



ORANGE COUNTY NEW YORK

MISSION STATEMENT

The Alliance for Balanced Growth supports economic growth while maintaining a high quality of life and providing a forum to address and develop a unified voice on issues of mutual interest and advocating for balanced growth. It is a standing committee of the Orange County Partnership whose members are actively involved in creating industrial and office development.

February 20, 2014

Commissioner Joe Martens
New York State Department of Environmental Conservation
625 Broadway – 14th Floor
Albany, NY 12233-1010

Re: Comments on the Draft Northern Cricket Frog Recovery Plan

Dear Commissioner Martens:

We write to provide you with our concerns regarding the Department's Draft Northern Cricket Frog Recovery Plan (the "Recovery Plan"). The Alliance for Balanced Growth (ABG) is a standing committee of the Orange County Partnership (OCP). The ABG's mission is to support balanced, sustainable economic growth while concurrently promoting a high quality of life for Orange County residents. Both the OCP and ABG closely monitor environmental regulation issues, and we have serious concerns regarding the Recovery Plan.

We enclose the comments of Steven T. Esposito, RLA, of Esposito & Associates. Esposito & Associates have worked with the Department in developing work plans and/or obtaining "take" permits which mitigated potential impacts to the Northern Cricket Frog ("NCF") within the Glenmere Lake Watershed, and as a result, their comments are based on actual NCF field and permitting experience. One of their key recommendations is that the Department undertake a pilot program to determine whether the NCF repopulate potential habitat before implementing a Recovery Plan that mandates the preservation of wide areas around such potential habitat with little or no understanding whether such efforts will actually promote the recovery of the species. We fully endorse this recommendation, as well as Mr. Esposito's other comments.

We further believe that the Recovery Plan is fundamentally flawed, for the following reasons:

- First: The reason that NCF are rare in New York is because New York obviously is at the end of the range for suitable NCF habitat. NCF are plentiful elsewhere throughout their range. Thus, the Department presumes that recovery is possible, when nature appears to dictate otherwise.
- Second: The Department acknowledges that it cannot quantify let alone account for the apparent historical decline of NCF in New York, and yet it offers to impose a Recovery Plan when the problem itself is not understood.
- Third: The Recovery Plan completely fails to acknowledge that the potential habitat areas and the surrounding uplands are currently utilized for residential, commercial and agricultural uses.

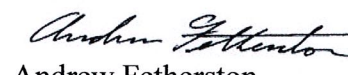
The Recovery Plan offers no suggestion that those existing and future uses of property can or will be balanced with the Department's stated goal of recovery for the NCF. On this point, we note that the Department served on the advisory committee for the 2012 Glenmere Lake Watershed Protection Plan -- which plan acknowledged the importance of NCF habitat in the context of other land uses -- yet failed to even mention the Watershed Protection Plan. The Watershed Protection Plan had the laudable goals of maintaining "sufficient health and quantity of natural habitats to support recreational activities and wildlife, including game, rare and endangered species, and common species," yet also supported sustainable development within the watershed that does not compromise the other objectives". Watershed Protection Plan at ES-i. We suggest that any final Recovery Plan incorporate these goals.


We also note that the Department's authority to implement recovery plans stems solely from the 2010 Part 182 regulation amendments. The 2010 Part 182 regulations constituted a significant shift from the Department's statutory authority for the protection of endangered species to the enhancement of endangered species, as embodied not in the concept of species "recovery", but also in the permitting standard of "net conservation benefit". This shift to enhancement has no statutory support within the State Endangered Species Act, which only authorized NYSDEC to "promulgate regulations to the taking, importation, transportation, possession or sale of any species of special concern as the department deems necessary for the proper protection of such species." ECL § 11-0535(3) (emphasis supplied). Enhancement, as embodied within the concepts of species recovery and the net conservation benefit requirement, is a standard well beyond protection. The Recovery Plan is obviously intended to further the NYSDEC's goal of restoring endangered species, which is not a goal expressed in the statute. Clearly, as an administrative body, NYSDEC cannot create rules that substantially increase its regulatory authority absent an act of the Legislature. See, e.g., Finger Lakes Racing Assn. v. New York State Racing & Wagering Bd., 45 N.Y.2d 471 (1978); see also Matter of Consolidated Edison Co. v. NYSDEC, 71 N.Y.2d 186 (1988). The Desmond-Americana v. Jorling, 143 Misc.2d 711 (Albany Co. 1989); Matter of Levine v. Whalen, 39 N.Y.2d 510 (1976); Matter of City of New York v. State of New York Commn. on Cable Tel., 47 N.Y.2d 89 (1979); Matter of City of Utica v. Water Pollution Control Bd., 5 N.Y.2d 164 (1959). Given this context, we question the Department's rationale to impose a flawed Recovery Plan that will affect broad swaths of property without any legislative mandate to do so.

Thank you for the opportunity to submit these comments. We ask that the Department withdraw the NCF Recovery Plan. In its stead, a pilot program for NCF recovery would make more sense than imposing a plan that appears flawed in its inception as well as its likelihood of success.

Respectfully Submitted,


John Lavelle
Co-Chair


Andrew Fetherston
Co-Chair


Dominic Cordisco
Co-Chair

cc:

Region 3 Regional Director Martin Brand

Region 3 Biologist Gregg Kenney

Region 3 Natural Resources Coordinator Bill Rudge

Hon. Senator William J. Larkin

Hon. Senator John J. Bonacic

Orange County Executive Steven M. Neuhaus

Executive Director Maureen Halahan, Orange County Partnership

Supervisor Michael Sweeton, Town of Warwick

Supervisor Alex Jamieson, Town of Chester

Mayor Jim Pawliczek Sr., Village of Florida



February 19, 2014

Mr. Gregg Kenney
NYS Department of Environmental Conservation
Region 3
21 South Putt Corners Road
New Paltz, NY 12561

Re: Draft Recovery Plan for the Northern Cricket Frog

Dear Mr. Kenney:

As you know, our firm has worked with the Department over the past few decades in obtaining a variety of State permits for our clients during the review and approval process. In the past 7 years, we have worked with the Department in developing work plans and/or obtaining "take" permits which mitigated potential impacts to the Northern Cricket Frog ("NCF") within the Glenmere Lake Watershed. Due to our experience in State permitting and recent issuance of two Take Permits, a number of stakeholders in and around the Glenmere Lake Watershed asked us to review the Draft Recovery Plan for the New York State Populations of the Northern Cricket Frog during the public comment period.

The following is our critique of the Draft Recovery Plan (the "Plan") for your consideration:

An overriding concern regarding the draft Recovery Plan for New York State Populations of the Northern Cricket Frog is that it fails to acknowledge that New York lies at the northerly edge of NCF habitat and how that factors into the scarcity of NCF in New York. Northern cricket frogs exist in abundance just south of New York, in New Jersey, all the way to Florida and Texas. Indeed, the NCF is only a protected species in New York due to the fact that it is at the edge of its natural habitat range in New York. The concept of a recovery plan presumes that the species needs to be recovered in New York even though New York lies at the edge of the NCF's range. Neither the International Union for Conservation of Nature nor the US Fish and Wildlife Service lists the northern cricket frog as being a threatened or endangered species within the United States.

Mr. Gregg Kenney
February 19, 2014
Page Two

The Plan unfortunately does not pinpoint the reason why the northern cricket frog population has decreased over the past 100+ years in southeastern New York. There is speculation as to the potential causes including habitat loss and degradation, chemical pollutants, pesticides, non-native species, pathogens, climate change and ultra-violet radiation. It is tough to solve a problem until the problem is sufficiently defined.

Without knowing why the cricket frog is in decline in this specific geographical location and whether or not the cricket frog may be recolonized within the historic observation areas, it may be premature to come up with a solution to the problem. The Plan states that there are gaps in the data regarding conservation biology of the northern cricket frog. It also implies that this data is necessary to evaluate and/or assist in the recovery of the species.

With regard to implementation of the Plan, there are five strategy components outlined that must be implemented over a fairly large geographical region. These include developing a monitoring program throughout the State of New York to determine the distribution and abundance of the northern cricket frog, protect suitable but unoccupied NCF habitat, restore and protect degraded aquatic habitats, identify suitable habitat in all recovery units in light of "climate change scenarios" (which is not defined anywhere), reintroducing the NCF at formerly occupied sites and exploring the development of a conservation bank. However, the success in implementing any plan is having the financial capabilities to implement the plan and maintain it. Nowhere is there a suggestion on how this extensive work would be funded.

The Recovery Plan does provide general information regarding the species' history, range, breeding and other biological habits. Figure 1 which graphically illustrates the range of the NCF within the United States appears to be clearly defined by latitude and longitude. The range of any living plant or animal is defined by climate, food source and natural predators. Three out of the 4 states that have the NCF listed as endangered (New York, Wisconsin and Minnesota) are north of 42nd latitude line. Michigan has the NCF listed as threatened and the northern 2/3's of that state is above the same latitude. This defined northern limit of the NCF distribution throughout the US may indicate that temperature may play a significant role in the survival of the species. This phenomenon is typical of many plant and animal species distribution.

Mr. Gregg Kenney

February 19, 2014

Page Three

Page 14 discusses regulatory protections in the State of New York, i.e., Article 11 "Take" Permit, as a mechanism to mitigate potential project-related impacts to NCF. However, the Plan goes on to say that there may be "instances where mitigation of impacts is not possible". Presumably this means that a project would not be able to move forward if, in the eyes of the Department, mitigation could not be developed that would provide a net benefit to the species. This could be significant to many landowners in and around existing cricket frog populations and areas that may have had potential habitat or formerly occupied habitat. In addition to breeding habitat there is reference to "upland" habitat associated "with hibernation, feeding, sheltering, migration and movement". Based on current DEC guidelines, these behaviors may take place within 1,500' of known breeding habitat.

As the Plan's strategies recommend protection of existing populations and habitats as well as suitable and unoccupied habitats and the uplands within 1,500' of these habitats, this may significantly encumber the ability for future development of these lands. Yet there is no rationale that the northern cricket frog would occupy the suitable or unoccupied habitats sometime in the future. The Plan looks to encumber significant areas of the Hudson Valley without establishing whether the northern cricket frog will recolonize in these areas.

Page 15 of the Plan states that the recovery goal is to "establish a long-term, self-sustaining population of the NCF within New York resulting in the recovery and delisting of the species. . . . To meet this goal, the northern cricket frog must reach a population level and sufficient habitat throughout its historic range to provide for long-term persistence of the species." Figure 2 illustrates the historic range of the northern cricket frog in New York based on observations between 1887 and 2011 which includes Richmond County, Queens County and Nassau County. Also included is much of the Hudson Valley. The Plan doesn't address the changes to the landscape and evolving land uses within this geographical area of the State over the past 126 years. The Recovery Plan fails to acknowledge that the areas of NCF habitat and potential habitat also serve now as areas for residential, agricultural and commercial activities. The NCF Recovery Plan makes no attempt to balance those competing interests with the goal of NCF recovery. The goal may not be achievable. Therefore, the species will not be delisted.

Mr. Gregg Kenney

February 19, 2014

Page Four

The northern cricket frog may potentially be considered for delisting in the State of New York when the four recovery objectives listed on page 18 have been met. One of the objectives is that the threats and causes of NCF decline have been identified and reduced or eliminated. Without understanding these threats or causes of decline, they can't be eliminated or mitigated and recolonization is unlikely to occur within any of the recovery units. Therefore, the objectives will not be met and the species will not be delisted. Without identifying the cause of the problem, the problem cannot be mitigated.

Evident in the outlined recovery tasks is the need for further research on the cause of decline of the species and monitoring of the existing populations and their distribution. One recommendation to evaluating the cause of the populations decline and to limit the scope of proactive restoration efforts would be to introduce an NCF population into areas that are existing suitable habitats that were previously occupied by the NCF and are lands that are already protected, i.e., State parklands/Sterling Forest. This newly introduced population can then be monitored in a controlled environment to determine the potential viability for recolonization of the NCF. This pilot program would reduce the initial scope and funding requirements as outlined in the Plan while resulting in test data that would allow for a better understanding of whether the repopulation theory is even feasible.

In general, although the Recovery Plan has its specific goals, it is not a practical resource for local and regional decision makers. There is a Recovery Task entitled Outreach Tasks which describes some programs that "could" be developed to inform and educate the general public and/or land owners within subject watersheds, planning boards and local governments about NCF habitat, NCF behavior and the need for habitat preservation. In our opinion, this task is something that can be developed and implemented with relative ease and minimal expense by the Department.

Not referenced in the Recovery Plan is the Glenmere Lake Watershed Management Plan ("WMP") dated February 2012 prepared for the Orange County Water Authority. The purpose of this WMP was to provide objective information and guidance to Glenmere Lake's managers, users and other stakeholders. One of the major recommendations of the WMP for Glenmere Lake was to maintain sufficient health and quality of natural habitats to support recreational activities and wildlife including game, rare and endangered species and common species. The WMP recognizes the need to manage the quality of the aquatic environment as well as land uses in the Glenmere Watershed to

Mr. Gregg Kenney
February 19, 2014
Page Five

maximize water quality relative to drinking water supply and for protection of important wildlife such as the northern cricket frog and other species.

The WMP recognizes that the largest cricket frog population in the State of New York resides at Glenmere Lake, a public water supply, and provides recommendations to the various stakeholders for managing the aquatic and upland environments. The WMP also provides recommendations for plan implementation contrary to the Recovery Plan which does not clearly present how the Plan may be implemented.

We appreciate the opportunity to comment on the Recovery Plan and would like to thank the Department for its continued efforts in the protection of our natural resources.

Very truly yours,
ESPOSITO & ASSOCIATES

A handwritten signature in cursive script, appearing to read "Steven T. Esposito".

Steven T. Esposito, RLA

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