

CRS Report for Congress

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The Role of Designation of Critical Habitat under the Endangered Species Act (ESA)

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Summary

The agencies that implement the Endangered Species Act (ESA) regard the designation of critical habitat (CH) as providing only very limited benefits beyond those achieved through the listing of species and the avoidance of jeopardy to them. Several courts have now held that the relevant regulation and interpretation that result in this conclusion are erroneous and do not carry out the intent of Congress. H.R. 2933 in the 108th Congress would change the definition of CH and move the time at which critical habitat must be designated for a species from being (basically) concurrent with the listing of the species to the earlier of either three years after listing or one year after approval of a recovery plan for that species. H.R. 1662 would add additional requirements relating to the use of science in CH designations. This report provides background for considering the regulatory posture and current legislative proposals on CH, and may be updated as circumstances warrant.

Introduction

The Secretary of the Interior, acting through the Fish and Wildlife Service (FWS), and the Secretary of Commerce, acting through NOAA Fisheries, have duties under the Endangered Species Act (ESA)¹ to preserve and conserve species, including by designating critical habitat (CH). Over several administrations, the agencies have asserted that the current system for CH designation CH affords few additional benefits for species beyond those provided by listing a species as endangered or threatened, and taking actions to avoid jeopardizing a species' continued existence.² Several courts have now held that the regulation and interpretation underlying the views of the FWS are erroneous and do

¹ Act of December 28, 1973, P.L. 93-205, 87 Stat. 884, as amended, codified at 16 U.S.C. §§ 1531 et seq. Responsibility for terrestrial and freshwater species rests with the Secretary of the Interior, while responsibility for marine species and anadromous fish rests with the Secretary of Commerce.

² See 64 Fed. Reg. 31871 (June 14, 1999) when the FWS discussed this issue and called for public comment on the current system.

not carry out congressional intent. Proposals are currently before Congress that address CH. This report³ is written as background for considering both the current legislative proposals and the agencies' position.

The preservation of ecosystems is one of the purposes of the ESA,⁴ and all federal agencies must use their authorities to conserve species and the ecosystems upon which they depend.⁵ The ESA protects habitat in many ways, including the definition of prohibited "take" of listed species; the purchase of lands; cooperative programs with states; consultation on federal actions or actions with a federal nexus; and issuance of incidental take permits based, in part, on habitat protection. The act also requires the designation of "critical habitat," which is defined as areas essential for the "conservation" of the species in question, which basically means that necessary for the recovery of the species.⁶ Designation serves several important express purposes and also informs other aspects of habitat protection under the act. Designation of CH may have fewer consequences than many members of the public seem to believe, but may have more consequences than the FWS asserts.

Habitat currently occupied by a listed species may be critical because it "may require special management considerations or protection."⁷ "Unoccupied" CH is the additional suitable area necessary for the conservation of the species.⁸ Currently, CH must be designated at the time a species is listed under the ESA, unless designation would not be prudent (as when vandals or collectors could harm a limited habitat or species), or the CH is not determinable.⁹

The appropriate Secretary must designate CH on the basis of the best scientific data available and after taking into consideration the economic, national security, or other relevant impacts, of designating a particular area as CH. The Secretary may exclude an area from designation if the Secretary determines that the benefits of exclusion outweigh the benefits of inclusion, unless the Secretary determines, based on the best scientific and commercial data available, that the failure to designate the area will result in the extinction of the species concerned.¹⁰ The designation of CH plays several direct and indirect roles under the ESA.

³ This report does not address the conservation of plant species listed as threatened or endangered.

⁴ 16 U.S.C. § 1531(b).

⁵ 16 U.S.C. § 1531(b) and (c).

⁶ *Critical habitat* is defined at 16 U.S. C. § 1532 (5); and see the definition of *conserve* at 16 U.S.C. § 1532(3), as meaning assisting species in reaching the point when they no longer need the protections of the act.

⁷ 16 U.S.C. § 1532(5). This language might have supported direct regulation of lands within critical habitat, but has not been so interpreted.

⁸ 16 U.S.C. § 1532(5)(A). The distinction between occupied and unoccupied habitat intended by Congress is not clear.

⁹ 16 U.S.C. § 1533(b)(6)(C).

¹⁰ 16 U.S.C. § 1533(b). In practice, few areas have been excluded.

Express Roles of Critical Habitat

1) Designation forces consideration of both species needs and the impacts of protection. Designation of CH requires the Secretary to consider what habitat is essential for conservation of the species and also the economic and other effects of including certain habitat areas. Designation ensures that the habitat needs of a species will be considered at the same time as the consequences of meeting those needs. Alternatives in terms of areas to be included and management actions that might be taken or recommended necessarily must be considered.

2) The designation process provides guidance for landowners. Similarly, designation of CH results in publication of guidance to landowners through consideration of the need for possible “special management and protection” of areas within the CH. There appear to be public misperceptions that CH designation results in binding federal restrictions on private lands. In fact, designation forces federal consideration of all aspects of the habitat needs of a species and generates guidance to landowners on avoiding penalties under the act, but has not been interpreted as authorizing direct regulation. Guidance typically addresses activities *not* likely to be viewed as prohibited “takes” and activities regarding which a landowner may wish to seek additional guidance to avoid takes.

3) Designation requires “consultation” on federal actions. Designation of CH primarily affects federal actions, but also private actions with a federal nexus. Section 7 of the ESA (16 U.S.C. § 1536) requires each federal agency to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of a listed species or “*result in the destruction or adverse modification of ...*” CH. (Emphasis added.) If an action is likely to jeopardize a species or result in destruction or adverse modification of CH, the action agency must consult with the FWS (or NOAA Fisheries). The consultation process applies to all actions by federal agencies, and to all actions with a federal nexus through an approval, permit, or funding, if there is reason to believe a listed species may be present in the project area and is likely to be affected by project activities. Consultation entails study of the likely effects of proposed actions, a statement by the Secretary on whether jeopardy or adverse modification is found and suggestions for reasonable and prudent alternatives to the harmful aspects of the proposed project in order to avoid jeopardy or destruction or adverse modification of CH. All but a few projects have been able to proceed following consultation.

4) Designation provides an opportunity for judicial review. In contrast to other agency studies that may be done, designation of CH is a statutory duty and the actions and non-actions of the FWS or NOAA Fisheries in this regard can be judicially reviewed,¹¹ including the adequacy of agency consideration of the habitat needs of the species, the economic and other impacts of designation, and possible alternatives for CH configuration.

¹¹ 16 U.S.C. § 1533(g)(1)(C).

Indirect Effects of Critical Habitat Designation

The designation of CH may also play several indirect roles in the conservation of species. While any habitat studies could serve many of these purposes too, designation of CH is a required and reviewable federal duty that must include the elements discussed above. It also is currently required to precede other actions that logically rest on the information the designation process garners. Some of the indirect effects of designation of critical habitat are:

1) The designation process provides information for §10 permits and habitat conservation plans. Section 10(a) of the ESA (16 U.S.C. §1539(a)) authorizes the otherwise prohibited taking of listed species if the taking is an incidental part of otherwise lawful activities and if the permit applicant submits a conservation plan (known as a habitat conservation plan or “HCP”) that minimizes and mitigates the impacts that likely will result from the taking. Adequate knowledge of the habitat needs of the species in question is crucial to and underlies the process of HCP development and approval and is critical to achieving adequate HCPs. Information on the habitat necessary for the survival and recovery of the species in question, and on the relationship of particular properties to these purposes, is crucial for all species planning. While habitat information can be obtained by the responsible agency aside from the formal process for designation of CH, the designation process is the required and reviewable means of ensuring that adequate scientific information is in fact obtained and that the habitat needs of the species have been considered simultaneously with a consideration of the economic, national security, and other effects of habitat protection.

2) The designation process provides information for land acquisition decisions. Similarly, the CH designation process provides information to inform decisions on possible acquisitions of properties for habitat protection purposes under § 5 of the ESA (16 U.S.C. § 1534).

3) Critical habitat informs the meaning of “harm” in the definition of “take”. At the heart of the ESA are its § 9 (16 U.S.C. § 1538) prohibitions against “take” of endangered species. “Take” is defined not only as killing a listed species, but also as harming species. *Harm* is defined in regulation as including “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”¹² Therefore, destroying habitat in general may trigger penalties. As a practical matter, it seems easier to demonstrate significant habitat modification or degradation if the habitat in question had already been found to be critical to the conservation of the species in question.

4) The designation process informs development of recovery plans. Section 4(f) of the ESA (16 U.S.C. § 1533(f)) requires the preparation of a recovery plan for each listed species. Recovery plans provide guidance on what actions, including habitat maintenance and restoration, are necessary to recover a species. Here again, the CH designation process can provide scientific knowledge of the habitat needs of a species

¹² 50 C.F.R. § 17.2 This regulation on harm was upheld against a facial challenge in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

and analysis of effects and impacts that could be crucial to an effective recovery plan. Any agency habitat studies would be helpful in developing a recovery plan, but the designation process, because it entails specific requirements and is reviewable, arguably is likely to provide a more sound basis for recovery plans than less formal studies.

Agency Interpretation

The FWS has asserted that designation of CH provides little additional protection beyond that provided by listing and the prohibition against jeopardy, yet consumes significant amounts of funding, staff time, and other resources.¹³ As a result, FWS has given designation such a low priority that the agency has completed CH designations for only 36% of listed species as of August 9, 2004. However, the courts have found that the agency does have a duty to designate CH,¹⁴ and that the regulation¹⁵ and interpretation on which the FWS conclusions rest are erroneous and unlawful. Under § 7 of the ESA, federal agencies must avoid jeopardizing a species or causing destruction or adverse modification of CH. However, the FWS has conflated jeopardy and *destruction or adverse modification of CH* by defining the latter phrase as meaning essentially actions that diminish the value of critical habitat for the *survival* of the species, thereby eliminating designation of habitat for *recovery*, and equating habitat modification with jeopardy. A court noted that critical habitat is defined in the ESA as habitat which is essential for the “conservation” of the species — i.e. recovery — and held that the regulation is facially erroneous.¹⁶

The agency’s interpretation had resulted in eliminating most of the value of designating unoccupied habitat since per se it is not needed for survival, and had eliminated the value of CH designations for species listed as threatened, since such species are not in immediate danger of extinction — both results that do not comport with the language and legislative history of the ESA. The Ninth Circuit also has held the regulation to be erroneous and contrary to Congressional will: “As the Fifth and Tenth Circuits have already recognized, the regulatory definition reads the ‘recovery’ goal out of the adverse modification inquiry; a proposed action ‘adversely modifies’ critical habitat if, and only if, the value of the critical habitat for *survival* is appreciably diminished.”¹⁷

¹³ See 64 Fed. Reg. 31872.

¹⁴ See, e.g., *Conservation Council for Hawaii v. Babbitt*, 24 F. Supp. 2d 1074, 1078 (D. Hi. 1998), in which the court set deadlines for the FWS to designate critical habitat for a number of species, even if funds were short (a situation plaintiffs alleged FWS was partially responsible for), and that the agency’s remedy for its listing duties and funds was Congress.

¹⁵ 50 C.F.R. § 402.02. The regulations apply to actions of both FWS and NOAA Fisheries, but most of the court cases have involved the FWS.

¹⁶ *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F. 3d 434 (5th Cir. 2001); cited with approval in *New Mexico Cattle Growers Ass’n v. FWS*, 248 F. 3d 1277, 1283 (10th Cir. 2001).

¹⁷ *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 2004 U.S. App. LEXIS 16215 at *22.

Legislation in the 108th Congress

Concerns over national security after September 11, 2001 resulted in amendments to the ESA regarding designation of CH. One change requires the consideration of impacts on national security during the designation process. Another precludes designating CH on any lands or other geographical areas owned or controlled by the Department of Defense or designated for its use that are subject to an Integrated Natural Resources Management Plan prepared under 16 U.S.C. § 670a, if the Secretary determines in writing that such plan provides *a benefit* to the species¹⁸ — arguably a low threshold to meet.

Several pending bills could affect CH. H.R. 2933 would change the definition of CH to be habitat determined by field studies to be occupied and used for essential behaviors, plus additional habitat necessary for the survival, as opposed to recovery, of the species, as current law requires. The bill would move the time for designation of CH to the earlier of either three years after listing, or one year after approval of a recovery plan, and would preclude CH designation for any areas covered under a §10 incidental take permit (and possibly even under a submitted habitat conservation plan), or under a state or federal land conservation or species management program that offers substantially equivalent protection. It would also strengthen consideration of economic costs and benefits to governments and landowners and require the Secretary to designate CH to the maximum extent “practicable,” in addition to the current standard of “prudent, and determinable.” This change could result in fewer CH designations.

The ESA requires the use of the best scientific and commercial data available. H.R. 1662 would add several provisions relating to this requirement. It would require greater weight to be given to empirical data that have been subject to peer review and would require the Secretary to “accept” data from landowners. It is not clear whether this last requirement means to physically receive such data, or to accept the data as valid. Three person peer-review panels would be created for several agency actions, including the designation or adverse modification of CH. It is not clear how these panels would function in practice.¹⁹

¹⁸ P.L. 108-136, Div. A, Title III, § 318, 117 Stat. 1433. (Emphasis added.)

¹⁹ For more information, see CRS Report RS21500, The Endangered Species Act (ESA), ‘Sound Science,’ and the Courts, by Pamela Baldwin, and CRS Report RL31546, The Endangered Species Act and Science: The Case of Pacific Salmon, by Eugene Buck, et al.