



PO Box 33218 • Reno, NV

---

Public Comments Processing  
Attn: Docket No. FWS-R8-ES-2012-0074  
And Docket No. FWS-R8-ES-2012-0100  
Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive, MS 2042-PDM  
Arlington, VA 22203

24 June 2013

**Sent Electronically via E-mail and USPS Certified Mail**

Public Comments Processing

Attn: Docket No. FWS-R8-ES-2012-0074  
And Docket No. FWS-R8-ES-2012-0100

Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive, MS 2042-PDM  
Arlington, VA 22203

To Whom It May Concern:

The Western Mining Alliance appreciates the opportunity to submit comments and information concerning the proposed rules to list as endangered/threatened and to designate critical habitat for the Sierra Nevada Yellow-Legged Frog (*Rana Sierrae*), Northern Distinct Population Segment of the Mountain Yellow-Legged Frog (*Rana Muscosa*) and the Yosemite Toad (*Anaxyrus Canorus*), as published in the Federal Register / Vol. 78, No. 80 / Thursday, April 25, 2013.

The Western Mining Alliance defends the rights of over 55,000 mining claim holders across the West, and our membership includes thousands of miners. One of our primary objectives is to present science based evidence on the truth about mining.

We are submitting these comments because it is important for the U.S. Fish and Wildlife Service to recognize and openly disclose the impacts on the public that result from Agency actions, as is required by federal law.

Numerous federal laws contain language that requires the FWS to involve and work in a cooperative manner with the public. While it is important to protect the natural environment, it is equally important to consider the needs of the humans that federal actions will affect. It is our intention to provide information to you about your proposed rules from the point of view of the needs of miners and the public that will be affected by them.

You may contact me at [craig@themineralalliance.com](mailto:craig@themineralalliance.com) or by phone at (916) 813-0104.

Respectfully,

A handwritten signature in black ink that reads "Craig A. Lindsay". The signature is written in a cursive style with a large, stylized initial 'C'.

Craig Lindsay

President, The Western Mining Alliance

## Table of Contents

Introduction .....	3
Comment 1: Proposed rules fail of purpose .....	3
Comment 2: Proposed rules fail to demonstrate actual need for listing or designation.....	4
Comment 3: Proposed rules fail to use current data to assess grazing and logging impacts ...	5
Comment 4: Proposed rules fails to address actual cumulative effects .....	6
Comment 5: Proposed CH rule fails to address economic impacts .....	6
Comment 6: Proposed rule erroneously claims benefit to local government.....	7
Comment 7: Proposed rules impose unfair burden on the public .....	7
Comment 8: Comment period for proposed rules was too brief to allow for public input .....	8

### Introduction

These comments address the proposed rules to list as endangered/threatened and to designate critical habitat (CH) for the Sierra Nevada Yellow-Legged Frog (SNYLF), Northern Distinct Population Segment of the Mountain Yellow-Legged Frog (MYLF) and Yosemite Toad (YT), published in the Federal Register / Vol. 78, No. 80 / Thursday, April 25, 2013.

These comments address both questions of science and areas where the proposed federal action adversely impacts our membership and the general public. Our comments do not attempt to completely cover all of the information generated and used by the Agency in their preparation of the Proposed Rule, nor are they intended to be an exhaustive legal review of the Proposed Rule, but are rather our review that captures the easily identified and obvious places where the FWS has failed to comply with the law and regulations, where the Agency has not been concise, clear or to the point, as well as where the Agency has not clearly provided evidence that is meaningful to the average person that supports the analysis or conclusion that is presented. (40 CFR 1502.1)

It is the intent of these comments to provide information to the FWS that will lead to correction of errors and omissions in the proposed rules.

### Comment 1: Proposed rules fail of purpose

If the purpose of listing and designation of critical habitat for these species is to save them from extinction, then it would necessarily follow that the clearest and most imminent threats should be the ones addressed. However, given that the clearest and most imminent threat to the three species is the *Batrachochytrium dendrobatidis* (Bd) fungus, a world-wide threat to

amphibians and not just the species addressed here, and given that Bd has been spreading naturally (i.e. not because of human influence), it is hard to see how listing and critical habitat designation would accomplish the rules' purposes. Bd will kill the frogs and toads just as surely if they are listed and their habitat designated as if they are not listed or their habitat designated.

There are still many aspects of the ecology, epidemiology, and pathogenicity of Bd that remain uncertain<sup>1</sup> other than the sure knowledge that any of the proposed listed species will likely die if they are left in the wild.

Furthermore, the next clearest and most imminent threat is the stocking of nonnative trout to alpine lakes. According to the Center for Biological Diversity (CBD), yellow-legged frog species are adapted to high-elevation habitats without aquatic predators. Thus the continued stocking of fish will ensure that the fish will continue to prey upon tadpoles and juvenile frogs. As long as there are nonnative predator fish, there will be a constant threat to the stability of the frog and toad populations. According to CBD, scientists predict that the yellow-legged frog could be extinct within decades just from the predator fish alone<sup>2</sup>.

The purpose of FWS is to “conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people.” FWS must consider whether there are areas of habitat essential to an endangered species' conservation but the Agency is not required to actually designate critical habitat. In this case, designation of critical habitat is not essential to the species' conservation, since there is nothing intrinsic to the proposed area that will save the species' from extinction. In diverting time, attention and taxpayer dollars to useless actions that will not conserve the species, the FWS fails to meet its own mandates.

Advised action: Retract the proposed rules to list and to designate critical habitat for the frogs and toad, and instead locate and secure uncontaminated, healthy specimens of frog and toad to raise in captivity until the Bd problem is resolved, either through human scientific effort or by the species' developing natural immunity on their own.

Additional action: Discontinue stocking of nonnative predator fish that feed upon the species in question.

## **Comment 2: Proposed rules fail to demonstrate actual need for listing or designation**

It very much appears that listing of and critical habitat designation for the yellow-legged frogs and Yosemite toads is being misused to implement use restrictions, management requirements and personal liabilities on the public that are not prudent, clearly defined or necessary.

When approximately two million acres of CH is proposed for the 3 species (*page 24516, 3<sup>rd</sup> column paragraphs 1-3*) it is clear that no attempt has been determined to actually identify actual habitat. It can hardly be considered prudent action to make a claim that so large an

---

<sup>1</sup> <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0056802> accessed June 21, 2013

<sup>2</sup> [http://www.biologicaldiversity.org/species/amphibians/Sierra\\_Nevada\\_mountain\\_yellow-legged\\_frog/](http://www.biologicaldiversity.org/species/amphibians/Sierra_Nevada_mountain_yellow-legged_frog/) accessed June 22, 2013

area meets the habitat requirements for the three aquatic species that are dependent upon water or moist sites to survive.

According to the California Wetlands Portal website<sup>3</sup> there are approximately 1,320 acres of wetlands in the area of the proposed critical habitat, that is, 0.066% of the proposed habitat. The word “prudent” involves exercising good judgment and common sense. There is no good judgment or common sense in designating such massive land area for protection of such a small amount of wetlands. In fact, there is no justification for pretending that critical habitat has been determined all when using such broad-brush strokes. It is obvious that the amount of wetland habitat found in this regional landscape-scale mapping unit is overly inflated. The idea that it is necessary to designate large landscape scale blocks of land that contains very little actual wetland habitat as critical for the survival of these species is totally unfounded and not based in science.

Furthermore, much of the proposed critical habitat is already designated US Forest Service, National Park Service or Bureau of Land Management Wilderness areas. Page 24484 Column 1 states “Currently, most of the mountain yellow-legged frog populations occur in National Parks or designated wilderness areas” and page 24487 Column 2 states “A large number of mountain yellow-legged frog locations occur within wilderness areas managed by the USFS and NPS and, therefore, are afforded protection from direct loss or degradation of habitat by some human activities”.

There is no compelling need to add additional layers of restrictions on these areas, particularly since such restrictions will not save the species from Bd. Additionally, since nonnative fish stocking also contributes to the decline of the species, critical habitat designation is not needed. Simply stop stocking the fish.

Advised action: Retract the proposed rules since these actions will not protect the species from Bd.

### **Comment 3: Proposed rules fail to use current data to assess grazing and logging impacts**

Page 24502 FWS states that grazing has been in decline for decades, and further states "However, despite these reductions, grazing still exceeded sustainable capacity in many areas (Menke et al. 1996, p. 9; UC 1996a, p. 115).

Nearly twenty years has passed since that study. While approximately 33 percent of the estimated range of the Yosemite toad is within active USFS grazing allotments (USFS 2008, geospatial data), FWS itself states on page 24504 “we lack definitive data to assess the link between Yosemite toad population dynamics and habitat degradation by livestock grazing activity...”

No definitive data has been provided to substantiate any negative effects on the Yosemite toad from grazing. It is poor science, indeed, that would go ahead and link two factors with no evidence of a relationship between the factors. In the absence of current data, logic alone dictates that the impact of grazing on the Yosemite toad must be considered negligible.

---

<sup>3</sup> [http://www.californiawetlands.net/tracker/ca/question/wetland\\_distribution.html](http://www.californiawetlands.net/tracker/ca/question/wetland_distribution.html) accessed June 21, 2013

Furthermore, road usage and logging also are not specific threats to the Yosemite toad. FWS states on page 24504 that "...there is no evidence that the current level of timber harvest occurring within watersheds currently inhabited by the Yosemite toad is adversely affecting habitat."

Advised action: Remove any reference to habitat degradation from grazing, logging or road use from the proposed rule.

**Comment 4: Proposed rules fails to address actual cumulative effects**

In 2010 in response to litigation by the Center for Biological Diversity (CBD), FWS designated more than 1.6 million acres of critical habitat for the California red-legged frog (*Rana draytonii*). According to the CBD, the designation was three-and-a-half times as large as the FWS 2006 designation. Only a small portion of the 1.6 million acres overlaps the proposed frog and toad habitat, meaning with just these two listings and designations, well over three million acres has been designated as critical habitat. The CBD settlement agreement requires review of over 477 total species. The aim appears to be to leave very little unrestricted land left at the end of the court ordered review. It is clear the designations of critical habitat are not only becoming larger and more frequent, but are not even based on science but rather settlement of lawsuits.

Agencies are required to assess not only so-called, "direct" effects, but also "aesthetic, historic, cultural, economic, social, or health" effects, "whether direct, indirect, or *cumulative*" (40 CFR 1508.8). Blanketing a whole state or many stages with critical habitat designations will not save any kind of frog or toad, but constant erosion of open access to public lands will definitely have negative effects on the public and on the social and economic health of communities and businesses.

Advised action: Revise the proposed rules to include assessment of the full effects of these and other species' listings and habitat designations.

**Comment 5: Proposed CH rule fails to address economic impacts**

On page 24516, 3<sup>rd</sup> column, it is clearly stated that a final decision must be based not only on the best available scientific data, but also on "taking into consideration the economic impact". However, on page 24541, 3<sup>rd</sup> column, we find that the FWS "will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment."

It is hard to imagine how the public could fully analyze the real impact of the proposed rules without the availability of an economic analysis. No decision can be made by the Secretary, until the Secretary has taken economic impact into consideration, anyway. Given that economic impact, including the cumulative effect of the listing and designation of additional species in other actions, is vital to the local citizens, it is clear that the rush to list and designate CH is ill-advised at best, and is clearly in violation of NEPA. The FWS failure to provide a timely economic analysis of the proposed rules underscores the futility of these proposed actions.

As a result of there being no socioeconomic impact report, businesses and the general public cannot evaluate the impacts on their own use of public lands, including mining, logging, outfitting and hunting, recreational camping and hiking, equestrian activities, off-road vehicle use, or anything else that the public might wish to use public resources for. Omission of this report is evidence of a persistent and increasing trend in public resource management actions over recent decades to reduce access to public lands, particularly for mining, logging and grazing. Above and beyond economic impacts, this is clearly contrary to the cultural and historic uses of the land and resources, and impacts low income communities that specifically are protected by environmental justice regulations.

Advised action: Retract the proposed rules. Revise and republish when an economic impact report is available. The report should address cumulative effects of listing and designation for this species combined with proposed and existing designations for other species.

**Comment 6: Proposed rule erroneously claims benefit to local government**

On page 24544 it is stated: “The designation may have some benefit to these governments because the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified.”

This strange statement has no basis. In fact, because of the broad brush used to “define” the critical habitat, there is no clear definition of the physical or biological features essential to the conservation of the species, nor is there any specific identification of the features of the habitat. On the contrary, since such a small percentage of the two million acres proposed for critical habitat are wetlands, the actual essential features and elements are obscured.

Advised action: Remove the statement from the proposed rule, as no benefit could possibly be determined from the information provided.

**Comment 7: Proposed rules impose unfair burden on the public**

Unlike FWS and other agencies charged with natural resource management, businesses and the public do not have paid scientific and other experts in their employ to analyze federal proposals and to guide the public in understanding the impacts and consequences of federal actions. Considering that the socio-economic impact of the listing and designation of critical habitat of the frogs and toads is of potentially major importance to the public, and considering that the FWS has not provided the required analysis of socio-economic impacts, a tremendous and absolutely unfair burden of time and effort has been imposed on businesses and the citizens who will be impacted.

The Council on Environmental Quality has issued regulations for the environmental impact analysis process required under the provisions of the National Environmental Policy Act. The legal mandate for socioeconomic impact assessment is based on the National Environmental Policy Act, as well as the Executive Order on Environmental Justice, and case law. A central requirement of NEPA is that before any agency of the federal government may take actions significantly affecting the quality of the human environment, the agency must *first* prepare an Environmental Impact Statement (or EIS). Preparing an EIS requires the integrated use of the social science, including economic impacts.

This means that the proposed rules, as published in the Federal Register in April 2013, were and are in violation of the law since they are incomplete. Merely stating that missing components will be available sometime in the future is not in compliance with NEPA. Proposing rules that are in violation of law is unfair to the public, is contrary to the purposes of the Endangered Species Act and is a flagrant misuse of public funds.

Advised action: Retract the proposed rules until they are significantly revised and are fully compliant with NEPA and CEQ regulations.

**Comment 8: Comment period for proposed rules was too brief to allow for public input**

Insufficient public education opportunities have been provided by the short (45 day) comment period, particularly since the local governments in the impacted counties would not have more than one scheduled public meeting during the comment period. This appears to be an attempt to limit public input into the proposed rules, and is unfair to governments, businesses and the public.

Advised action: Retract the proposed rules. Republish when revisions are complete and the required socioeconomic impact report is available. Provide a 60-day comment period to allow for local governments to meet more than one time and for businesses and the public to have adequate time to evaluate and respond.