

California Native Plant Society

And

Center for Biological Diversity

August 2, 2004

Diane Noda, Field Supervisor
Ventura Fish and Wildlife Office
U.S. Fish and Wildlife Service
2493 Portola Road, Suite B,
Ventura, CA 93003

RE: Comments on Proposed Designation of Critical Habitat for *Astragalus lentuginosus* var. *piscinensis* (Fish Slough Milkvetch)

Dear Ms. Noda:

The California Native Plant Society (CNPS) is a non-profit organization of more than 10,000 laypersons and professional botanists organized into 32 chapters throughout California. The mission of the California Native Plant Society is to increase understanding and appreciation of California's native plants and to conserve them and their natural habitats, through education, science, advocacy, horticulture and land stewardship. 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. The Center for Biological Diversity (CBD) is a non-profit organization with over 9,000 members in CA and across the nation, dedicated to Protecting endangered species and wild places through science, policy, education, and environmental law.

The CNPS and CBD have reviewed the rule proposing to designate critical habitat for *Astragalus lentuginosus* var. *piscinensis* (Fish Slough Milkvetch). CNPS generally supports the proposed critical habitat, because it is based on the best available science, and has integrated all of the available data to determine the habitat that is critical for the species survival. We recognize a comprehensive Proposed Critical Habitat. The inclusion of adjacent potential pollinator habitat is a necessary primary constituent element that has often been overlooked in previous designations.

However, we still have several requests that will increase the effectiveness of the final Critical Habitat designation, and further help to assure the continued existence and recovery of the Fish Slough Milkvetch.

First, CNPS and CBD request that all of the historic range for the species be included in the Critical Habitat designation. Historic sites are essential for range expansion, migration and recovery of species. Ultimately, recovery and delisting, not merely survival, of species is the goal of the Federal Endangered Species Act (FESA).

According to Section 3 of the FESA,



Dedicated to the preservation of California native flora

“(5)(A) The term “critical habitat” for a threatened or endangered species means--

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.”

“Conservation” is defined in FESA Section 3 as

*“(3) The terms “conserve”, “conserving”, and “conservation” mean 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.** Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.” (emphasis added)*

It is clear that the purpose of critical habitat designation is to facilitate recovery of listed species, not merely to ensure the survival of individuals or occurrences within a fragmented and disturbed landscape of unsuitable or destroyed habitat. Such a designation may not even be adequate even to ensure the long-term survival of the species, much less its recovery. Critical habitat designations should provide species the opportunity for genetic exchange, migration in response to climate change or recruitment events, and other adaptations over time. Designation of unoccupied suitable habitat is essential to giving species a chance to recover and thus is one of the most important benefits offered by critical habitat.

These views of the value of critical habitat are supported by case law. In a recent case the 5th U.S. circuit court of appeals required critical habitat to be designated because the requirements to designate critical habitat and to consult on federal actions that affect critical habitat are aimed not only at preventing extinction (i.e. jeopardy), but also at promoting recovery of the listed species (*Sierra Club v. U.S. Fish & Wildlife Service*, 2001 U.S. App. LEXIS 3936 (5th Cir. 2001)). Other cases have stressed the requirement for separate consultation regarding adverse modification and jeopardy (e.g. *Greenpeace et al. vs. National Marine Fisheries Service et al.*, 55 F.Supp.2d 1248 July 13, 1999).

Secondly, only by extending the Final Critical Habitat designation to protect all areas critical to the hydrologic regime required by the species can this designation promote its conservation. This issue is noted in the Critical Habitat proposal (Pg. 31560), and must be included as a primary constituent element. Under no circumstances should the proposed Critical Habitat be reduced!

Lastly, the proposed rule asserts that “the designation of critical habitat is of little additional value for most listed species” (page 31553). The facts show otherwise. Research by Cornell University, using FWS' own data, shows that species with designated critical habitat are less likely to be declining, and twice as likely to be recovering, than species without critical habitat." see: <http://www.biologicaldiversity.org/swcbd/programs/policy/ch/CHSEER9-2003.pdf>. Critical Habitat is therefore essential for protecting rare species, because it works. Species cannot be conserved unless their habitat and the ecological processes they depend upon are also conserved. This is a basic tenet of ecology and conservation biology. President Nixon and Congress obviously understood this. That is why they put the critical habitat requirements in the Endangered Species Act in 1973, and that is why the case law referenced above distinguishes between jeopardy and adverse modification of critical habitat. They are simply not the same thing.

While we commend the U.S. Fish and Wildlife Service for the proposed rule, and we appreciate the opportunity to present these comments, we specifically ask that

- (1) all historic habitat be included in the final Critical Habitat and
- (2) all areas essential to maintaining the hydrological regime the species depends upon are also incorporated into the final Critical Habitat.

Under no circumstances should this proposal be reduced. We look forward to the opportunity to continue to work with the US Fish and Wildlife Service in the conservation of this species and the rest of California's botanical resources.

Thank you for the opportunity to submit these comments.

Sincerely,



Illeene Anderson
Southern California Regional Botanist
California Native Plant Society

ls\
Daniel Patterson
Desert Ecologist
Center for Biological Diversity

cc: CNPS State Office
David Chipping, CNPS Conservation Director
Bristlecone Chapter, CNPS