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Subject: Arroyo toad final critical habitat

Rick,

Now that the AT fCH rule has been published, it is being covered in the media. Not surprisingly, some people and organizations are dismayed by the extent of the exclusions. Here are my final thoughts on AT CH.

Our 2000 proposal included 478,400 acres, of which, 182,360 acres were finalized. Then, after it was vacated, in 2004 we proposed 138,713 acres, which we revised to 95,544 in Feb. 2005. We have now finalized 11,695 acres. The final rule includes 104,699 acres that we determined to be essential to the conservation of the species, but only 11% has been designated as critical habitat. As far as economic exclusions go, 67,584 of the 104,699 essential acres (65%) were excluded for economic reasons (exclusions made by DOI).

We felt a lot of pressure during the last few months of drafting the final rule to reduce the total cost & therefore acreage. This occurred because the draft economic analysis (dEA) found that the cost of our proposal would exceed \$100 million/year. This is apparently some sort of threshold above which congress needs to be involved somehow. We also felt pressure to justify all of the acreage we had proposed. This is not necessarily a bad thing, in some ways it is similar to the peer review process when trying to get something published. However, the scrutiny is not from scientific peers in this case and the approach to critical habitat by DOI leads to some ways of doing things that make biologists uneasy. For example, DOI (i.e., Julie M.) has a very narrow definition of "occupied" habitat (perhaps stemming from a past court case). In our case, this led to removing all areas > 0.7 mile above the upper-most AT observation. We could demonstrate that an individual toad can move that far (although we/experts suspect they can go further). We felt we could not include suitable habitat above that, which we might want to do to account for AT that might be there but have not been observed, or to allow for population expansion. We would have had to justify it as unoccupied habitat that is nevertheless essential to the conservation of the species. It's tough to do that given incomplete information about these areas and given that we were already proposing 23 units. It seems to me that the era of erring on the side of the species is clearly over; the burden of proof is on us. The other somewhat bizarre unofficial guidance we have that makes no biological sense to me is that we should base boundaries on average numbers (e.g., average distances moved). Does that mean we should protect the amount of space the average toad uses? If this were ever equated to protecting 1/2 the area used by toads, or the area needed to sustain 50% of a population, then we would eventually lose most populations over time (the guidance is not clear).

Nevertheless, despite the pressure to reduce the acreage in the rule, I think our final delineation of essential habitat is fairly biologically sound. I don't think we were pressured into identifying anything less than what really is essential, with two possible exceptions. First, we narrowed upland habitat to 500 m from the stream (if 80' contour had not yet been reached)—this is probably just fine everywhere except for the coastal AT population(s) on/near Camp Pendleton where AT were found up to 1140 m from the riparian edge. But perhaps the upland habitat beyond 500 m there used by a seemingly small number of toads isn't crucial?? In any event, we couldn't justify more upland habitat than this under the "average" rule. Second, we did not include any unoccupied units; I don't think that would have gone over well with DOI given that we had 23 occupied units. However, in terms of recovery, as the recovery plan is written I don't think we could ever delist the arroyo toad without reintroducing it to formerly occupied areas (e.g., Salinas River) unless a number of new populations turn up on private land.

My main concern over the whole thing centers around the economic exclusions based on an inflated dEA. (I understand that any unit costing > \$10 million was excluded.) As has been pointed out in previous emails by me and others (e.g., 5/7/04, 5/10/04, 11/19/04), the dEA is based on assumptions that are unrealistic. For example, the dEA assumes that 1.25 acres of private land within critical habitat would need to be set-aside for the toad for every 1 acre that is developed, and that 80% of these set-aside acres

are developable land worth ~\$100 to \$200 thousand/acre. Our track record tells a different story. Of the 4 past AT BOs where land has been set aside for the toad, they have totaled about only  $\frac{1}{3}$  as much as the ratio predicts for future set-asides. And, perhaps more importantly, all of the set-aside land that I'm familiar with is in a floodplain (e.g., Rancho Las Flores, Newhall (but Newhall was not counted as one of the 4 development BOs for AT with land set-asides)). At Rancho Las Flores the dEA indicates that the 290 acres they have promised to set aside for the toad would result in a loss to them of \$7.5 million (the dEA assumes the developable land is worth \$130,000/acre there). However, all 290 acres are within the floodplain/riparian area of Horsethief Creek and the West Fork of the Mojave River, and most of it is within the inundation zone of the Mojave Forks Reservoir, and probably wouldn't/couldn't have been developed anyway, resulting in little to no actual monetary loss in real estate value. Although I'm not an economist, the dEA figures are a few orders of magnitude too high in my opinion, and the exclusions were made based on these numbers. The biology has to be peer-reviewed and scrutinized, why not the economic analysis?

Another complication of the economic exclusions—they undermine our efforts with private landowners to enter into conservation agreements. We had 2-3 such agreements with landowners whose land has now been excluded for economic reasons. Their incentive to conserve AT habitat has been removed and we look like we were goading them into conservation efforts that they didn't need to make, at least from their standpoint.

Now that I've got that out of my system, I can move on and finally get something done on the projects that have been piling up over the past many moons!

Creed