

California Native Plant Society

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Chief
Division of Endangered Species
U.S. Fish and Wildlife Service
1849 C Street N.W., Mailstop ARLSQ-420,
Washington, D.C. 20240

Regarding: Notice of Intent To Clarify the Role of Habitat in Endangered Species
Conservation

To whom it may concern:

The following are the comments of the California Native Plant Society (CNPS) on the proposal (Notice) to revise procedures for designating critical habitat (CH) under the Federal Endangered Species Act (FESA). The CNPS is a non profit organization of more than 10,000 laypersons and professional botanists. The mission of the California Native Plant Society is to increase the understanding and appreciation of California's native plants and to preserve them in their natural habitat through scientific activities, education, and conservation. Our members and chapters work closely with the U.S. Fish and Wildlife Service (USFWS) and other State and Federal agencies to manage and conserve rare and common botanical resources in California.

We welcome the initiation of public discussions of the role of CH in the conservation of listed species. However we are troubled by some of the assumptions in this Notice. The Notice asserts that the CH designation and consultation system does not function properly and must therefore be altered, perhaps even abandoned. However, the Notice provides primarily unsubstantiated statements of opinion to support this claim. We agree that current USFWS policies do not allow CH to fulfill its role in meeting the goals of the FESA. We do not agree that the solution is to restrict the role of CH in endangered species management, or to eliminate it altogether. Our comments will discuss issues raised in the Notice and will present suggested regulatory changes to address these issues.



Dedicated to the preservation of California native flora

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A. Resource limitations to USFWS

A premise of the Notice is that it is difficult or impossible for the USFWS to fully comply with legal requirements to determine CH and consult under Section 7 for each listed species. The Notice discusses at length several examples of how time consuming it is for the USFWS to perform this duty. The Notice implies that because the USFWS does not currently have adequate resources to perform this task, the task should no longer be required.

It is true that in recent years resource limitations have made it difficult for the USFWS to fulfill all of its legal obligations. However, the primary sources of resource limitation are (1) a Congress dominated by opponents of strong protection for rare species, and (2) decisions by USFWS to resist listing of species and designation of CH leading to a series of successful and expensive citizen lawsuits. Thus, one primary source of resource limitation may be temporary, and another is directly due to – presumably alterable - USFWS policies.

We are particularly startled by the statements in the Notice claiming that litigation regarding CH somehow has impaired the USFWS' ability to perform other important conservation duties, such as listing. The sole reason that litigation has been brought regarding CH is that the USFWS has deliberately chosen to avoid some of its legal obligations. Simple compliance with the law would preclude successful litigation on this issue and would save money for the USFWS and the taxpayer. We suggest that the USFWS consider this option.

Moreover, there has been more litigation regarding failure to list species than there has been regarding CH. Does the USFWS plan next to abandon listing on this basis?

We do not agree that the types of resource limitations that currently face USFWS constitute a sufficient reason to weaken habitat protections in the FESA regulations. Instead we suggest that the USFWS

- (i) embrace full compliance with all requirements of FESA to avoid expensive and time consuming litigation, and
- (ii) develop and present realistic budget requests to Congress that accurately reflect the workload facing the agency.

B. Benefits of Critical Habitat Designation Augment those of Listing

Another premise underlying this Notice is that listed species realize no conservation benefits from CH that they do not realize from listing and resulting jeopardy consultations. The Notice states, "we have long believed that, in most circumstances, the designation of "official" critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources." We disagree.

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1. Better Science and Management Through Critical Habitat Designation

First, consultation is not the only conservation benefit that species realize from CH designation and management. As a recent Congressional Research Service report has pointed out (Baldwin, 1999), CH designation forces both the USFWS and other interested parties to consider, based on the best scientific data, what habitat is critical for the recovery of the listed species. This is an invaluable process that, due to fiscal, staffing, and time constraints, may not be performed as rigorously in the absence of a CH determination.

CH designation also frequently produces high quality non binding guidance to landowners regarding how to protect listed species on their lands. Since CH management cannot be directly regulated in the absence of a Federal nexus, such guidance is often optional. However, landowners who implement the guidance can provide significant conservation benefit to listed species.

CH designation provides scientific information that is essential to the recovery and habitat conservation planning processes. CH designation provides more direct and explicit protection than jeopardy consultation for habitat-dependent processes that are critical for species survival and recovery, such as hydrological processes that require certain watershed or water table management regimes. CH designation also helps agencies to prioritize lands for future acquisition, again providing the possibility of substantial conservation benefit to listed species. Thus, the CH designation process alone, even in the absence of consultation, can provide multiple benefits to listed species.

In particular CH designation, and the information gathering and scientific analysis that accompany it, are essential to effective habitat conservation planning. Habitat conservation planning increasingly dominates USFWS implementation of the FESA. However, habitat conservation plans are prepared by applicants rather than by USFWS biologists and other experts. By definition, therefore, habitat conservation plans include and may be dominated by considerations other than species recovery. CH, on the other hand, is that habitat which is "essential for the conservation of the species" (FESA Sec. 3 (5)(A)(ii)) and is selected "on the basis of the best scientific data available" (FESA, Sec. 4 (b)(2)). Because it is a scientific rather than a political process, and is focused primarily on recovery, CH designation places the habitat needs of the species in question above other considerations and thus yields more accurate and complete information regarding species requirements.

Current Federal policy discourages the designation of private land as CH because consultation requires a Federal nexus and thus CH designation of private land is seen as useless. The Notice states that "...on private land, where no Federal involvement exists, a critical habitat designation has no regulatory impact." As outlined above, although CH designation on private land may not have direct regulatory impacts, it may furnish many significant conservation benefits to listed species. We suggest that the USFWS policies

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be changed to allow increased designation of suitable private land as CH, particularly in cases where no suitable Federal lands exist. CH should be designated based on the habitat needs of species, irrespective of ownership or political boundaries.

2. Designation of Unoccupied Habitat Provides Important Benefits

Second, CH designation is the only opportunity the FESA provides to protect unoccupied habitat which may be indispensable for recovery. Despite its predominant contention that CH provides little benefit, even the Notice acknowledges that CH designation does benefit species where unoccupied habitat is designated. However, the Notice attaches little significance to this since unoccupied habitat is designated for only a small minority of the very few listed species that have designated CH. Since even the Notice acknowledges the value of unoccupied CH, the failure to designate such CH is difficult to understand. Based on the information in the Notice, then, one way to increase the benefits of CH clearly would be simply to designate more unoccupied habitat.

We have long been disappointed by the failure to designate unoccupied habitat. For plants, the median number of individuals in a taxon at the time of listing is very low - 119.5 individuals, according to one study (Wilcove et al., 1993). Species represented by so few individuals generally have experienced substantial reductions in range and destruction of habitat. In fact, according to the Notice, "the present or threatened destruction, modification or curtailment of its habitat or range" (FESA Sec. 4 (a)(1)(A)) is the most frequently cited basis for listing species. Protection of unoccupied habitat is thus clearly necessary in order to have any chance of achieving the recovery goals of the FESA.

Many species experience substantial variation in range or numbers from year to year. For example, the location and population sizes of many annual plants changes each year depending on temperature and rainfall. An example of this kind of situation would be an ephemeral desert plant that is only visible every few years, but requires suitable habitat when it does germinate and reproduce. Protection of unoccupied suitable habitat allows species to migrate or expand their numbers or range as environmental conditions dictate. This ability to relocate in response to changing conditions is of course becoming increasingly crucial as global climate change accelerates.

We suggest therefore that the USFWS alter its regulations and policies so that unoccupied CH is designated more frequently. Specifically, 50 CFR § 424.12(e), which currently provides that unoccupied critical habitat will be designated only after a determination that the currently occupied habitat is insufficient to effect species recovery should be deleted. All habitat that is "essential to the conservation of the species" (FESA Sec. 3 (5)(a)(ii)) should be designated as critical, irrespective of occupancy at the time of listing.

Note, however, that designation of unoccupied CH should not become a reason to avoid designation of all suitable occupied habitat as CH. Certainly, habitat that is both suitable and occupied should retain the highest priority for designation. Suitable unoccupied CH

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should be designated in addition to - not instead of - suitable occupied habitat.

3. Redundancy between Critical Habitat and Jeopardy Consultation

Third, any redundancy between CH and jeopardy consultations is largely the artificial result of regulatory choices made by USFWS. The Notice proposes to change USFWS regulations to "streamline" or (further) curtail CH designation in order to address the redundancy. There are other ways to address it which are more consistent with the purpose of the FESA. The primary source of the supposed duplication between CH and jeopardy consultation is the regulatory standards used to determine whether a project would "*jeopardize the continued existence of*" a species, or would cause "*destruction or adverse modification*" of CH. Both standards require that an project must be likely to directly or indirectly adversely impact "*both the survival and recovery*" of a listed species in order to trigger regulatory action under Section 7 regulations.

Nothing in the FESA statute requires that CH and jeopardy consultations have such similar standards. We submit that the regulatory standard for "*destruction or adverse modification*" of CH is inappropriate. By requiring that habitat modification must adversely impact "*both the survival and recovery*" of a species, the standard is in practice reduced to the more limiting term: survival. The word "recovery" is rendered meaningless because any impact that may decrease the likelihood of recovery but would not increase chances for extinction is eliminated from consideration by the mandatory linkage with "survival". This may be appropriate for the jeopardy standard, since jeopardy focuses on extinction. However, the FESA defines CH as that habitat needed for the "conservation" of species. "Conservation" is defined,

"... to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." (FESA Sec. 3 (3)).

Under the plain language of the statute, "conservation" is obviously meant to encompass a great deal more than merely preventing extinction. Thus we suggest a change to the regulatory definition of "*destruction or adverse modification*":

"*Destruction or adverse modification*" means a direct or indirect alteration that appreciably diminishes the value of critical habitat for ~~both the survival and~~ the recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. "

Finally, the purpose of the FESA is

"...to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a

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program for the conservation of such endangered species and threatened species." (FESA Sec. 2(b))

The Notice itself acknowledges that claims of redundancy between jeopardy and CH consultation only apply to "most" species. What impact will changes in CH regulations have on the group of species that the USFWS feels do receive conservation benefits from CH consultation? Any regulation changes must maintain consistency with the purpose of the FESA and ensure that conservation is improved, not undermined.

C. Prudence and Determinability

The notice states that CH is designated for only nine percent of listed species. The reason for this is that it has been USFWS policy not to designate CH. Currently USFWS regulations state (50 CFR § 424.12 (a)):

"a designation of critical habitat is *not prudent* when one or both of the following situations exist: (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or (ii) Such designation of critical habitat would not be beneficial to the species.

[....]

"Critical habitat is *not determinable* when one or both of the following situations exist: (i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or (ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat."

This language makes it very easy to determine that CH designation is not prudent or not determinable, and the USFWS has done just that in 91% of listing decisions, according to the Notice.

However, as noted above, the purpose of the FESA as described in Section 2(b) is to conserve the "ecosystems" that species depend upon, not merely the species themselves. The Notice itself repeatedly states that habitat conservation is at the core of the FESA's purpose and mandate. Further, when the FESA was drafted, Congress explicitly directed the USFWS to designate CH to the "maximum extent prudent and determinable" (FESA Sec. 4(a)(3)). Designation in only nine percent of cases is consistent with neither the nor the letter of this "maximum extent" mandate. Therefore, USFWS policies and regulations, should be redesigned to allow maximum use of this important tool, as Congress intended.

Specifically, we suggest the following change to the prudence regulations, 50 CFR § 424.12(a)(1):

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a designation of critical habitat is ~~not~~ prudent ~~when one or both of the following situations exist: (i) The species is threatened by taking or other human activity, and unless it is demonstrated based on clear and convincing evidence that~~ identification of critical habitat can be expected to increase the ~~degree of such threat to the species, or (ii) Such designation of critical habitat would not be beneficial to the species.~~

For determinability, we suggest the following change to 50 CFR § 424.12(a)(2):

Critical habitat is ~~not~~ determinable if there is credible scientific data which identifies habitat as essential for the conservation of the species ~~when one or both of the following situations exist: (i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or (ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat."~~

D. Economic Impact

We welcome the discussion of the economic analysis issue in the Notice. However, we are somewhat puzzled by its tone. The Notice states that the economic analysis is a particularly arduous and expensive component of the CH designation process. However, there are no statutory requirements for detailed economic analysis during CH designation. The FESA requires only that,

"The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." FESA Sec. 4(b)(2)

Thus, the only requirement is that CH shall be designated based on the best scientific data available and that economic and other impacts be somehow considered. This does not call for an extensive economic analysis. Indeed, since the Notice states that under USFWS policy to date, CH designation has added little or nothing to the benefits conferred by listing, it is difficult to see what the USFWS has found to discuss in the "arduous" CH economic analyses it has performed so far. We suggest that the USFWS restrict economic analyses to issues that are truly likely to occur, such as actions that may require consultation.

E. Spatial Designation

The notice also solicits comments on the utility of explicit spatial designation of CH on maps as opposed to more general narrative descriptions. We support the retention of the current requirements. Precise designation allows agencies and landowners to know exactly which habitats are critical to listed species. Adding ambiguity to the designation

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would make it more difficult for those who must administer and conserve CH and make it easier for those who wish to challenge CH consultations.

However, we also support the addition of some narrative descriptions of CH to the current spatial descriptions. Habitat-based descriptions using watershed boundaries, geological substrates, microclimates, hydrologic regimes or other environmental descriptors would assist all interested parties to better understand what conditions are suitable for each listed species.

We acknowledge that there may be cases in which it would be undesirable to disclose the exact location of CH. We do not see any reason why it is always necessary to disclose this information. The only entities which require this knowledge in advance of a project are Federal agencies who must consult regarding the possibility of adverse modification. Therefore, we suggest that the USFWS continue to designate CH spatially, but add regulations which allow this information to remain confidential if confidentiality would reduce threats to the species.

F. Critical Habitat and Recovery Planning

The Notice solicits comments on how habitat protection can be treated more effectively in the recovery planning process. CH should be designated at the time of listing and amended as appropriate during recovery planning. Species recovery planning simply cannot occur in the absence of accurate information on the habitat needs of the species. Moreover, since after listing many years – and much loss of habitat - may pass before recovery planning occurs, protection of CH at or near the time of listing would help to maximize future management options and to make recovery plans more robust.

CH is the only statutory mechanism expressly provided in the FESA for habitat protection. The FESA makes no separate provision for designation or protection of habitat under the recovery, habitat conservation planning, or listing processes. Thus CH must be designated, to the maximum extent prudent and determinable as discussed above, as close to the time of listing as possible. Prompt CH designation generates information about species habitat needs and creates tools to help preserve as much habitat as possible. Both of these products greatly enhance the effectiveness of later recovery and habitat conservation planning.

Answers to specific questions raised in the Notice

In summary, we present the following answers to the questions raised in the Notice. We do not provide answers to all questions posed.

1. Do the unoccupied habitat aspects of critical habitat designation provide significant conservation benefit for imperiled species?

Yes. For the reasons discussed above the USFWS should amend its policies,

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procedures and regulations as recommended in these comments to ensure that more unoccupied habitat is designated is CH.

2. When will the designation of critical habitat provide additional benefit (beyond that of listing)?

As noted above, CH designation will generally provide at least some additional benefit by generating information and analysis regarding the habitat needs of the listed species that can be used by landowners and agencies in management and planning. Because of these conservation benefits, we suggest that the USFWS regulations be amended so that:

- i. CH is designated for most species, not for a small minority
 - ii. Suitable habitat on private lands is designated. CH should be designated based solely on suitability for species needs irrespective of ownership or political boundaries.
 - iii. The “destruction or adverse modification” standard emphasizes and conserves the values of CH for the recovery of listed species, rather than merely for their survival
3. What considerations should be included in our prudence [and determinability] determinations?

See Section on prudence and determinability above. USFWS regulations should be revised so that CH is determined “to the maximum extent”, as required by the FESA, rather than for a small minority of listed species.

4. [Is] pinpointing small areas of species occurrence and drawing precise small circles around habitat on maps the methodology we should be employing to identify and describe critical habitat, or instead [would] more general habitat location delineations and broad descriptions of habitat types [be] the most efficient descriptors to be used in the designation of critical habitat?

Both methods are valuable and both should be combined. CH should be designated based on habitat needs of species and should also be so described. However, map based methods may be more precise and easy for agencies to work with. Federal agencies should consider keeping some explicit descriptions of CH confidential in cases where publication of explicit locations may increase threats to the species.

5. How can the USFWS, at the stage of developing a recovery plan, when much more may be known about the needs of the species than at the time of critical habitat designation, be more specific about the extent of habitat protection necessary for recovery?

CH should be designated at the time of listing. If recovery planning reveals that additions or changes should be made to prior CH designations, CH should be revised

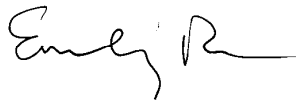
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as appropriate.

We hope these comments are useful. We appreciate the opportunity to submit them.

Sincerely,



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References

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