



Pima Natural Resource Conservation District  
Pima Center for Conservation Education, Inc.  
NRCS Plant Materials Center  
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## **Minutes of the Combined Meeting of the Board of Supervisors of the Pima NRCD and Pima Center for Conservation Education**

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Meeting Date: September 20, 2018  
Time meeting was called to order: 10:01 AM MST  
Attendees:  
Supervisor Jim Chilton  
Supervisor Cindy Coping, Chair  
Supervisor Jonathan DuHamel  
Supervisor Patricia King  
Biologist Dennis Parker

Due to unforeseen circumstances, Mr. Parker is unable to complete and submit comments on the proposed regulatory changes under the ESA as previously proposed.

He did point out the following regarding the proposed regulatory changes to listings and critical habitat:

It's a good attempt, to improve, the first attempt in 40 years.

Some problems with the regulation were not picked up by the draft comments shared with us by others, as follow:

There are problems with the definition of "occupied" habitat that must be addressed.

A subset definition of what can be designated as "critical but unoccupied" is at SCOTUS *Weyerhauser vs. FWS*. Question: Does ESA allow designation of private land that not habitat and not occupied? Ultimately SCOTUS will decide. FWS is asking for specific input on this.

Important to weigh in and to consider creating a coalition to pay Norm James to write an amicus brief for submission to SCOTUS.

USFWS is planning to use "Concepts of conservation biology (CB), formerly used only by NOAA, in their determinations. This was used in critical habitat designation for the jaguar.

CB is theological, nonreplicable, based on pre-determined outcome and built backwards. CB is not science. It is not appropriate to be used for unoccupied habitat but USFWS claims it would facilitate “more efficient conservation” (terminology that is not mentioned in the ESA). Conservation biology could be a major factor used, in lieu of the best available science. CB language should be stricken altogether.

The regulation must not designate critical habitat based on physical *or* biological features but rather, physical and biological features. Otherwise, critical habitat could be hypothetically designated on Mars simply because of the presence of open space. In the references to physical and biological features it would be best to get rid of NOAA’s references conservation biology. Since rule seeks to harmonize FWS with NOAA it must be watched out for.

It remains a problem that any physical feature is enough to have habitat viewed as critical. We argued that one physical feature does not justify jaguar critical habitat. Suggest following Congress’s intent as Norm wrote about in law review. Bio-physical factors are what must be considered. There must be more than one factor, and a combination of both physical and biological features.

In many areas of the regulations, particularly in references to unoccupied habitat, the word “will” must be changed to “shall” or it does not conform to the strict requirements of the ESA.

Mr. Parker recommended that a broad coalition of organizations pool together and have Norm James to write an amicus brief on the Dusky Gopher Frog lawsuit, now being heard by SCOTUS. The outcome will directly impact the critical habitat rule. We can anticipate the case outcome will render many comments on the proposed revisions to critical habitat moot.

Finally, Mr. Parker stated that even with the rule improvements and the bills in Congress to revise the ESA, there remains a 14<sup>th</sup> Amendment “equal protection clause” issue because solely the opponents of a 90-day positive finding are unable to sue and get an evidentiary hearing. Proponents of a positive finding can sue over a negative finding and get a full evidentiary hearing. Opponents must wait until a final decision is published, and then pursue relief under the Administrative Procedure Act, which does not allow for scientific evidence to be examined.

There is a fundamental flaw in the ESA. Congress created a permanent underclass of the regulated community, which has fewer legal rights than anti-business, anti-freedom activists with no skin in the game. This constitutes a fundamental violation of the Equal Protection clause. Vagueness is the devil’s workshop. The courts have reinterpreted many phrases in law to mean the exact opposite of Congress’s intent. Everyone should have access to sue in federal district court using rules of evidence at 90 days instead of having to settle for suing under APA. Only a negative 90-day petition finding is currently actionable due to the word “negative” in the ESA.

In lieu of Dennis Parker writing the comments, Cindy Copping will write them, with heavy reliance on draft comments received from other organizations, and addressing the issues Mr. Parker has raised.

Motion was made by Supervisor Chilton to adjourn

Motion 2nded by Supervisor King to adjourn  
The motion carried by unanimous voice vote.  
Meeting adjourned 10:29 AM.

Next meeting: Tuesday, September 25, 2018, 1:00 PM, NRCS Plant Materials Center conference room, 3241 N Romero Rd., Tucson, AZ 85705

Date Minutes were Approved by a quorum of the Pima NRCD/PCCE Board of Supervisors y unanimous voice vote on September 25, 2018.



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Cindy Coping, Chair, Pima NRCD/PCCE