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Public Comments Processing
Attn: FWS-R8-ES-2009-0072
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203.

RE: Comments on Proposed Critical Habitat for the Santa Ana Sucker (*Catostomus santaanae*) 74 FR 65056

To whom it concerns:

These comments on the U.S. Fish and Wildlife Service's proposed rule designating critical habitat for the Santa Ana sucker (*Catostomus santaanae*) are submitted on behalf of the 240,000 staff, members and online activists of the Center for Biological Diversity and the members of the Inland Empire Waterkeeper (collectively – the Conservation Organizations).

The Center for Biological Diversity is a national, nonprofit organization whose mission is to protect and restore endangered species and their habitats through science, policy, education, advocacy, and environmental law. Many of the Center's members and on-line activists reside in California, including southern and central coastal California where the Santa Ana sucker also resides. The Center's members and staff regularly visit the habitat of the sucker for purposes of research, photography, rafting, enjoyment of rare riparian areas and other recreational, scientific, and educational activities.

Inland Empire Waterkeeper (“Waterkeeper”) is a nonprofit water quality organization whose mission is to protect and enhance the water quality of the Upper Santa Ana River Watershed through programs of advocacy, education, research, restoration, and enforcement. All of our members and staff reside in the 2,600 square mile watershed where the Santa Ana sucker

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resides. Waterkeeper’s staff and members utilize the waterways of the Inland Empire for educational field trips and recreation. We also pursue investigations of illegal discharges into the river and its tributaries on behalf of our members for the protection of people and aquatic species alike, according to the federal Clean Water Act. Our comments herein are limited to discussions of the Santa Ana River Watershed and does not include the Santa Clara River.

The Conservation Organizations strongly support the designation by the Service of critical habitat for the Santa Ana sucker that includes all of the extant occurrences and historic areas that are functional or that could be managed and/or restored to provide recovery opportunities for this rare fish. Species with critical habitat designations for two or more years are more than twice as likely to have an improving population trend, and less than half as likely to be declining¹. While this proposal is a strong improvement over the current designation and recognizes an important (and namesake) portion of the sucker’s range, we still have specific concerns about the proposed draft critical habitat. The proposed designation fails to include the occupied historic habitat of the Santa Ana sucker in the Santa Clara River. The proposed designation also fails to include all unoccupied suitable habitat within the species’ historic range. Additionally, the Conservation Organizations are particularly concerned about the habitat areas that the Service has indicated will be considered for exclusion from the final designation. The proposed exclusions would result in a final designation that violates the basic purposes and principals of the Endangered Species Act (“ESA”). For the additional reasons discussed below, the proposed critical habitat is not adequate to inform a decision as important as the re-designation of critical habitat for the Santa Ana sucker.

I. Background

Critical habitat is defined by the ESA as:

(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(I) essential to the conservation of the species and

(II) that may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by a species at the time it was listed, upon a determination that such areas are essential for the conservation of the species. 16 U.S.C. § 1532(5)(A), ESA § 3(5)(A); see also 50 C.F.R. § 424.02(d).

“Conservation” is the “use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(3), ESA § 3(3); see also 50 C.F.R. § 424.02(c).

“Special management considerations or protection” means “any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.” 50 C.F.R. § 424.02(j).

¹ Taylor et al. 2005

The ESA imposes mandatory duties on FWS when designating critical habitat, including the requirement that FWS shall designate critical habitat “on the basis of the best scientific data available.” 16 U.S.C. § 1533(b)(2). Further, FWS shall “tak[e] into consideration the economic impact and any other relevant impact of specifying any particular areas as critical habitat.” *Id.* FWS “may exclude any area from critical habitat” only upon finding “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).

II. The Proposed Rule is Flawed Because It Fails to Include Areas of Occupied Habitat.

FWS’ proposed rule is fatally flawed because the agency fails to include essential habitat for the sucker, recently known to be occupied. As the proposed critical habitat designation acknowledges, the Santa Ana sucker occurs in the Santa Clara River. Regardless of hybridization and introgression issues between the Santa Ana sucker and Owens Valley sucker, the fact still remains that the Primary Constituent Elements (PCEs) are present for the Santa Ana sucker in the Santa Clara River. Opportunities for recovery of the species still exist within the Santa Clara River. In fact, the Service has taken conservation jurisdiction over this population by issuing the Newhall Farm Seasonal Crossing Habitat Conservation Plan in 2003 where the Santa Ana sucker is a covered species. If anything, the continuing presence of Santa Ana sucker fish only reinforces the need to include the Santa Clara River and its tributaries as critical habitat.

While the discussion in the proposed critical habitat designation on the Santa Clara River population discusses the introgression and hybridization issues, it does not present data on the presence of the PCEs in a river that has only one diversion and no dams or other impediments to sucker movement and currently supports suckers.

III. The Proposed Rule is Flawed Because FWS Fails to Include Unoccupied Habitat Essential for Recovery.

Under the ESA, critical habitat designation is intended to promote conservation of listed species by protecting both occupied and unoccupied essential habitat needed for recovery of the species. Accordingly, the importance of the designation and protection of critical habitat cannot be over-stated. In *Center for Biological Diversity v. Norton*, the Court found:

[T]he designation of critical habitat serves as ‘the principal means for conserving an endangered species, by protecting not simply the species, but also the ecosystem upon which the species depends.

240 F. Supp. 2d 1090, 1101 (D. Ariz. 2003) (citation omitted). The Ninth Circuit recognized this as well when it struck down the Service’s regulatory definition of “adverse modification.” The court explained, that “[a]s the Fifth and Tenth Circuits have already recognized, the regulatory definition reads the ‘recovery’ goal out of the adverse modification inquiry; a proposed action ‘adversely modifies’ critical habitat if, and only if, the value of the critical habitat for survival is

appreciably diminished.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069-70 (9th Cir. 2004) (emphasis in original) citing *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 441-42 (5th Cir. 2001) and *N.M. Cattle Growers Ass’n v. United States Fish and Wildlife Serv.*, 248 F.3d 1277, 1283 & n.2 (10th Cir. 2001). The court stated that the regulation offended the ESA because “[i]f the FWS follows its own regulation, then it is obligated to be indifferent to, if not to ignore, the recovery goal of critical habitat” and such an interpretation “would drastically narrow the scope of protection commanded by Congress under the ESA.” *Gifford Pinchot*, 378 F.3d at 1070.

Failing to include additional habitat that may not currently be occupied but was occupied in the recent past and where field conditions have not changed precludes the opportunity for species recovery in these essential areas. The Service again appears to be ignoring the recovery goal in its consideration of critical habitat. Critical habitat is a separate and additional requirement of the ESA that provides important protections for listed species not otherwise provided by law. Species with designated critical habitat are more likely to be recovering than species that lack the designation². Without sufficient designated critical habitat, the Santa Ana sucker has a reduced chance of persisting and recovering. It follows that FWS must consider and evaluate the recovery benefits of critical habitat designation in order to promulgate a legally valid critical habitat rule based on “the best scientific data available” and after taking into consideration “the economic impact and any other relevant impact of specifying any particular areas as critical habitat.” 16 U.S.C. § 1533(b)(2). Unfortunately, the proposed rule has failed to do so by failing to fully consider all unoccupied habitat that has the PCEs and may be necessary for recovery of the species.

For instance, a number of streams in San Bernardino County have been evaluated as sites for Santa Ana sucker re-introduction by the California Department of Fish and Game (CDFG) and other technical experts. Santa Ana River tributaries such as Mill, Plunge, City, Strawberry, Twin, Upper Santa Ana upstream of Seven Oaks Dam, Lytle and Cajon were evaluated (personal communication Santa Ana Sucker Team meeting). Several of these creeks were evaluated by the experts to have all the requirements (PCEs) for sucker. USFWS needs to confer with CDFG and the other technical experts to identify additional streams that exhibit the PCEs and are good candidates for reintroduction and include those in the critical habitat designation.

IV. The Final Critical Habitat Rule May Not Exclude Essential Habitat Covered By Other Conservation Mechanisms.

The Conservation Organizations support the conservation efforts for Santa Ana sucker and other species established through habitat conservation plans (HCPs) including the western Riverside County Multiple Species Habitat Conservation Plan (WR MCHCP) and the Newhall Farm Seasonal Crossings.

HCPs adopted pursuant to Section 10 of the ESA allow for the “take” of species including the Santa Ana sucker. HCPs however, are simply *not* a substitute for the designation of critical habitat. We oppose any exclusions to this proposed critical habitat of areas that may be

2 Ibid

covered by other management plans, the Western Riverside County Multiple Species Habitat Conservation Plan (WR MSHCP) or the Newhall Land Seasonal Crossing Habitat Conservation Plan, pursuant to Section 3(5)(A) under the logic that they do not need “special management” or under Section 4(b)(2). All Santa Ana sucker essential habitat needs special management because of the variety of impacts to the habitat, from changes in hydrologic regimes, to water quality and quantity, to direct impacts from development and many others.

Additionally, the Draft Conservation Program for the Santa Ana Sucker (*Catostomus santaanae*) within the Santa Ana River Watershed (2003) remains a draft document and is sorely lacking in conservation assurances, and fails to address any recovery goals. In fact, during the Conservation Program’s tenure (it is being implemented despite not being a final document), the Santa Ana sucker populations in the Santa Ana River have been documented to be in a statistically significant downward trend³. While the Santa Ana sucker team has been pro-active in experiments to improve habitat and collected important data sets on the populations and habitat along the Santa Ana River, the fact still remains that despite all of the efforts, the fish are in decline along that stretch of the river.

Excluding areas of essential habitat from critical habitat designation, pursuant to ESA sections 3(5)(A) or 4(b)(2), areas that admittedly require special management considerations but which are covered or will be covered in the future by other management plans and/or conservation plans, is unreasonable and unjustified. The ESA’s definition of critical habitat as an area that may need special management does not mean that it needs additional management but only that it needs to be managed.

In the past, the FWS has argued that habitat which may not need management beyond any existing management plans does not meet the definition of critical habitat under 3(5)(A). In the case of the Mexican spotted owl, the district court in Arizona explicitly struck down this reasoning. The court concluded that the USFWS was improperly interpreting “may need special management” as “may need additional management.” *Center for Biological Diversity, et al. v. Norton*, 240 F. Supp. 2d 1090, 1099 (D. Az. 2003). The court found that the existence of a management plan, far from being a reason to exclude an area from critical habitat, is indisputable proof that the area qualifies as critical habitat.

Whether habitat does or does not require special management is not determinative of whether or not that habitat is “critical” to a threatened or endangered species. What is determinative is whether or not the habitat is “essential to the conservation of the species” and special management of that habitat is possibly necessary. 16 U.S.C. § 1532(5)(A)(i). Thus, the fact that a particular habitat does, in fact, require special management is demonstrative evidence that the habitat is “critical.” The agency should not take the position that if a habitat is actually under “adequate” management, then that habitat is not per se “critical.” This makes no sense. Habitat would not be subject to special management and protection if it were not essential to the conservation of the species. “The fact that habitat is already under some sort of management for its conservation is absolute proof that *habitat is critical*.” *Center for Biological Diversity, et al. v. Norton*, 240 F. Supp. 2d 1090, 1099 (emphasis in original). The court clearly established that

3 J. Baskin 2009, personal communication

FWS cannot exclude essential habitat simply because it is covered by some management plan.

The Ninth Circuit has also stated that alternative management measures are not a substitute for a critical habitat designation. In *NRDC v. U.S. Dept. of Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997), the court found that the existence of other protections for listed species' habitat, even if equal to or allegedly greater than the protection that critical habitat provides, cannot excuse the Service's failure to designate critical habitat. *Id.* The Ninth Circuit flatly rejected the Service's argument and emphasizing that "the existence of such an alternative would not justify FWS's failure to designate critical habitat." *Id.* at 1127. "Alternative [planning processes] cannot be viewed as a functional substitute for critical habitat designation" because "[c]ritical habitat designation triggers mandatory consultation requirements for federal agency actions involving critical habitat." *Id.* As another court determined, the protection afforded even by other sections of the ESA, such as the prohibition on "taking" species found in section 9, "differs from that of [section 7] consultation and . . . may not serve as a basis for a decision not to designate a critical habitat." *Conservation Council of Hawaii*, 2 F.Supp. 2d 1280, 1287 n.10 (D. Haw. 1998).

The Service should apply this standard to the Santa Ana sucker critical habitat designation and be sure to include all the historical and contemporary areas where the sucker was known, whether or not the area is included within an HCP (unless the habitat has been developed) because these areas meet the definition of critical habitat by nature of their need for special management.

Any exclusion of critical habitat that relies on unadopted, preliminary and not publicly reviewed plans for conservation is also unacceptable and provides only a highly speculative conservation benefit at best. The proposed critical habitat does not demonstrate unequivocally that the benefits of excluding these areas outweigh the benefits of including them.

V. Management Considerations Needs to Include Supportive Hydrological Regimes.

Changes in hydrological regimes cause severe impacts to southern California streams and the species that rely on them (Riley et al. 2005), including the Santa Ana sucker. No areas of habitat for the sucker should be dismissed from the proposed designation because of current or historic alterations of hydrology from upstream dams. We urge the Service not to write these areas off, but instead work cooperatively with the dam managers to implement hydrological regimes that mimic natural flows. This will aid in the recovery of the Santa Ana sucker.

While we recognize that the dams and the basins behind them pose a barrier to sucker movement, nonetheless proper management can restore habitat above and below dams and basins and the Service should promote such restoration. By protecting and maintaining these important habitat areas and pressing for changes in flow regimes to support sucker, the Service help can effectively realize significant recovery benefits for the species in historic habitat.

VI. The Critical Habitat Designation Must Support Existing Conservation Investments.

If conservation investments from mitigation for impacts to Santa Ana sucker have been made, those conservation areas should be included in the critical habitat designation. The proposal should not withdraw these lands from the critical habitat designation, which would undermine and devalue the previous conservation investments because the surrounding land would no longer be highly valued for conservation. The ensuing isolation and fragmentation of adjacent areas would degrade the mitigation lands, and ultimately make irrelevant the mitigation. All existing conservation investments must be able to continue to function as originally conceived. This new proposed critical habitat re-designation should carefully consider all of the existing conservation investments through mitigation of impacts to the sucker and support those investments so that they can succeed.

VII. The Economic Analysis Must Include all Occupied and Unoccupied Santa Ana Sucker Habitat.

The proposed rule indicates that an Economic Analysis is currently being conducted. FWS needs to include all occupied and suitable unoccupied habitat in the Economic Analysis (and Final Critical Habitat Rule), and not rely on the flawed Draft Critical Habitat as the basis for the Economic Analysis.

VIII. Conclusion

The Conservation Organizations appreciate the opportunity to comment on the proposed rule. As noted above, the proposed rule failed to include sufficient proposed critical habitat to protect and conserve all known extant occurrences of this species. Suitable unoccupied habitat needs to be added to the designation to assure recovery of the species. No areas should be excluded because they are included within proposed or current HCP's. Prior conservation investments for Santa Ana sucker conservation must also be supported.

We look forward to reviewing the economic analysis and final rule, which will need to include peer-reviewed analysis and a designation that adequately respond to these concerns. Please feel free to contact me with any questions at 323-654-5943 or at ianderson@biologicaldiversity.org.

Best regards,



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Center for Biological Diversity



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