

Ileene Anderson
Biologist
Center for Biological Diversity

***Testimony on “Questionable Fish Science and Environmental
Lawsuits: Jobs and Water Supplies At Risk in The Inland
Empire”***

October 14, 2010

Summary of Testimony

1. The 2010 final critical habitat designation for the Santa Ana sucker is scientifically based and utilizes the best available science to identify the habitat requirements that the Santa Ana sucker needs to survive.
2. In contrast, a 2005 decision to designate no critical habitat for the fish on its namesake river was not based on any science and was the work of political appointees in the Bush administration.

Background and Qualifications

3. I have a Master’s of Science in Biology and a Bachelor’s of Arts in Biology from the California State University, Northridge.
4. I have 20 years of experience studying the ecology of southern California environments, including the Santa Ana River.
5. I have directed and participated in numerous field surveys of federal and state-listed threatened and endangered species, as well as other rare species. I have written results in conformance with the California Environmental Quality Act and the National Environmental Policy Act.
6. I have written, implemented and monitored a variety of restoration and revegetation plans, primarily implemented as mitigation.
7. I have published articles on these subjects in peer-reviewed scientific journals and presented papers and posters at scientific meetings.
8. I am currently a staff biologist with the Center for Biological Diversity, where I focus on protecting native natural resources primarily in San Bernardino, Riverside, Orange, Los Angeles and Kern counties.
9. I have attended meetings of the Santa Ana Sucker Recovery Team since 2005. I have participated in “river walks” organized by U.S. Fish and Wildlife Service in conjunction with the Santa Ana Sucker Recovery Team. During the “river walks,” I helped characterize the suitability of habitat along the Santa Ana River for the Santa Ana sucker fish.

Use of Science in the Designation of Critical Habitat for the Santa Ana Sucker Fish

10. The Santa Ana sucker (*Catostoma santaanae*) is a small native fish of the Santa Ana River. It is a federally threatened species and a State species of concern throughout its range, which includes the Santa Ana River in San Bernardino, Riverside and Orange Counties and the San Gabriel River and Tujunga Wash in Los Angeles County.
11. In 2004, the United State Fish and Wildlife Service proposed a scientifically based Critical Habitat for the fish that included the Santa Ana River from just south of Colton downstream to Prado Basin.
12. In 2005, political appointees in the Bush administration pushed through a final designation of critical habitat that included zero acres on the Santa Ana River. In my professional opinion, there was no biological basis for excluding occupied habitat supporting a successfully reproducing population of the Santa Ana sucker especially in the fish's namesake river.
13. On March 15, 2005, the Center for Biological Diversity submitted a Freedom of Information Act request to the U.S. Fish and Wildlife Service for all information associated with the 2005 critical habitat designation for the Santa Ana sucker fish. In those documents, the Center found clear and unequivocal evidence of political meddling by the Bush administration appointee, Craig Manson. According to U.S. Fish and Wildlife Service staff emails, Mr. Manson, who is not a scientist and has no background in habitat requirements of the Santa Ana sucker fish, decided to remove the proposed critical habitat units in the Santa Ana River from the final critical habitat designation. Exhibit 1.
14. Based on the evidence, the Center for Biological Diversity challenged the U.S. Fish and Wildlife Service's 2005 critical habit designation in federal court on November 15, 2007 and quickly came to a settlement agreement whereby the U.S. Fish and Wildlife Service would revisit the critical habitat designation through their typical public process for critical habitat designations by December 2010.
15. On December 9, 2009, the U.S. Fish and Wildlife Service re-proposed critical habitat for the Santa Ana sucker and allowed a 60-day public comment period on the draft proposal. On July 2, 2010, the U.S. Fish and Wildlife Service published the availability of the economic analysis of the economic costs associated with the proposed critical habitat designation for the Santa Ana sucker and allowed a 30-day public comment period on the economic analysis.
16. I submitted comments on the proposed critical habitat designation on February 6, 2010 on behalf of the Center for Biological Diversity and Inland Empire Waterkeepers. Based on my review of the data, I found the scientific evidence comprehensive in identifying areas along the Santa Ana River that were essential to the persistence of the Santa Ana sucker. In particular, inclusion of upstream areas which are the source of gravels that form the breeding substrate for the Santa Ana sucker was biologically justified.
17. The 2009 proposed critical habitat designation in the Santa Ana River was very similar to the areas proposed for critical habitat in 2004, which were subsequently deleted in the 2005 final designation by Mr. Manson.

18. Our comments noted that the 2009 proposal failed to include all suitable habitat for the Santa Ana sucker fish.
19. The 2010 final designation of critical habitat for the Santa Ana sucker is scientifically defensible. It includes the necessary components for the persistence of the fish in the Santa Ana River. While the upstream portion of the designation includes areas that have ephemeral surface flows, these areas provide the essential gravels upon which the Santa Ana sucker depends for successful breeding downstream.
20. Between 2004 and 2009, more information on the Santa Ana sucker and its habitat has become available. Unfortunately, this data shows the Santa Ana Sucker has declined from 2001 to 2008. Data about these declines as well as new information about the habitat needs of the species were incorporated into the 2010 designation of critical habitat for the Santa Ana sucker.
21. The Center for Biological receives less than half of one percent of its total annual income from attorney fees recovered through the Equal Access to Justice Act.
22. The majority of cases where legal costs are reimbursed under the Equal Access to Justice Act are filed by individual veterans and social security recipients - not environmental groups.

Conclusions

In summary:

- In 2004, the Santa Ana river was properly included in the proposed critical habitat designation based on the best available science and because it harbored successfully reproducing Santa Ana sucker.
- In 2005, political interference ignored the scientific evidence and improperly excised the Santa Ana River from the final critical habitat designation, as documented by U.S. Fish and Wildlife Service's emails.
- The 2010, the final critical habitat was designated based on all of the best available science including the most recent data collected between 2005 and 2009.

Kurt Johnson

12/20/2004 06:31 AM

To: Douglas Krofta/ARL/R9/FWS/DOI@FWS, Chris Nolin/ARL/R9/FWS/DOI@FWS

cc: Tannika Engelhard/CFWO/R1/FWS/DOI@FWS, Andy Yuen/CFWO/R1/FWS/DOI@FWS

Subject: Re: Fwd: SAS - version with 1b 

We need an answer from FWP as soon as possible on this. The package is due today, and we have a long way to go if Unit 1B is coming out. I will start working with Tannika to ensure that we have both versions ready to go. But we'll need language on why we are deleting Unit 1B. In my opinion, there is not economic justification for removing this Unit, especially in light of last Friday's message from Michael Taylor at NEA. I do not know if Randy has seen this message, but it may get him to reconsider his recommendation. But if he still wants Unit 1B out, we'll have to figure out language and I'll need help with that.

Thanks.

Kurt

Douglas Krofta

 **Douglas Krofta**

12/20/2004 08:23 AM


To: Chris Nolin/ARL/R9/FWS/DOI@FWS, Kurt Johnson/ARL/R9/FWS/DOI@FWS

cc:

Subject: Fwd: SAS - version with 1b

in case the original did not arrive

----- Forwarded by Douglas Krofta/ARL/R9/FWS/DOI on 12/20/2004 08:22 AM -----

 **Tannika Engelhard**
<tannikae@yahoo.com>
m>

12/20/2004 12:02 AM

To: linus_chen@fws.gov, douglas_krofta@fws.gov

cc:

Subject: Fwd: SAS - version with 1b

Please make sure that Kurt and Chris get this in case I got their email addresses wrong (since I'm sending from home). Thanks, Tannika

Note: forwarded message attached.

Do You Yahoo!?

Tired of spam? Yahoo! Mail has the best spam protection around

<http://mail.yahoo.com>

----- Message from Tannika Engelhard <tannikae@yahoo.com> on Sun, 19 Dec 2004 20:52:39 -0800 (PST) -----

To: kurt_johnson@fws.gov, chris_nolin@fws.gov, Tannika Engelhard
<tannika_engelhard@fws.gov>

Subject SAS - version with 1b

:

Here's the latest version with unit 1b. I've addressed most of Lynn Cox's comments. It appears that most of Randy's comments were already addressed in the version I started from. Here's a list of things that either need to be finished or checked (my edits are highlighted in yellow):

response to comments - several need more justification and several comments on DEA need responses

Redacted - Sec Privileged Doc. #28

Need for Special Mgmt. - review my addition

Unit Descriptions -- review my additions

Redacted - Sec Privileged Doc. #28

✓ Exclusions - Riverside MSHCP - check if NCCP permit has been issued

Redacted - Sec Privileged Doc. #28

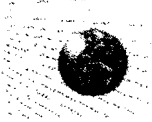
Section 17.95 - renumber PCEs if new one added

Legals - insert new ones

Do you Yahoo!?



Meet the all-new My Yahoo! - Try it today! SAS.fch 12-19-04_with unit1b.do



Kurt Johnson

12/20/2004 02:01 PM

To: Tannika Engelhard/CFWO/R1/FWS/DOI@FWS, Andy Yuen/CFWO/R1/FWS/DOI@FWS
 cc: Patrick Leonard/ARL/R9/FWS/DOI@FWS
 Subject: Removal of units 1 and B from Santa Ana sucker CH

For the record, the changes discussed over the telephone by Chris, Kurt, Doug, Tannika, and Tony will be made tonite and tomorrow and the document will be delivered to the Federal Register by COB tomorrow. The document will still have three Units, but Unit 1 will consist entirely of excluded habitat. We will still need explanatory language from Randy.

Kurt

----- Forwarded by Kurt Johnson/ARL/R9/FWS/DOI on 12/20/2004 04:57 PM -----



Patrick Leonard

12/20/2004 03:59 PM

To: chris_nolin@fws.gov, Douglas Krofta/ARL/R9/FWS/DOI@FWS, Kurt Johnson/ARL/R9/FWS/DOI@FWS
 cc:
 Subject: Removal of units 1 and B from Santa Ana sucker CH

----- Forwarded by Patrick Leonard/ARL/R9/FWS/DOI on 12/20/2004 03:57 PM -----

Randal Bowman@DOI

12/20/2004 03:57 PM

To: Elizabeth Stevens/ARL/R9/FWS/DOI@FWS
 cc: Patrick Leonard/ARL/R9/FWS/DOI@FWS
 Subject: Removal of units 1 and B from Santa Ana sucker CH

Judge Manson has decided to remove both of these, not under 4(b)(2) as I had earlier suggested for 1B, but because he does not believe they qualify as critical habitat. Both are unoccupied as far as we know, and were proposed more as a source of sand and gravel to be PCEs downstream than for their own intrinsic importance. He does not believe this makes them "areas essential to the conservation of the species" as required under the Act for unoccupied areas.

I will draft up explanatory language and get it to you this afternoon. Please let CNO know of this right away; they had prepared alternative maps and coordinates against the possibility of this happening.



Jane Hendron

12/22/2004 03:22 PM

To: Alexandra Pitts/SAC/R1/FWS/DOI@FWS

cc: Jim Bartel/CFWO/R1/FWS/DOI@FWS, Andy

Yuen/CFWO/R1/FWS/DOI@FWS, Tannika

Engelhard/CFWO/R1/FWS/DOI@FWS, Diane

Elam/SAC/R1/FWS/DOI@FWS

Subject: Some comments on the Santa Ana sucker rule

Hi Alex:

Attached is the revised final critical habitat designation for the Santa Ana sucker that was sent to the Federal Register yesterday for publication. I am just beginning to review the rule, but have some concerns about the way the exclusion of Units 1A and 1B is explained and other language within the rule that would appear to contradict the assertion that these units are not 'essential'. It should also be noted that the revised final rule states repeatedly that areas were proposed as critical habitat - the fact of the matter is these areas were designated as critical habitat on Feb. 26, 2004 and concurrently included in a proposed rule. What this revised rule does is remove previously designated areas (that were given such designation based on their being "essential to the conservation of the species".)

In the SUMMARY of the rule (basically the first page), it says that 23,719 acres of aquatic and riparian habitats have been identified as essential to the conservation of the Santa Ana sucker and that essential habitat in Orange, Riverside and San Bernardino counties has been excluded because we determined the benefits of exclusion are greater than the benefits of including them as critical habitat.

Response to comment #6 - in this paragraph it now says that "while the Santa Ana Wash was proposed as critical habitat based on, among other things, its contribution of sediments and maintenance of a functioning hydrograph, these attributes do not, of themselves, warrant determining that an area is "essential to the conservation of the species." Therefore, Unit 1B, Santa Ana Wash has been removed from the revised designation.

This statement would appear to indicate the habitat is not 'essential' so the acreage that falls within Unit 1B should no longer be counted in the estimate of 23,719 acres of habitat 'essential to the conservation of the species'. This also creates confusion with the SUMMARY section where it states we excluded essential habitat because of the benefits of doing so when in reality most of the exclusion was based on a revision of what constituted "essential" habitat. There is a big difference between excluding based on a benefits analysis and the wholesale removal of an area based on a reassessment of the criteria used to determine 'essential' habitat.

Response to comment #26 - the same type of confusing language occurs here as with comment #6.

Response to comment #29 - the commenter states "there are no new anticipated impacts to Santa Ana Wash (Unit 1B) and therefore it should be excluded...."

Our response states "The Santa Ana Wash is threatened by rapid development of the Santa Ana River Watershed in San Bernardino County, and by the demand for increased building materials and water supplies. However, Unit 1B, Santa Ana Wash, has been removed from the revised designation."

Response to comment #30 - the commenter states that Unit 1A does not contain habitat for the Santa Ana sucker.

Our original response is left intact - in that paragraph we state that Chino Creek historically supported the Santa Ana sucker and still contains one or more of the primary constituent elements essential to the species. In addition, the riparian habitat adjacent to the stream and the stream's contribution to the hydrological system are essential.

Another paragraph has now been inserted after the first one. In this newly inserted paragraph it now says that the attributes do not of themselves warrant determining an area is essential to the conservation of a species....the Unit 1A has been removed from designation.

The pattern appears to be that Units 1A and 1B were excluded because the Department said they weren't 'essential to the conservation of the species'; however, there wasn't enough time to remove any of the language that was in the earlier version of the rule where the Service discussed why habitat in these units was, in fact, essential. Now it looks like we don't have a clue what we are trying to say with regard to the habitat for the Santa Ana sucker.

There are other problems along the same lines but I just wanted to give you a general sense of how difficult this one will be when it comes to straight facing it with the public and the press.

Jane



Alexandra Pitts
12/23/2004 09:19 AM

To: Steve Thompson/SAC/R1/FWS/DOI@FWS, Paul Henson/SAC/R1/FWS/DOI, Jane Hendron/CFWO/R1/FWS/DOI@FWS
cc:
Subject: Re: Some comments on the Santa Ana sucker rule

Wow. See return message below. Profiles in courage and responsibility! I think the calls should then be handled in CNO. I will take them. Jane if you could give me a call and we can work through how best to respond that would be great.

Alexandra Pitts, Assistant Manager, External Affairs
California and Nevada Operations Office
US Fish and Wildlife Service
3800 Cottage Way Suite W-2606, Sacramento, CA 95825
916 414 6464
916 414 6486 (f)
alexandra_pitts@fws.gov

----- Forwarded by Alexandra Pitts/SAC/R1/FWS/DOI on 12/23/2004 09:14 AM -----

Pat Fisher
12/23/2004 08:18 AM

To: Alexandra Pitts/SAC/R1/FWS/DOI@FWS
cc: Megan Durham/ARL/R9/FWS/DOI@FWS, Cindy Hoffman, Nicholas Throckmorton/ARL/R9/FWS/DOI@FWS
Subject: Re: Some comments on the Santa Ana sucker rule

Alex-

We cannot pass this on to Hugh Vickery to handle, nor are we in any position to field media calls. Nick and I fully understand your awkward position caused by the significant edits. Nevertheless, you guys are just going to have to tough it out and handle any calls in your office. Nick reports that the outreach package is in ES as of this morning. Cindy will be acting this afternoon and all next week. Happy New Year.

Alexandra Pitts



Alexandra Pitts
12/22/2004 06:54 PM

To: Megan Durham/ARL/R9/FWS/DOI@FWS, Pat Fisher/ARL/R9/FWS/DOI@FWS
cc: Christine Eustis/ARL/R9/FWS/DOI@FWS, Robert Clarke/ARL/R9/FWS/DOI@FWS, Paul Henson/SAC/R1/FWS/DOI
Subject: Some comments on the Santa Ana sucker rule

Based on Jane's email below and after a conversation with Steve Thompson, we would prefer that Washington take the press calls on this FR notice. Steve agrees that if the WO made these changes but then failed to make the rest of the document consistent with those changes that it shouldn't fall to the field to figure out how to square the story. Can you let me know who we should identify on the press release to take calls. Thanks.

Alexandra Pitts, Assistant Manager, External Affairs
California and Nevada Operations Office
US Fish and Wildlife Service
3800 Cottage Way Suite W-2606, Sacramento, CA 95825
916 414 6464
916 414 6486 (f)
alexandra_pitts@fws.gov

----- Forwarded by Alexandra Pitts/SAC/R1/FWS/DOI on 12/22/2004 03:46 PM -----



Jane Hendron
12/22/2004 03:22 PM

To: Alexandra Pitts/SAC/R1/FWS/DOI@FWS
cc: Jim Bartel/CFWO/R1/FWS/DOI@FWS, Andy Yuen/CFWO/R1/FWS/DOI@FWS, Tannika Engelhard/CFWO/R1/FWS/DOI@FWS, Diane Elam/SAC/R1/FWS/DOI@FWS
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This statement would appear to indicate the habitat is not 'essential' so the acreage that falls within Unit 1B should no longer be counted in the estimate of 23,719 acres of habitat 'essential to the conservation of the species'. This also creates confusion with the SUMMARY section where it states we excluded essential habitat because of the benefits of doing so when in reality most of the exclusion was based on a revision of what constituted "essential" habitat. There is a big difference between excluding based on a benefits analysis and the wholesale removal of an area based on a reassessment of the criteria used to determine 'essential' habitat.

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Response to comment #30 - the commenter states that Unit 1A does not contain habitat for the Santa Ana sucker.

Our original response is left intact - in that paragraph we state that Chino Creek historically supported the Santa Ana sucker and still contains one or more of the primary constituent elements essential to the species. In addition, the riparian habitat adjacent to the stream and the stream's contribution to the hydrological system are essential.

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The pattern appears to be that Units 1A and 1B were excluded because the Department said they weren't 'essential to the conservation of the species'; however, there wasn't enough time to remove any of the language that was in the earlier version of the rule where the Service discussed why habitat in these units was, in fact, essential. Now it looks like we don't have a clue what we are trying to say with regard to the habitat for the Santa Ana sucker.

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Jane