



Protecting endangered species and wild places through science, policy, education, and environmental law.

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Re: Proposed Designation of Critical Habitat for the Alameda Whipsnake (70 Fed. Reg. 60607, October 18, 2005)

These comments are submitted on behalf of the Center for Biological Diversity (“Center”). The Center is a nonprofit, public interest organization dedicated to the protection of native species and their habitats through science, education, policy and environmental law. The Center has over 14,000 members throughout California and the United States.

The Center has participated in the U.S. Fish and Wildlife Service’s (“Service”) processes for designating Critical Habitat for the Alameda whipsnake (“whipsnake”), for example: the Center filed suit against the Service in November 1999 to compel Critical Habitat designation; the Center submitted comments on May 8, 2000, in response to original proposed Critical Habitat; and the Center intervened in the lawsuit filed by the Homebuilders Association and other development interests in June of 2001 challenging the economic analysis of the Critical Habitat designation.

Background

As the Service is well aware, the Endangered Species Act (“ESA”) requires it to designate Critical Habitat for threatened and endangered species. 16 U.S.C. §1533. “Critical Habitat” includes both occupied and unoccupied habitats that are “essential to the conservation of the species.” 16 U.S.C. §1532(5)(A). “Conservation” means using “all methods and procedures which are necessary to bring any endangered or threatened species to the point at which” protections under the ESA are no longer required. 16 U.S.C. §1532(3). Critical Habitat designations (“CHDs”) must be based on “the best scientific data available and after taking into consideration the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat. [The Service] may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.” 16 U.S.C. §1533(b)(2).

The Service’s discretion in balancing the benefits and costs of CHDs is not unfettered. Rather, the Service must consider that one of the major purposes of the ESA is “to provide a means whereby the

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ecosystem upon which endangered and threatened species depend may be conserved.” 16 U.S.C. §1531(b). The ESA also says that “these species of fish, wildlife and plants are of esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people.” 16 U.S.C. §1531(a)(3). These legislative statements reflect a high national priority on conserving threatened and endangered species and the habitats on which they depend. These statements also articulate a variety of national values and benefits inherent in the conservation of such species and their habitats.

If these statutory instructions are not explicit enough, then the U.S. Supreme Court has explained that the ESA makes “it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which [Congress] described as ‘institutionalized caution.’” *TVA v. Hill*, 437 U.S. 153, 194 (1978). “The institutionalization of that caution lies at the heart of [the ESA].” H.R. Rep. No. 93-412, pp. 4-5 (1973). Congress and the Courts have said that this “institutionalized caution” requires the Service to give any threatened or endangered species the benefit of every doubt. H.R. Conf. Rep. No. 96-697, 96th Cong., 1st Sess. 12 (1979); *TVA v. Hill*, 437 U.S. 153, 194 (1978); *Sun Exploration and Production Co. v. Lujan*, 489 U.S. 1012 (1989); *Conner v. Buford*, 848 F.2d 1441, 1454 (9th Cir. 1988) *cert. den. sub nom.*

The proposed whipsnake CHD does not give the Alameda whipsnake any benefit of the doubt. In particular, the proposed CHD is inadequate because: it does not include any unoccupied whipsnake habitat; arbitrarily and without explanation excludes areas previously designated by the Service as critical habitat for the whipsnake or identified as essential for the recovery of the species in the recovery plan for the whipsnake; and incorrectly concludes that the benefits of excluding lands covered by the East Contra Costa County Habitat Conservation Plan (“HCP”) and lands managed by the East Bay Regional Park District (“EBRPD”) outweighs the benefits of including these lands in the CHD.

The Proposed Critical Habitat Designation is Inadequate

Failure to Include Unoccupied Whipsnake Habitat

In the proposed whipsnake CHD, the Service notes that “we are not proposing to designate any areas as critical habitat that lie outside the geographical area presently occupied by the subspecies.” 70 Fed. Reg. 60607 (October 18, 2005) at 60612. The Service’s failure to include unoccupied whipsnake habitat in the CHD is a violation of the ESA. The ESA requires the Service to designate areas as critical habitat if they are necessary for the recovery of the species, not simply its survival. 16 U.S.C. §1532(3), 1532(5), & 1533; *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). In this case, unoccupied habitat is necessary to the survival and recovery of the species.

The Service noted at the time it proposed to list the whipsnake as threatened and in its draft recovery plan for the whipsnake (USFWS 2002)¹ that only five isolated populations of the whipsnake remain in highly fragmented habitat. 62 Fed.Reg. 64306 (December 5, 1997). The Service has stated that “further fragmentation or habitat loss within any of the five populations and any increase in habitat degradation or impediments to movement within the two corridors will undoubtedly affect the ability of the population(s) to rebound from natural or human-induced events.” USFWS 2002, page II-74. The Service has noted that habitat loss and fragmentation from urban development and road construction were the primary reason for state and federal listing of this species, and that habitat fragmentation has

¹ U. S. Fish and Wildlife Service. Draft Recovery Plan for Chaparral and Scrub Community Species East of San Francisco Bay, California. November 2002.

likely prevented or severely reduced movement of individuals between areas of suitable habitat and reduced the total amount of suitable habitat available for the Alameda whipsnake. 62 Fed.Reg. 64306 (December 5, 1997) and USFWS 2002. Finally, the Service has concluded that the past and ongoing fragmentation of Alameda whipsnake habitat makes some populations of this species more vulnerable to extinction, noting that “small, isolated populations are vulnerable to extinction...” USFWS 2002, page II-74. Clearly, if the whipsnake is to recover, much less survive, it must have suitable, unoccupied habitat to allow population growth and expansion. It was a legal error to exclude unoccupied habitat from the proposed CHD.

The Service’s proposed CHD also appears to exclude any habitat which could be restored to provide the Primary Constituent Elements for whipsnakes and aid in the recovery of the species. In their draft recovery plan for the whipsnake, the Service stated “areas of habitat that are currently unsuitable or believed to be low quality are also included within the boundaries in Figure 16. These suboptimal habitat types may be needed for the long-term viability of metapopulations (Carroll et al. 1996). Because the species was listed as threatened due to habitat loss, fragmentation, and degradation, it is prudent to preserve areas that may be restorable in the future. Even if habitat quality is relatively low, these areas provide opportunities for dispersal of young animals from recovering populations. As populations increase the offspring of those individuals living in high-quality habitats often only find available low-quality habitats. This expansion (often followed by contraction) of populations protects some very complex evolutionary processes. Dispersal and population expansion can allow previously unconnected subpopulations to come into contact and exchange genetic information. Natural selection pressures may also vary enough in these suboptimal habitats to create locally adapted subpopulations that differ genetically from the source population. The effects would increase the genetic diversity, and thus the long-term viability, of the species.” USFWS 2002, page II-60.

Arbitrary Exclusion of Areas Previously Designated as Critical Habitat or Identified as Essential for the Recovery of the Species

The Service proposes as Critical Habitat lands that have the Primary Constituent Elements (“PCEs”) for whipsnakes, within the boundaries of 203,342 acres in Contra Costa, Alameda, Santa Clara, and San Joaquin Counties minus 60,105 acres proposed to be excluded under §4(b)(2) of the ESA. However, in March of 2000, in its initial CHD proposed rule, the Service identified 406,708 acres of critical habitat in these 4 counties. 65 Fed. Reg. 12155 (March 8, 2000). The Service has not adequately explained why 203,366 acres previously determined to be essential to the conservation and recovery of the species are not included in the new CHD proposal. Obviously some of this area is not occupied or suitable whipsnake habitat and does not contain the required PCEs due to urban development or roads. Such habitat could reasonably be excluded due to refined mapping or additional information about the unsuitability of the habitat for whipsnakes or its lack of utility as dispersal or connective habitat. However, the Service has not explained or identified why these 203,366 acres were not included and has made no effort to justify their exclusion.

The Service has neglected to provide adequate maps of the proposed CHD that allow the public to determine whether areas previously included as critical habitat have been excluded from the current proposal. The map published lacks the scale or identifying regional features to determine what land has been excluded. The Service should accurately map and specifically discuss the rationale for excluding lands that were previously proposed for inclusion in Critical Habitat. Nonetheless, it is clear that many areas on private land appear to have been excluded above and beyond the Contra Costa HCP and EBRPD lands. Many of these areas may be essential to the conservation and recovery of the whipsnake, and were identified as critical habitat in the original critical habitat designation and

identified as part of recovery units in the draft recovery plan. Some of these areas have recent sightings of whipsnakes or have the PCEs for suitable whipsnake habitat. For example, much of the area of southeastern Alameda County proposed as Unit 5 (Sunol-Cedar Mountain Unit) in the CHD proposed in March of 2000; areas in the Walpert Ridge and Pleasanton Ridge adjacent to the currently-proposed Unit 3; and areas in western Contra Costa County adjacent to the currently-proposed Unit 1 have been arbitrarily excluded. See 65 Fed. Reg. 12155 (March 8, 2000). Likewise, the former connective corridor in Alameda County proposed as Unit 7 (Niles Canyon/Sunol Unit) in the March 2000 proposed CHD has been excluded. This corridor was identified by the Service as important to “maintain genetic and demographic interchange that will help maintain the viability of a regional metapopulation.” 65 Fed. Reg. 12155 (March 8, 2000). The Service has not subsequently published any information that this corridor is not required to allow movement between areas supporting Alameda whipsnakes and facilitate dispersal.

The Service’s recovery draft plan for the whipsnake states that protected areas for the whipsnake should include “enough acreage to protect a buffer area as well as the population itself.” USFWS 2002, page II-78. There is no indication that the Service has included any type of buffer areas from urban development, roads, or disruptive human activity in the proposed CHD.

Exclusion of East Contra Costa County HCP and EBRPD Lands

The Service is proposing to exclude 60,105 acres of land from the CHD under §4(b)(2) of the ESA. The bulk of this habitat is land within the East Contra Costa County HCP (“HCP”). Nowhere in the proposed CHD does the Service identify the acreage or the specific locations of this habitat. It appears that the Service is proposing to exclude 42,665 acres from Unit 4 that are covered by the HCP, since the Service identifies 17,440 acres of EBRPD land that will be excluded.

The rationale for excluding these 42,665 acres is that the HCP will preserve some whipsnake habitat and habitat connections. However, the Service notes that the HCP contemplates preserving only 12,254 to 13,983 acres of whipsnake habitat, a mere 27% of the 51,987 acres of suitable whipsnake habitat identified in the HCP area. Thus the HCP could allow the development or adverse modification of almost $\frac{3}{4}$ of the whipsnake habitat in the HCP area. Given the proposed exclusion of this and other habitat, the Service is only designating 19% of the 69,957 acres of identified Critical Habitat in Unit 4. This is a recipe for further fragmentation of habitat and eventual extirpation of whipsnakes from eastern Contra Costa County. The Service states that they “believe that exclusion of these lands, which are considered occupied habitat, will not result in the extinction of the Alameda whipsnake.” 70 Fed. Reg. 60607 (October 18, 2005) at 60621. However, the Service’s exclusion of significant acreage from the protections of critical habitat is sure to prevent the recovery of the species. Potential development or modification of up to 38,000 acres of the critical habitat of eastern Contra Costa County is sure to lead to the extirpation of whipsnakes from this area. Added to this significant habitat loss will be the anticipated harassment, disturbance and injury from more people and pets, increased vehicle-related disturbance and mortality, increased runoff and urban pollutants and increased risk of wildfire from implementation of the HCP.

The Service’s proposed CHD includes a flawed analysis weighing the benefits of exclusion or inclusion of lands under §4(b)(2) of the ESA. The Service wrongly equates the protections of critical habitat with those of species listing, despite the clear language of the ESA and consistent rulings of federal courts that critical habitat provides an important layer of protection for species beyond listing. The Service’s flawed analysis assumes that preventing jeopardy to the whipsnake is the same as promoting the recovery of the species. In excluding the HCP lands, the Service states “inasmuch as

these areas are currently occupied by the species, consultation for activities that might adversely impact the species, including habitat modification (see definition of "harm" at 50 CFR 17.3), would be required even without the critical habitat designation. Because habitat modification is considered under the jeopardy analysis, we believe the benefits of habitat protection from critical habitat is now small to moderate" and "actions that might adversely affect the subspecies are expected to have a Federal nexus, and would thus undergo a consultation with the Service under section 7 of the Act. The jeopardy standard of section 7 of the Act, and routine implementation of habitat preservation through the section 7 process, as discussed in the economic analysis, provide assurance that the subspecies will not go extinct. In addition, the subspecies is protected from take prohibitions in section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat."

The Service is proposing to exclude 17,440 acres of EBRPD land from the CHD, but does not describe what portions of EBRPD lands these are, why they were chosen, or what management activities may be conducted with federal permits or funding on EBRPD lands that are detrimental to whipsnakes. The impacts of recreational activities, livestock grazing, and roads on EBRPD lands proposed for exclusion were not discussed by the Service.

The Service's Proposed Economic Analysis for Whipsnake CHD

The Center continues to be disappointed in and increasingly concerned and frustrated by the economic analyses used by the Service in making critical habitat designations ("CHDs"). Specifically, the Service has a pattern of over-estimating costs, adding costs not attributable to CHDs, and dismissing, discounting and not even acknowledging benefits that derive from CHDs.

The Service's economic analysis for the whipsnake CHD must adequately identify, discuss, quantify and qualify values and benefits that would derive from the proposed CHD, particularly positive economic impacts or social benefits that could derive from the proposed CHD. 16 U.S.C. §1533(b)(2). Not all benefits of CHD are biological; Congress itself identified national values and benefits derived from the conservation of species and their habitats to include "esthetic, ecological, educational, historical, recreational, and scientific value[s]." 16 U.S. C. §1531(a)(3). Increases in land and home values due to being near preserved whipsnake habitats must be considered.

Other economic and non-economic benefits that could result from the proposed CHD, and that should be considered and evaluated include:²

- existence value
- social welfare
- input to regional economics
- use values
- conservation bank revenues
- genetic preservation
- ecosystem benefits
- improved water quality
- improved habitat for non-target species
- recreational/educational/cultural benefits

² For a more complete list and discussion of benefits derived from species and habitat conservation, see, Bergstrom, J.C. 2002. Postproductivism and Rural Land Values. Working Paper, available on request. jbergstrom@agecon.uga.edu.

improved air quality
improved flood/drought mitigation
maintenance of biodiversity

Economic Costs of CHD

Costs due to other regulatory requirements and assumed time delays cannot properly be included. The economic analysis must distinguish the costs specific to the proposed critical habitat designation from the costs of the whipsnake ESA listing and other costs that would be incurred whether critical habitat is designated or not. Including so-called “co-extensive” costs would significantly inflate the costs in the overall analysis, and improperly tip the scales away from including lands in critical habitat designations.

Protections afforded by the critical habitat designation are separate from and largely subsequent to protections afforded by Sections 7, 9 and 10 of the ESA. Protections under Sections 7, 9 and 10 of the ESA were triggered for the whipsnake when it was first listed as endangered in 1997. Any costs associated with these protections are not “coextensive” with critical habitat designation and would be incurred regardless of CHD designation.³

Similarly, the Army Corps of Engineers’ (“Corps”) regulatory authority under the Clean Water Act is not co-extensive to the effects of critical habitat designation. The Corps’ authority under the Clean Water Act is not focused on endangered species conservation. That obligation comes from the ESA itself, and the listing of a species as threatened or endangered. It is not redundant to the Corps’ obligations under the Clean Water Act, and economic impacts triggered by critical habitat designation under the ESA cannot be considered “co-extensive” with regulatory restrictions and economic impacts that flow from the Clean Water Act programs and authorities.

Any time delays associated with Section 7 consultation or other requirements triggered by the designation above and beyond project delays resulting from baseline regulatory processes cannot properly be included in the economic analysis for critical habitat designation. The trigger for the Section 7 consultation process was the listing of the whipsnake in 1997, not the proposed CHD.

Conclusion

The Service’s proposed CHD for the Alameda whipsnake is flawed, incomplete and inadequate. The cornerstone of the Endangered Species Act’s success has been the protection of “critical habitat,” which provides protection of areas not currently occupied by the species and protects essential habitat from destruction or adverse modification. Scientific studies have shown that species with their critical habitats protected by the Endangered Species Act are twice as likely to be recovering as those that do not.⁴ The USFWS has no documentation to support their absurd claims that critical habitat does not provide additional protection to species, or even that these protections are outweighed by the costs of such designations.⁵ The Alameda whipsnake cannot afford to lose any more suitable habitat nor suffer

³ Efforts by the Service to include these costs stems from a misinterpretation of *New Mexico Cattle Growers Ass’n v. U.S. Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). In that case, the court said the Service must conduct “a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable coextensively with other causes.” *Id.*, at 1285. The economic analysis for the proposed CHD should not, and legally cannot, include or incorporate costs or impacts that would otherwise already be incurred.

⁴ See www.biologicaldiversity.org/swcbd/Programs/policy/ch/sub1.html

⁵ See www.biologicaldiversity.org/swcbd/activist/Manson-CH-FOIA.pdf

further fragmentation of currently occupied habitat. By excluding known and suitable whipsnake habitat that has previously been identified as essential for the recovery of the species, the Service has arbitrarily denied important critical habitat protections to the whipsnake and is jeopardizing the recovery of the species.

Sincerely,

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