



Via Federal eRulemaking Portal and U.S. Mail

February 17, 2011

Public Comments Processing
Attn: Docket No. FWS-R8-ES-2009-0044
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
Suite 222
Arlington, VA 22203

**Re: Revised Proposed Rule to Designate Critical Habitat for the Sonoma County
Distinct Population Segment of the California Tiger Salamander**

To Whom It May Concern:

On behalf of the Center for Biological Diversity, I submit these comments on the Proposed Rule to Designate Critical Habitat for the Sonoma County Distinct Population Segment of the California Tiger Salamander. The Center applauds the agency's proposed designation of over 50,000 acres of critical habitat for this highly imperiled species. We are pleased that the proposal does not exclude any critical habitat areas under Section 4(b)(2) of the Endangered Species Act ("ESA"), but we are concerned about the revision that eliminates nearly all areas within the 100-year floodplain. The Center urges the U.S. Fish and Wildlife Service ("FWS") to promptly issue a final rule without any exclusions or further revisions that remove critical habitat areas.

BACKGROUND

In 2002, in response to litigation brought by the Center for Biological Diversity, FWS listed the Sonoma County Distinct Population Segment ("DPS") of the California tiger salamander on an emergency basis. After the emergency designation expired, FWS published a final rule listing the Sonoma County DPS in 2003. *See* 68 Fed. Reg. 13498 (March 19, 2003). The listing rule did not designate critical habitat.

The Center thereafter brought a lawsuit against FWS challenging the failure to designate critical habitat. The parties entered a settlement agreement requiring FWS to enter a final determination on a proposed critical habitat designation before December 1, 2005. In August of 2005, FWS issued a proposed rule to designate 74,223 acres of critical habitat. *See* 70 Fed. Reg. 44301 (Aug. 2, 2005). But thereafter, the final rule identified just 17,418 acres of critical habitat and then excluded all these areas, resulting in no critical habitat being designated for the salamanders. *See* 70 Fed. Reg. 74138 (Dec. 14, 2005).

Again, the Center was forced to initiate a lawsuit against FWS. On May 5, 2009, FWS and the Center entered a settlement agreement requiring the agency to issue another proposed rule that encompassed the same area as the August 2, 2005 proposed rule. Consistent with its settlement obligations, FWS issued the rule on August 18, 2009, which proposed 74,223 acres for designation of critical habitat. *See* 74 Fed. Reg. 41662.

On January 18, 2011, FWS issued a revised proposed rule for designation of critical habitat. 76 Fed. Reg. 2863 (Jan. 18, 2011). As a result of this revision, the area proposed for critical habitat is 50,855 acres rather than the 74,233 acres identified in the August 18, 2009 proposed rule. *Id.* at 2866. Most significantly, FWS determined that almost all of the 100-year floodplain is not essential for the conservation of the salamander. *Id.* In addition, the revised proposed critical habitat designation no longer includes the urbanized centers of Santa Rosa, Bennett Valley, Rohnert Park, and Cotati. *Id.* Finally, FWS revised the critical habitat boundary to add a small area in the southeastern edge of the unit, remove an area in the southernmost region of the Santa Rosa Plain, and remove several areas of remnant open parcels that occur between the eastern periphery of suburban Sebastopol and the western edge of the 100-year floodplain. *Id.*

ANALYSIS

The Center fully supports the designation of critical habitat for the Sonoma County DPS of California tiger salamanders. Such a conclusion is compelled by the best available science on the threats faced by this highly imperiled species. But as explained more fully below, the Center is concerned that FWS's revised proposed rule excludes nearly all areas within the 100-year floodplain. In addition, the Center requests that FWS finalize the critical habitat designation without excluding any areas under Section 4(b)(2) of the ESA. The Center urges FWS to designate all areas known to be occupied by the salamander, including habitat along Roblar Road where a quarry has been proposed.

I. SOME AREAS WITHIN THE 100-YEAR FLOODPLAIN ARE ESSENTIAL TO THE CONSERVATION OF THE SPECIES

In the revised proposed rule, FWS explains that it has determined that most of the Federal Emergency Management Agency (“FEMA”) 100-year floodplain “lacks the physical and biological features and is not essential for the conservation of the California tiger salamander.” 76 Fed. Reg. 2866. FWS purports to base this determination upon the Santa Rosa Plain Conservation Strategy. Appendix E of the Conservation Strategy provides:

6) Areas within the FEMA 100 year floodplain generally are not included within the Conservation Areas, unless a substantial portion of the property is outside the floodplain. In addition, floodplain areas and seasonal pools that are subject to flooding from perennial sources (such as the Laguna de Santa Rosa) are considered not likely to support CTS breeding, but may have wetlands and listed plants. This is due to the high likelihood of CTS predators in pools within the floodplain. Periodically flooded uplands within the 100 year floodplain may be considered CTS habitat if located near predator-free breeding pools.

Furthermore, a peer reviewer of the Conservation Strategy suggests that some portions of the 100-year floodplain may lack suitable upland habitat. The peer reviewer explains (as provided in Appendix L of the Conservation Strategy):

[W]etlands do not represent suitable upland habitat. This is presumably why CTS have yet to be found within the 100 yr flood plain of the Laguna de Santa Rosa, even though suitable pools are present. Although burrows may develop in wetlands during the dry summer months, they are absent or extremely rare during the wet season when CTS move across the surface in search of new burrows. In research at Jepson Prairie, CTS were roughly three times less dense south of Olcott Lake where the landscape is largely flooded in winter as compared with north of the lake which is dominated by slightly higher terrain. In the Conservation Strategy there is no discussion of what portion of reserve areas must be upland habitat suitable for CTS ‘aestivation’.

As explained below, neither of these statements in the Conservation Strategy support FWS’s decision to remove almost all areas within the 100-year floodplain.

Certainly, pools subject to flooding from perennial sources are more likely to contain salamander predators, such as bullfrogs and fishes. But this does not mean that all pools within the 100-year floodplain contain predators. Moreover, even some pools that contain predators may have features essential for breeding and for providing space, food, and cover necessary to sustain early life history stages of larval and juvenile California tiger salamander. To be sure, FWS has determined that:

Standing bodies of fresh water (including natural and manmade (e.g., stock)) ponds, vernal pools, and other ephemeral or permanent water bodies that typically support inundation during winter rains and hold water for a minimum of 12 consecutive weeks in a year of average rainfall, are features that are essential for Sonoma population breeding and for providing space, food, and cover necessary to sustain early life history stages of larval and juvenile California tiger salamander.

74 Fed. Reg. 41665. Numerous areas within the 100-year floodplain meet this broad description.

The Conservation Strategy peer reviewer's statement does not provide support for FWS's proposal to remove nearly all areas within the 100-year floodplain. Rather, the peer reviewer points out that wetlands within the 100-year floodplain may lack burrows needed by the salamanders. But again, just because some areas within the floodplain might lack suitable upland habitat, this does not mean that all areas lack the necessary features. To be sure, the Conservation Strategy recognized that periodically flooded uplands within the 100 year floodplain may be considered CTS habitat "if located near predator-free breeding pools."

Instead of removing nearly all areas within the 100-year floodplain, the Center requests that FWS focus on determining which areas within the floodplain contain one or more of the Primary Constituent Elements ("PCEs") essential to the conservation of the salamander. At a minimum, any upland areas within the floodplain that include underground refugia should be included, as well any predator-free water bodies that "hold water for a minimum of 12 consecutive weeks in a year of average rainfall," as these are "features that are essential for Sonoma population breeding and for providing space, food, and cover necessary to sustain early lifehistory stages of larval and juvenile California tiger salamander." *See* 74 Fed. Reg. 41665.

For these same reasons, the Center urges FWS to further examine the area south of Pepper Road in the southernmost region of the Santa Rosa Plain. The FWS discounts this area because the floodplain fragments the remaining undeveloped land in this area. *See* 76 Fed. Reg. 2866. But the California tiger salamander has been observed in this area. As such, the area deserves further examination of its suitability for the salamanders.

II. NO AREAS SHOULD BE EXCLUDED FROM THE CRITICAL HABITAT DESIGNATION UNDER SECTION 4(b)(2)

Section 4(b)(2) of the ESA requires that FWS designate critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. 16 U.S.C. § 1533(b)(2). FWS may exclude an area from critical habitat if it determines that the

benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species. *Id.*

FWS has not proposed to exclude any areas from critical habitat. 76 Fed. Reg. 2867. This is primarily because the Conservation Strategy Implementation Plan has not been developed or implemented by local agencies since the publication of the December 14, 2005 final critical habitat rule. *Id.* As such, FWS properly recognized that the Conservation Strategy cannot provide a sufficient basis for exclusion from the critical habitat designation.

FWS explains that any exclusion of critical habitat based on potential economic costs will be presented in the final rule. *Id.* The Center urges FWS to conclude that no areas need to be excluded based on potential economic costs. The Draft Economic Analysis estimates that the total potential incremental impacts in areas proposed as critical habitat over the next 25 years is a modest \$465,000.

FWS states that it may consider exclusion of all or some of the Federated Indians of Graton Rancheria of California's 254 acre parcel of Tribal trust land that currently overlaps with proposed critical habitat. 76 Fed. Reg. 2867. FWS explains that the exclusion would occur under Section 4(b)(2) of the ESA and by taking into consideration Secretarial Order 3206 involving American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act.

The Secretarial Order does not require the exclusion of Tribal trust lands from critical habitat designation. Rather, the Secretarial Order requires FWS to recognize "the contribution to be made by affected Indian tribes, throughout the process and prior to finalization and close of the public comment period, in the review of proposals to designate critical habitat and evaluate economic impacts of such proposals with implications for tribal trust resources or the exercise of tribal rights." Secretarial Order 3206, Sec. 3(B)(3). Further, the Secretarial Order provides that FWS "shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands." Secretarial Order 3206, Sec. 3(B)(4).

The conservation needs of the Sonoma County DPS of the California tiger salamander cannot be achieved by limiting the critical habitat designation to other lands. The proposed casino site is located on lands essential for dispersal of the salamanders between the Stony Point Conservation Area and Northwest Cotati Conservation Area. *See* "Conservation Area Overview" (attached). FWS has recognized the importance of retaining this area "to reduce fragmentation of the northern and southern breeding concentrations within the unit by allowing for potential dispersal and genetic exchange." 76 Fed. Reg. 2866; *see also* David G. Cook et al., Sonoma County California Tiger Salamander Metapopulation, Preserve Requirements, and Exotic Predator Study 17 (2005) (discussing the importance of establishing connectivity between

preserves), *available at*

[http://www.lagunadesantarosa.org/pdfs/Cook%20CTS%20Metapop%2022Dec05Final%20\(2\).pdf](http://www.lagunadesantarosa.org/pdfs/Cook%20CTS%20Metapop%2022Dec05Final%20(2).pdf).

Furthermore, in a Biological Opinion dated February 3, 2009 (attached), FWS has recognized that the proposed casino site contains important salamander habitat. The casino site is occupied salamander habitat because a gravid California tiger salamander was found at the site. BiOp at pp. 2, 31. FWS has explained that the “finding of a gravid female suggests that there is breeding habitat on or near the project site and other CTS individuals occupy this area. In addition, the site supports adequate dispersal and foraging habitat for CTS.” BiOp at p. 31. FWS found that “CTS individuals are expected to be found at the project site and in all directions in suitable habitat,” which is found to the west and north with limited habitat to the east and south. BiOp at p. 31. A 2004 assessment determined that “the area outside of the 100-year floodplain provides suitable upland habitat for CTS in the form of gopher burrows.” BiOp at p. 31. In addition, the 2004 assessment found that suitable aquatic habitat for larvae occurs in the drainage ditches to the north of the site, where both salamander egg sacs and larvae were observed. BiOp at p. 31. In addition to the gravid female found on site, adult salamanders were observed adjacent to the intersection of Millbrae Avenue and Highway 101 approximately 0.66 miles northwest of the proposed casino site. BiOp at p. 31.

Moreover, the Center is unaware of any tribal habitat management plan for the California tiger salamander. Without a plan that is viable and being implemented, there appears to be little justification for critical habitat exclusion. *See Marren Sanders, Implementing the Federal Endangered Species Act in Indian Country: The Promise and Realty of Secretarial Order 3206*, Joint Occasional Papers on Native Affairs no. 2007-1 at 37-38, *available at* <http://www.jopna.net>.

In summary, the best available science indicates that the proposed casino site is essential for the conservation of the salamander because of its key location between the northern and southern breeding concentrations and because it has suitable upland habitat within proximity of known breeding areas of the salamanders.

FWS explains that it has entered into discussions with the Tribe regarding the proposed revised designation. *See* 76 Fed. Reg. 2870. FWS should also request a conference with the National Indian Gaming Commission because its approval of gaming operations at the proposed casino site is a federal agency action that is likely to result in the destruction or adverse modification of proposed critical habitat. 50 C.F.R. § 402.10(b); *see also* Letter from C. Adkins Giese dated December 9, 2010 (attached).

III. ALL AREAS OCCUPIED BY SALAMANDERS SHOULD BE DESIGNATED AS CRITICAL HABITAT

In requesting public comment on the revised proposed rulemaking, FWS explained that it was particularly interested in receiving comments on “areas that provide habitat for the Sonoma County DPS of the California tiger salamander that we did not discuss in this revised proposed critical habitat rule.” 76 Fed. Reg. 2864. The Center is aware that salamanders have been observed 1.75 miles west of the Santa Rosa Plain Conservation Area at a site along Roblar Road, which is slated for development of a quarry. *See* Letter from Kim Fitts dated July 20, 2010 (attached); *see also* Santa Rosa Plain Conservation Strategy Map (attached).

The observation of salamanders in this area outside of the Santa Rosa Conservation Strategy Study Area raises the important question of whether salamander survey efforts may have missed other essential salamander habitats. The Center urges FWS to designate as critical habitat all areas in Sonoma County presently occupied by California tiger salamanders.

CONCLUSION

The Center for Biological Diversity appreciates that FWS has proposed to designate over 50,000 acres of critical habitat for the Sonoma County DPS of the California tiger salamander. The designation of this critical habitat – with no exclusions – is necessary for the survival and recovery of these endangered animals.

Thank you for offering this opportunity to submit comments on this proposed rulemaking. If you have any questions on these comments, please do not hesitate to contact me.

Sincerely,



Collette L. Adkins Giese
Herpetofauna Staff Attorney
Center for Biological Diversity
8640 Coral Sea St. NE
Minneapolis, MN 55449-5600
cadkinsgiese@biologicaldiversity.org
651-955-3821