CENTER for BIOLOGICAL DIVERSITY

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December 30, 2015

Re: Notice of Violations of the Endangered Species Act for Failing to Make Required Findings on a Petition to Protect Barrens Topminnow, the Canoe Creek Pigtoe, and the Beaverpond Marstonia

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 ("FWS") is in violation of Section 4(b)(3) of the ESA, 16 U.S.C. § 1533(b)(3), for failing to make required 12-month findings on our April 20, 2010

petition to protect Barrens topminnow (*Fundulus julisia*), the Canoe Creek pigtoe (*Pleurobema athearni*), and the beaverpond marstonia (*Marstonia castor*) under the ESA.[1]

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 900,000 members and supporters dedicated to the protection of endangered species and wild places. The Center and its members are concerned with the conservation of imperiled species, including freshwater species from the southeastern United States, and the effective implementation of the ESA.

BACKGROUND

The southeastern United States is a global center of freshwater species diversity and is home to an astounding variety of freshwater animals. The rivers and streams which support these animals face many threats including pollution, drought, excessive groundwater withdrawal, development, mining, logging, oil and gas extraction, dams, and global climate change. The Southeast is in the midst of an extinction crisis. More than 50 freshwater species from the region have already been lost. Freshwater species are disappearing at 1,000 the normal background extinction rate.

Though often under-appreciated, freshwater species play an important role in maintaining the health of streams and rivers. The health of the Southeast's waterways, the biodiversity they support, and the human communities in the region are all interrelated. Protecting the freshwater species of the Southeast and the habitat they need to survive will also protect the health of the waterways for human communities.

To address the ongoing Southeast freshwater extinction crisis, on April 20, 2010 the Center for Biological Diversity and allies submitted a legal petition seeking federal protection for 404 imperiled freshwater species from 12 southeastern states. Drawing on hundreds of scientific papers, the 1,145 page petition outlined the threats to the region's aquatic species and why the petitioned species warrant protection under the ESA.[2]

The U.S. Fish and Wildlife Service issued a positive 90-day finding for the Barrens topminnow, Canoe Creek pigtoe, and beaverpond marstonia on September 27, 2011. Federal Register, 76: 59836-59862. The 12-month finding for these species is now more than four years late. Accordingly, the Service is in violation of the law and has abrogated its duty to ensure that protection of endangered species occurs in a timely manner thereby avoiding further decline, increased risk of extinction, and increased cost of recovery.

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[1] The FWS's failure to make the required finding 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).

[2] The Petition is available for download here: http://www.biologicaldiversity.org/programs/biodiversity/1000_species/the_southeast_freshwater_extinction_crisis/pdfs/SE_Petition.pdf

SPECIES SPECIFIC INFORMATION

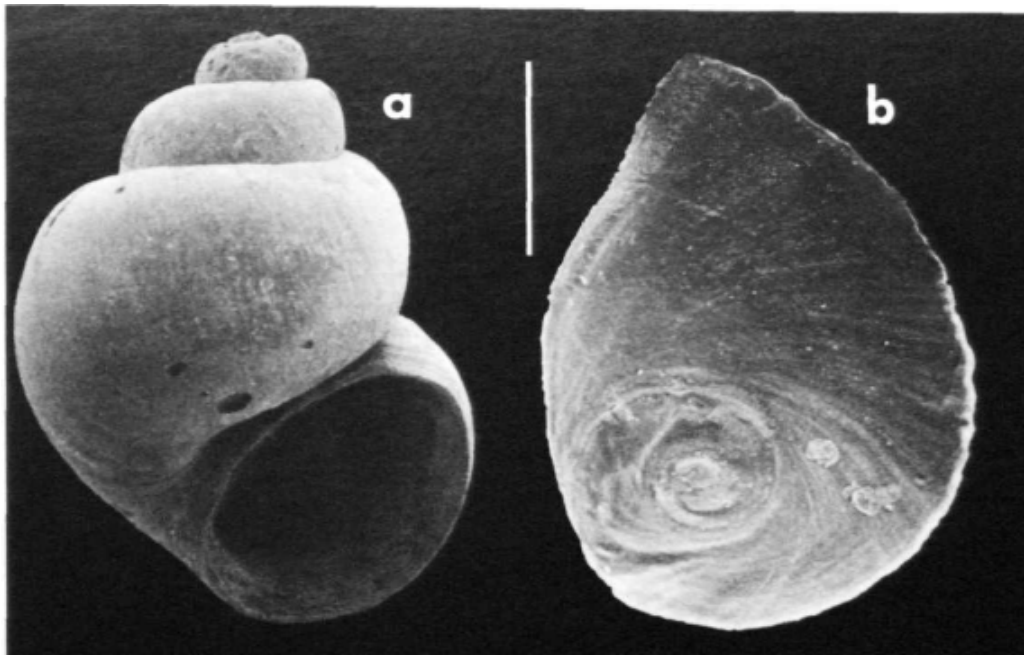
Barrens topminnow (*Fundulus julisia*) is a small freshwater fish from Tennessee that is on the very brink of extinction. The fish is found in only three locations on the Barrens Plateau of south central Tennessee. It is four inches long, brightly colored, and swims near the surface of the water where it preys on mosquito larvae and other insects. It lives in clear spring-fed streams with aquatic vegetation. It is ranked as Endangered by the state of Tennessee, by the American Fisheries Society, and by the International Union for the Conservation of Nature. Its range is just three counties, Cannon, Coffee, and Warren, in the headwaters of the Duck and Elk rivers in the Tennessee River drainage and in the Caney Fork River system in the Cumberland River drainage. It may already be lost from the Duck River watershed. It has declined from14 known sites in the early 1980s to seven sites in the mid-1990s, and is currently known from only two to three viable populations. The population is estimated to have declined from approximately 5,000 total fish in the 1980s to just several hundred by 1995. Reasons for the decline include water diversions and withdrawals for agriculture, drought, water pollution, and predation by invasive mosquitofish. This small vertebrate is in urgent need of protection and conservation action.

Barrens Topminnow Photo Courtesy of J.R. Shute, Conservation Fisheries, Inc.

The Canoe Creek pigtoe (*Pleurobema athearni*), a freshwater mussel also known as the Canoe Creek clubshell, was first discovered in 2006. It lives in only one location, Big Canoe Creek, a tributary of the Coosa River, in northeast Alabama. The mussel is threatened by erosion and water pollution from development, agriculture, and natural gas exploration including fracking. Tar sands exploration is also an emerging threat in Alabama. The mussel is nearly four inches long with a dark yellow to brown shell and a salmon-orange soft body. Juveniles have faint green stripes, and the inside of the shell is iridescent mother-of-pearl white. It is ranked as Endangered by the American Fisheries Society. It is named after the famous malacologist Herbert D. Athearn of Tennessee. The recently discovered mussel has a very limited range and a small population size and should be protected from threats before the population declines beyond recovery. It is known from fewer than two dozen specimens, only one-third of which are recent. Nearly 40 species of aquatic mollusks from the Mobile Basin have already been lost to extinction.

Canoe Creek Clubshell Photo Courtesy of Frank Chitwood, Coosa Riverkeeper

The beaverpond marstonia (Marstonia castor) is a tiny, tan freshwater snail. The shell has four whorls and is up to 2.7 mm tall. It was discovered in 1977 and has not been detected in recent surveys causing scientists to fear that it may be nearly extinct. It is known only from a single creek, Cedar Creek, a tributary of the Flint River in Crisp County, Georgia. It is threatened by pollution from cotton fields, groundwater withdrawal, and urbanization. It is ranked as Critically Endangered by the International Union for the Conservation of Nature. Surveys to determine the snail's status are urgently needed and it should be protected under the ESA on an emergency basis.



Beaverpond Marstonia Shells from Burch 1986 and Hershler 1994

ESA VIOLATION

In response to a petition to list a species as threatened or endangered, the ESA requires that the Secretary to "the maximum extent practicable" within 90 days determine "whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A). The ESA also requires that the Secretary within 12 months determine whether listing is warranted, not warranted, or warranted but precluded. 16 U.S.C. § 1533(b)(3)(B).

We filed our petition seeking protection for this fish, mussel, and freshwater snail on April 20, 2010, and the Service issued its 90-day finding on September 27, 2011. More than four years have passed without the FWS making the required 12-month findings for these species. Accordingly, FWS is violating Section 4 of the ESA and failing to ensure that protection of endangered species occurs in a timely manner thereby avoiding further decline and increased risk of extinction.

CONCLUSION

The Barrens topminnow, Canoe Creek pigtoe, and beaverpond marstonia are threatened by multiple factors and continued delay is harming prospects for the recovery of these highly imperiled animals. 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 overdue findings, we will pursue litigation against the agency. If you have any questions, or would like to discuss this matter, please contact us.

Sincerely,

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