

California Native Plant Society

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Re: 64 Federal Register 11485 (March 9, 1999) --"5-point policy guidance"

Dear Ms. Smith and Mr. Collins:

The California Native Plant Society (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. CNPS appreciates the opportunity to comment on the Draft Addendum to the Final Handbook for Habitat Conservation Planning and Incidental Take Permitting Process (Addendum).

Introduction

We welcome the development of the Draft Addendum. It is a first step towards much needed reform of the Habitat Conservation Planning (HCP) program. However, although the attempt is laudable, this first draft of the Addendum fails to adequately address the serious problems that currently encumber the HCP program.

The most fundamental shortcoming of the Addendum is the equivocal and elective nature of the guidance it contains. Legally, the Addendum guidance is wholly optional. As part of a non-binding handbook, the Addendum is not law and is not enforceable. We do not understand why the US Fish and Wildlife Service and the National Marine Fisheries Service (Services) have chosen to place these policy changes in a non binding handbook rather than in regulation, as they did with the "no surprises" policy. It is troubling that the "no surprises" policy, which was developed solely to provide greater accommodation to permittees, was given the full force of law; while this Addendum,

whose purpose is to increase protection for species and habitat, is not given similar legal authority. We recommend that the Services release this Addendum as an enforceable regulation, as they did with the "no surprises" policy.

In addition to its weak legal status, much of the language in the Addendum is remarkably equivocal. Although the Addendum contains many recommendations that would greatly improve the HCP program, each section is replete with qualifying words and phrases which make it clear that most of the guidance is completely optional. The result is that the Addendum provides little definite, specific guidance to permittees or agency staff regarding how to properly develop and implement HCPs. It merely provides more options for them to consider.

The HCP program is currently mired in controversy. CNPS is a strong supporter of multi-species, habitat-based biological diversity conservation. However, although many HCPs have been successful, we, like many observers of and participants in the program, have been dismayed by the poor science and weak conservation benefits in others. This Addendum is, at least in part, a response to the accumulating criticism of the program from scientific and conservation organizations. Merely providing more options for the Services and applicants to consider during HCP development is not a sufficient response to the serious and well documented problems with the HCP program. When those problems are combined with the fact that the Services are offering take permits to applicants of dubious reliability and questionable commitment to resource and species conservation (e.g. Pacific Lumber Co. in Northern California), it becomes extremely important that all HCP development guidance be both clear and enforceable. Unfortunately, this first draft of the Addendum is neither.

Specific comments on the 5 point plan

Our general recommendation is that the Services release this Addendum as an enforceable regulation, as they did with the "no surprises" policy, as noted above.

In addition, there are several sections that must be clarified if the Addendum is to produce meaningful improvements in HCPs on the ground. Our comments will follow the order of the sections in the 5 point plan.

Biological goals

The section on biological goals must set clear procedures and standards for developing biological goals. The Addendum states that qualified experts "may help" to develop biological goals. We do not understand why the use of qualified experts should be entirely optional. It should be mandatory, or at least strongly recommended, that biological goals be developed in consultation with and reviewed by qualified experts. If this is impractical for some small or low effect HCPs, then the Addendum should set clear standards specifying the conditions which exempt an HCP from this requirement. The Addendum also states that the scientific literature, conservation strategies, "... and other sources of relevant scientific and commercial information can serve as guides in setting biological goals...". Again, why are no specific standards set for what sources of

information must be consulted during biological goal development? The Addendum should set a minimum standard that all available relevant scientific literature must be consulted during the development of biological goals.

The Services state that "biological goals and objectives may be either habitat or species based." The Service should strongly encourage use of species-based goals over habitat-based goals. The true test of the success of an HCP is whether its target species maintain viable populations within the HCP planning area. Success (or failure) is best assessed by directly estimating population size over time, not by measuring habitat features. In most cases, biological data will be insufficient to link habitat features (e.g., size, quality, species composition, configuration, connectivity) to population size. Even when these data are available, there may be other factors independent of traditional habitat measures that can reduce population size (e.g., overcollecting, invasion by exotic species, or disease). The more indirect the measure of population size becomes, the more uncertainty is introduced into the estimate. For this reason, the Service should strongly encourage HCP-writers to use species-based goals over habitat-based goals.

In its single example of an acceptable biological goal, the Addendum states that "the overall biological goal could be to ensure population viability by maintaining habitat contiguity" and that "the specific measurable objective to achieve this goal may be to conserve...so that a viable corridor is maintained." This example is inappropriate. Although important, habitat contiguity and adequate corridors can not be the primary measurable objective to ensuring population viability (as suggested by the Services' use of this objective as its only illustration of the concept). The Services should cite another example to illustrate a more meaningful, measurable objective such as a target population size within a certain time period or a consistent upward trend in population size over a specific time period.

Adaptive Management

The section on adaptive management should also be strengthened. A great deal of space is devoted to a vague discussion of what constitutes adaptive management, but few clear instructions are given to assist the Services or permittees to develop robust adaptive management plans. No requirements are presented for what components (e.g. timelines, benchmarks, alternatives, budgets, funding mechanisms) must be included in an acceptable adaptive management plan.

The Addendum presents a reasonable discussion of the desirability (although this too appears to be optional) of collecting baseline data on species and habitat status as part of adaptive management programs. The Addendum says nothing, however, about restricting take until sufficient information is available to estimate the impacts to listed species and their habitats. The Addendum should state that take should be minimized or deferred until sufficient data are gathered to develop reliable and quantitative estimates of the impacts to covered species and their habitats. Reliability should be judged by qualified experts.

This section states that adaptive management plans can and should be part of HCPs under "no surprises". We agree. However, this comforting assurance assumes that the Services and the applicant will somehow anticipate every possible circumstance that may occur over the life of an HCP during HCP development. This is clearly unrealistic, particularly given our inadequate understanding of the biology and ecology of many rare species and the unpredictability of ongoing processes such as non native species invasions and global climate change. For this reason, the discussion of "no surprises" in this section is somewhat misleading and should be qualified in the final Addendum to acknowledge that it is impossible for the Services and applicants to anticipate all possible problems over the life of and HCP. Therefore, given the frugality of Congress in environmental spending, it is inevitable that the "no surprises" policy will sometimes place substantial limits on the ability of HCPs to meet their conservation goals.

Finally, Nothing is said in this section about the need for assured funding for both monitoring and for future management changes that may occur under an HCP. We recognize that the Sec. 10(a) of the ESA requires that adequate funding be provided for all HCPs. However, the Services record in requiring adequate funding for HCP implementation is inconsistent (e.g. San Diego County HCP) and the Services therefore should take every opportunity to remind applicants and agency staff that funding is a mandatory prerequisite to approval of adaptive management programs and HCPs.

Monitoring

The monitoring section provides a useful discussion of different types of monitoring and of desirable components of monitoring plans. Like the rest of the Addendum, it is unnecessarily equivocal. For example, the discussion of monitoring protocols presents a list of essential components for "most" monitoring protocols. Nowhere in the Addendum are any baseline standards provided for *all* monitoring protocols. We do not understand why there are no baseline requirement for all projects that include a monitoring component. Under what circumstances is it inappropriate to monitor the level of incidental take or the implementation and effectiveness of the HCP terms and conditions, for example? Some monitoring is clearly desirable for all HCPs. The Addendum should propose minimal and mandatory components for all monitoring plans. We suggest that the Addendum clearly propose minimum required components for all monitoring plans, should describe which, if any, HCPs should be exempt from these requirements, and present optional additional monitoring tasks that may be appropriate in certain circumstances.

The Addendum is silent on the desired or required qualifications of monitoring personnel. The credibility and effectiveness of the HCP program depends on credible monitoring. We suggest that the Addendum contain guidance regarding who is qualified to collect accurate and reliable monitoring data. The Addendum should also state that the Services are responsible for approving personnel who will conduct monitoring, and should clarify that the Services are responsible for the accuracy and scientific validity of all monitoring data.

We commend the Services for the commitment to developing an HCP issuance and compliance database. Such a database would be of great assistance to the Services, policymakers, and to the public in monitoring, evaluating, and improving the HCP program. However that commitment is presented without a timeline to ensure that it will be adhered to. We suggest that the Addendum outline a more specific proposal for implementation of the database, and present a timeline for initiation and completion so that the public will know when we will be able to access to this useful tool. Alternatively, the Addendum could commit the Services to releasing the specific provisions and timeline for the database in a separate decision document to be released within a specific time period. We also recommend that the Services enhance the database by creating public "libraries" of HCPs in each USFWS/NMFS regional office and in the national office. Currently, there is still no central location in which to review the HCPs approved for a particular region.

As in other sections, we suggest that the equivocal language be removed from the discussion of the database. The Addendum does not mandate that any specific information be included in reports to the database. Instead it merely states that certain fields "should" be used. It goes on to merely "suggest" some other types of information for inclusion. The relegation of some information to "suggested" status essentially ensures that it frequently will not be collected. Therefore the data types in this category should be selected carefully, and we question some choices for the "suggested" status. We do not understand why information on the reporting frequency, or on the nature and effect of the incidental take should be optional components of the HCP database. The discussion of the database should be strengthened to ensure that this essential project is implemented and that it is useful to all concerned.

The equivocal language continues in the section on periodic evaluation of compliance with HCP conditions and effectiveness of HCPs. The measures suggested are generally excellent. However, the Addendum contains no explicit instructions regarding who is qualified to serve on oversight committees, whether these committees are appropriate for all HCPs or only for certain ones, when the committees' findings should receive peer review, should be confirmed by independent field investigations. All of these issues should be more clearly discussed in this Addendum.

The vagueness of the Addendum is exemplified by sentences in the section on effectiveness such as "[e]ffects and effectiveness monitoring will generally include, but are not limited to, the following" and "[t]he following represents the minimum information frequently needed in a monitoring program and its reports.." in the section on monitoring reports. As in other sections, although the Addendum provides excellent *suggestions* regarding possible monitoring plans and reports, no *instructions* are given regarding *basic required* elements of programs and reports which makes the Addendum less useful than it could be. We do not understand why this information is presented as optional. Under what circumstances would it be inappropriate to account for incidental take, or perform a species survey, assess habitat condition, or develop one or more progress reports over the life of an HCP, for example? Under what circumstances should monitoring reports not include methods or frequency for measurements or effects on covered species and habitats? The addendum should clearly state what the

mandatory minimum elements of all monitoring programs and reports will be, clearly describe what conditions may exempt an HCP from these requirements, and clearly describe what additional items may be required for more complex or high impact HCPs. Such clarity will help the public, HCP applicants, and the staff of the Services better understand what should be expected from HCP monitoring.

We are very concerned by the isolated statement that "[t]he Services have discretion to offer the permittee an extension of time to demonstrate compliance" with monitoring requirements. No additional explanation or guidance is provided to elucidate this statement. Under what circumstances will extensions be granted? Will take be allowed in the absence of required monitoring data showing that such take is not putting a species in jeopardy of extinction? How long would the extensions be? Under what circumstances would extension be inappropriate or prohibited? Would the permittee be required make any substantive demonstration of good faith in order to be granted an extension? What will the procedures be for review of extension applications? Monitoring is essential to the success of the HCP program. That is why it is required explicitly by the ESA. Allowing open ended exemptions from monitoring requirements without any apparent restrictions can not assist the HCP program to achieve its goals of species conservation. This statement should be qualified and expanded to provide clear instructions to the Services regarding extensions.

Funding

We welcome the statement in the section on funding that "[a]n HCP that does not contain an adequate funding commitment from the applicant/permittee to support an acceptable monitoring program should not be approved unless the HCP establishes alternative funding mechanisms." As noted above, we have been concerned that some larger HCPs have been approved without assured funding programs, such as the San Diego County multi species HCP in California. We hope that this Addendum signals that the Services intend to discontinue this practice.

We note that although this section discusses the parties responsible for monitoring, as in other sections it is silent on the qualifications that may be required or desirable in personnel performing monitoring tasks. As discussed above, qualified staff are essential to any credible effective monitoring program. The Services must provide direction regarding what qualifications are required of monitoring personnel.

Public Participation

We welcome the recognition of the need to expand public participation in the HCP process. We also welcome the proposed expansions of the comment periods for HCPs. However, it is unclear from the Addendum what new opportunities may be offered for public participation during HCP development prior to the initiation of the National Environmental Policy Act (NEPA) process. The most important decisions in HCPs are made prior to the initiation of NEPA and greater opportunities for public input are needed while plans are being developed. It should be possible for the Services to require, or at least more strongly encourage, public review and input during HCP

development as a condition of issuance of a Federal incidental take permit. Thorough public review is particularly important within the context of the Federal "no surprises" policy which severely limits or eliminates flexibility to respond to new information after HCPs are finalized.

Conclusion

Many HCPs have been noncontroversial and have met or even exceeded scientific standards and conservation goals. However, others have been based on poor or inadequate science, have excluded the public from the HCP development process, and have given rise to fears that they will provide inadequate conservation for rare and listed species. Far too many HCPs have been based on insufficient baseline data on covered species, poor scientific analysis, contain inadequate monitoring plans and little or no provision for adaptive management (e.g. Kareiva and others, 1999, Schilling, 1997; Hood et al., 1998; Noss et al., 1997). These deficiencies have undermined the public's belief that the HCP program will meet the mandate of the Endangered Species Act (ESA) to conserve threatened and endangered species and prevent further species extinctions. In addition, poor opportunities for public input and the "no surprises policy" have exacerbated public's concerns regarding the HCP program. The scientific and procedural problems with the "no surprises" policy have been thoroughly discussed by many observers and analysts (e.g. Smallwood, 1997) and need not be reiterated here. In combination, these problems have eroded support for the HCP program, both among the public and within the scientific community, and litigation both of individual plans and of policies such as "no surprises" is increasing.

Thus, the Addendum comes at a critical time. If the Addendum is strengthened in the ways outlined in these comments, and as recommended in studies such as the recent "Kareiva Report" (Kareiva and others, 1999), the report "Science and the Endangered Species Act" (Clegg and others, 1995), or the Defenders of Wildlife Report (Hood et al., 1998) so that specific, legally binding and enforceable guidance is provided to improve the HCP program, it could signal the beginning of a new era for the program. We hope that this will be the case.

We hope these comments are useful. We look forward to reviewing the final Addendum.

Sincerely,

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References

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