



March 24, 2011

***SENT VIA EMAIL***

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**Re: Center for Biological Diversity and John Muir Project Petition to List the Black-Backed Woodpecker**

Dear Department and Commission:

We are writing in regard to the Department of Fish and Game's ("DFG") Evaluation of the Petition to List the Black-Backed Woodpecker ("BBWO").

We are pleased that the Evaluation agreed with many of the Petition's points as noted below in bullet point:

- "the Department generally agrees with the Petition regarding the negative impacts to BBWO from post-fire salvage logging, active fire suppression, and pre-fire forest thinning" (Report at 9);
- "the highest densities of the species are found in recently burned forests (Hutto 1995, Hanson and North 2008)" (Report at 13);
- "in every published study either provided with the Petition, received by the Department, or already in the Department's possession that compares BBWO foraging and nesting use of burned and salvage-logged forests to the use of burned and un-logged forests, BBWOs and BBWO nests have been significantly less abundant in the salvage logged stands – even when snags were retained to improve wildlife habitat (Saab and Dudley 1998, Hutto and Gallo 2006, Saab et l. 2007, Hanson and North 2008, Cahall and Hayes 2009, Saab et al. 2009)" (Report at 22);
- "the Petitioners indicate, and the Department agrees, that high quality BBWO habitat (i.e. conifer forests burned at high intensity) is being created at greatly reduced levels compared to historic levels due to modern fire suppression actions (p. 49)" (Report at 22);

- “the Petition states that pre-fire suppression forest management (e.g. stand thinning and fuel break creation) prevents the creation of high quality BBWO habitat by excluding fire from ecosystems and reducing pre-fire forest stand tree density and canopy cover (p. 53). This is a logical conclusion based on Hutto’s (2008) finding of a significant correlation between pre-fire thinning intensity and post-fire BBWO occupancy levels” (Report at 23);
- “the Department generally agrees with the Petitioner’s view that changes in western North American climate can be expected to result in less annual fire extent and decreased fire intensity within mid and upper elevation conifer forests, thereby further limiting the creation of high quality BBWO habitat (p.57). McKenzie et al. (2004) have noted a trend towards increasing summer precipitation which is expected to reduce the frequency and extent of high intensity wildfire (Giardin et al. 2009, Parisien and Moritz 2009)” (Report at 23);
- “the Department finds the Petitioner’s assessment of current land management practices on National Forest lands (p.59) and private lands (p. 62) to be reasonably accurate” (Report at 24);
- “the Department generally agrees that the Petitioners’ management suggestions would benefit BBWO” (Report at 26).

There are, however, several issues that we wish to clarify and explain further because it appears that the Department has misunderstood some of the Petition’s points. Moreover, in some instances, the Department is either incorrect in its assessment of the literature or inappropriately points to “uncertainty” to sidestep an issue. We hope that the Department, after reading this letter and the associated letter from Chad Hanson, will correct these issues because the Evaluation Report is generally the primary document that the Commission relies upon when making its decision. Thus, until the Evaluation Report is corrected, the Commission will be incapable of making a well-founded decision.

The current Evaluation Report provides a solid background regarding the legal landscape for California Endangered Species Act (“CESA”) listing petitions. However, the Evaluation incorrectly asserts that “[i]n short, under controlling law, the Commission’s obligation at this first step in the CESA listing process is to discern what an objective, reasonable person would conclude in light of the information contained in the BBWO Petition.” This statement is wrong, or at least could be misappropriated, because the question at this stage of the listing process is “what *could* a reasonable person conclude?” This distinction is critical because reasonable people can differ in their conclusions. DFG’s statement, on the other hand, can be read to imply that there is only one reasonable conclusion.

To explain further, whether or not the Evaluation’s conclusions are reasonable is not the issue — what matters is whether DFG has rationally explained why Petitioner’s conclusions are unreasonable. The fact that DFG disagrees with some of the Petition’s conclusions is immaterial unless DFG has explained why no reasonable person could make the conclusions that Petitioners

make. Again, at this stage in the listing process, it's not about which conclusions are the *most* reasonable. As explained by a California Appeals Court, "the standard, at this threshold in the listing process, requires only that a substantial possibility of listing could be found by an objective, reasonable person. The Commission is not free to choose between conflicting inferences on subordinate issues and thereafter rely upon those choices in assessing how a reasonable person would view the listing decision. Its decision turns not on rationally based doubt about listing, but on the absence of any substantial possibility that the species could be listed after the requisite review of the status of the species by the Department under [Fish and Game Code] section 2074.6." (*Center for Biological Diversity v. California Fish and Game Commission* (2008) 166 Cal.App.4th 597, 611.)

Federal law also provides important insights on the reasonable person standard. "CESA was in large part modeled upon FESA; thus, federal decisional law must be given great weight." (*San Bernardino Valley Audubon Soc'y v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 603.) Federal courts, in interpreting FESA, have consistently found that the "may be warranted" standard is a low threshold and does not require a listing petition to provide conclusive evidence. For instance, in *Center for Biological Diversity v. Kempthorne*, 2008 U.S. Dist. LEXIS 17517 (D. Ariz. 2008), the court declared that "the application of an evidentiary standard requiring conclusive data in the context of a [petition] review is arbitrary and capricious."

The federal courts have also, like the California Appeals Court in the *Center for Biological Diversity* Decision, explicitly stated that contradictory evidence does not mean a petition can be rejected. In *Center for Biological Diversity v. Kempthorne*, the Court explained:

[W]here there is reasonable disagreement among scientists, the 'may be warranted' standard is satisfied, and the [agency] should publish a positive 90-day finding and proceed with a status review, at which time the [agency] may employ the more-searching 'is warranted' standard. The specific question at the 90-day stage is not whether there is conclusive evidence to establish that the petitioned action is warranted, but merely whether there is enough information to lead a reasonable scientist to believe that the petitioned action may be warranted.

(2008 U.S. Dist. LEXIS 17517 at \*34-35; *see also Center for Biological Diversity v. Kempthorne*, 2007 U.S. Dist. LEXIS 4816, \*11-12 (N.D. Cal. 2007) ("A reasonable person could find that an action 'may be warranted' even in the face of evidence cutting multiple ways. Here, the Service reached its ultimate conclusion because much of the evidence was not conclusive. This was arbitrary and capricious."))

In sum, at this stage in the listing process there are only 2 things to consider, 1) what is the available information, and 2) what inferences could a reasonable person draw from that information? Thus far, DFG has presented counter arguments to the Petition's conclusions, but as noted by the *Center for Biological Diversity* Court, "[a] counter showing or argument that raises only a conflicting inference about a portion of the showing in favor of the petition, unless that counter inference is very strong, will not, for an objective, reasonable person, diminish the possibility that listing could occur . . . ." 166 Cal.App.4th at 612. As explained in Chad Hanson's letter (attached to this letter), not only are DFG's counter inferences not very strong,

they are in some instances factually incorrect and/or based on misunderstandings. If corrected, there should be no doubt that the Petition presents a reasonable argument that listing could occur. Consequently, if the Commission follows the law, it will accept the Black-backed Woodpecker Petition and initiate a status review for the species.

For all the above reasons, we urge the Department to reassess its BBWO Petition Evaluation and correct the errors and inaccuracies it contains. The Petitioners are available to discuss the issues should the Department be interested in doing so. Otherwise, we ask that the Commission take the appropriate action and move to the next step in the listing process, a status review.

Respectfully submitted this 24th day of March, 2011,



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Justin Augustine

On behalf of Petitioners, the Center for Biological Diversity and the John Muir Project