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), the Center for Biological Diversity (Center) provides this 60-day notice of its intent to sue the U.S. Fish and Wildlife Service (Service) for violations of the ESA¹ in connection with the Service's failure to designate critical habitat for the Georgetown salamander (*Eurycea naufragia*) and Salado salamander (*Eurycea chisholmensis*). Specifically, the Service violated and continues to violate ESA Section 4, which requires the Service to designate critical habitat concurrently with making a determination that a species is endangered or threatened and within one year of publishing a proposed rule to designate critical habitat.²

In May 2004, the Center submitted to the Service a petition to list the Georgetown salamander and the Salado salamander (collectively, "Salamanders") as endangered or threatened under the ESA and to designate critical habitat. At that time, the Salamanders had remained on the candidate waiting list without protection for more than 10 years.

¹ 16 U.S.C. § 1531, *et seq.*; 50 C.F.R. § 402, *et seq.*

² 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C).

Eight years later in August 2012, the Service proposed listing the salamanders as endangered and designating 1,031 acres of critical habitat for the Georgetown salamander and 372 acres of critical habitat for the Salado salamander.³ Another six months later in January 2013, the Service reopened the public comment period on the proposed listings and designation of critical habitat because it had identified and was proposing additional critical habitat units for the Georgetown salamander.⁴ Then, in August 2013, the Service announced a six-month extension of its final decision of whether to list the Salamanders as endangered or threatened species and reopened the comment period on the proposed rule to list them, citing “substantial disagreement regarding the sufficiency or accuracy of the available data relevant to [their] determination.”⁵ The Service again reopened the public comment period on its proposal to list the Salamanders in January 2014, and also requested comments on City of Georgetown’s final ordinances for water quality and urban development, which were proposed to benefit the Georgetown salamander.⁶

On February 24, 2014, the Service listed the Georgetown salamander and Salado salamander as threatened under the ESA.⁷ The Service did not designate critical habitat and did not indicate a need or basis for an extension of time for such designation. On April 11, 2014, the Service published a correction to the final rule, which did not address designation of critical habitat for the Salamanders.⁸ To date, the Service has not finalized a rule or rules designating critical habitat for the Georgetown and Salado salamanders.

The ESA requires the Service to designate critical habitat “concurrently with making a determination . . . that a species is an endangered species or threatened species.”⁹ Only if critical habitat is not determinable at the time of listing may the Service extend the period to designate critical habitat, and such extension may be no longer than one year.¹⁰ Additionally, once the Service publishes notice in the Federal Register of a proposed regulation designating critical habitat, it has one year to either: 1) publish “a final regulation to implement such designation”; or 2) if critical habitat is not determinable, publish notice that it is extending the one-year period by no more than one additional year.¹¹ If the Service avails itself of an extension because it finds critical habitat is not determinable, it must within one year publish a final regulation designating critical habitat “based on such data as may be available at that time.”¹²

The Service has violated the ESA by failing to designate critical habitat within the nondiscretionary statutory timeframes required under the Act. Specifically, the Service failed to designate critical habitat for the Salamanders “concurrently” with its February 24, 2014 rule listing the species as threatened. Likewise, the Service did not publish a final rule designating critical habitat within a year of publishing the proposed rule on January 25, 2013. Based on the statutory timelines, the Service’s designation of critical habitat is more than four years overdue.

³ 77 Fed. Reg. 50,768 (Aug. 22, 2012).

⁴ 78 Fed. Reg. 5,385 (Jan. 25, 2013).

⁵ 78 Fed. Reg. 51,129 (Aug. 20, 2013).

⁶ 79 Fed. Reg. 800 (Jan. 7, 2014).

⁷ 79 Fed. Reg. 10,236 (Feb. 24, 2014).

⁸ 79 Fed. Reg. 20,107 (Apr. 11, 2014).

⁹ 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C).

¹⁰ *Id.* § 1533(b)(6)(C)(ii); 50 C.F.R. §§ 424.12(a)(2), 424.17(b)(2).

¹¹ 16 U.S.C. § 1533(b)(6)(A)(ii); 50 C.F.R. § 424.17(a).

¹² 16 U.S.C. § 1533(b)(6)(C)(ii).

The Service did not indicate a lawful need or basis to extend the timeline to designate critical habitat. Even if it had sought a one-year extension, such an extension would have long expired, as more than five years have passed since the Service published a proposed rule to designate critical habitat on August 22, 2012, and more than four years have passed since the Service published a final rule listing the Salamanders on February 24, 2014.

In conclusion, the Service has failed to timely designate critical habitat for the Georgetown salamander and Salado salamander, and it is in violation of ESA Section 4. The Service will continue to be in violation of the law until it publishes a final rule or rules designating critical habitat for the Salamanders. If the Service does not make the required critical habitat designation for the Salamanders within the next sixty days, the Center intends to file suit in federal court. Please contact us if you have any questions or if you would like to discuss this matter.

Sincerely,

A handwritten signature in cursive script that reads "Ecf Bennett".

Elise Pautler Bennett
Reptile and Amphibian Staff Attorney
Center for Biological Diversity
P.O. Box 2155
St. Petersburg, FL 33731
(727) 755-6950
ebennett@biologicaldiversity.org

Jennifer Loda
Reptile and Amphibian Staff Attorney
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(510) 844-7100 x336
jloda@BiologicalDiversity.org