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ESA opponents to challenge critical habitat for 48 Calif. species

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PORTLAND, Ore. -- In one of the most sweeping challenges to the Endangered Species Act in recent history, California builders, farmers and business leaders plan to file suit against critical habitat designations for 48 federally protected species throughout the state, according to a legal notice filed yesterday. The Pacific Legal Foundation, whose lawyers have challenged numerous ESA provisions in the past, said it will sue the government's two leading species agencies -- the Fish and Wildlife Service and National Marine Fisheries Service -- for designating broad swaths of land as critical habitat instead of identifying only the areas that are essential to species conservation. PLF also charges in its 60-day notice of intent to sue that the agencies have routinely violated ESA by understating the economic hardships critical habitat designations create on private landowners and businesses statewide.

The plaintiffs in the case include the Home Builders Association of Northern California, the Building Industry Legal Defense Foundation, the California Chamber of Commerce, the California State Grange and the Greenhorn Grange. The groups are challenging critical habitat designations for every California species not already subject to some form of litigation and for which the six-year statute of limitations has not expired.

California is home to more federally protected species than all but one other state, Hawaii, in part because of its large size but also because it incorporates three of the nation's six biodiversity hot spots, according to scientists who have studied U.S. plant and animal diversity and distribution (Land Letter, Jan. 4, 2002). As such, efforts to protect species routinely clash with development interests that are trying to provide housing, utilities, transportation networks and workspaces for the state's expanding population.

PLF maintains that time and time again, FWS and NMFS do not fully consider the economic downsides of critical habitat upon the state's economy. "The federal government has repeatedly ignored the impact of ESA regulation on California property owners, business and communities," said PLF attorney Reed Hopper.

To bolster his case, Hopper pointed to a 2003 Northern California district court decision in which a judge ruled that the designation of more than 400,000 acres of critical habitat for the Alameda whipsnake would indeed have economic consequences. Hopper said he hopes to have the whipsnake ruling applied to the 48 species at issue in the new lawsuit, and then get the agencies to undertake a "more accurate" analysis of the economic effects of critical habitat.

FWS spokesman Jim Nickles, while declining comment on the pending PLF lawsuit, explained that his agency's approach to economic analyses are constrained by ESA itself. That is because the regulations associated with critical habitat only apply to federal land or for activities involving a federal permitting nexus. Thus, the economic impacts are often found to be small, he said.

But for many activities, such as homebuilding, federal permitting requirements are at issue, according to PLF, as was the case with the whipsnake where much of the designated property was slated for housing.

Environmentalists, too, have attacked the Bush administration's approach to critical habitat, but on very different grounds. Species advocates say FWS and NMFS often exaggerate the negative economic effects of a project by factoring in all costs associated with listing a species rather than the isolated costs of designating critical habitat (Greenwire, June 25). Environmentalists also have charged the agencies with ignoring the benefits of critical habitat designations, including improved

recreational opportunities, increased tourism and cleaner water (Greenwire, April 19).

In preparing its sweeping litigation effort, PLF also hopes to establish a legal standard to be used nationwide for designating critical habitat, much like that laid out by the judge in the whipsnake case, according to Hopper. Too often, the service simply designates large swaths of land as critical habitat without regard to whether parcels are already developed and without explaining why the land is essential to the species conservation, he said.

Hopper said the new lawsuit also will try to force the agencies to establish recovery goals at the same time they designate critical habitat, which would help provide certainty to landowners and businesses alike, he said. "Everyone wins, because if we can get the species recovered fast, faster than we could by just ignoring recovery, [the species] can recover faster and the landowners win because it reduces the regulatory burdens faster," Hopper said.

Kieran Suckling of the Center for Biological Diversity, which intervened in the whipsnake case, said the PLF lawsuit will have to wait until the whipsnake ruling, which CBD appealed after FWS let the lower court ruling stand, is decided by the 9th Circuit Court of Appeals.

Suckling said it is telling that PLF announced its lawsuit just after the presidential election -- a full year and a half after the district court ruled on the whipsnake. "[PLF may be] planning that the Bush administration will not defend itself in this case as well," Suckling said.

Nickles questioned a claim in PLF's lawsuit announcement citing the California State Association of Counties' claim that 42 percent of California is designated critical habitat -- or, 42 million acres out of a total 100 million acres. "I would like to see their documentation," Nickles said of the assertion.

According to Suckling, the 42 million figure is a fabrication by ESA opponents, noting that his tally shows California's total designated critical habitat covers a much smaller area, about 15 million acres.