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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. 1299 in the 109th 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. This report provides background for considering agency regulations 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 the National Marine Fisheries Service (NMFS)), have duties under the Endangered Species Act (ESA)¹ to preserve and conserve species, including by designating critical habitat (CH). Over several administrations, these agencies have asserted that CH designation affords few 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 this view are erroneous and do not carry out congressional intent. Proposals are currently before Congress that address CH. This

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.

report³ is written as background for considering both the current legislative proposals and the agencies' position.

The preservation of ecosystems is one of the express 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 private 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 occupied areas with features that are essential for the "conservation" of the species in question, and which may require special management considerations or protection.⁶ Unoccupied habitat essential for conservation of a species also may be designated.⁷ Habitat necessary for conservation means habitat necessary for the *recovery* of the species, not merely its survival.⁸ 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.

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

⁷ 16 U.S.C. § 1532(5)(A).

⁸ *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.

⁹ 16 U.S.C. § 1533(b)(6)(C).

¹⁰ 16 U.S.C. § 1533(b).

Direct 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 various alternative habitat areas.

2) The designation process provides guidance for landowners. 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, such as a federal approval, permit, or funding. 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 NMFS. Consultation entails study of the likely effects of proposed actions, a biological opinion by the Secretary on whether jeopardy or adverse modification is likely to result if the action is carried out, 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.

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:

¹¹ 16 U.S.C. § 1533(g)(1)(C).

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.

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, significant destruction of 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 has 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 and analysis of effects and impacts that could be crucial to an effective recovery plan.

Agency Interpretation

The FWS has asserted that designation of CH provides little additional protection beyond that provided by listing and the prohibition against jeopardy, and that designation 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 had completed CH designations for only 36% of listed species as of August 9, 2004. However, courts have

¹² 50 C.F.R. § 17.3. 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).

¹³ See 64 Fed. Reg. 31872.

found that the agency has 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. The Fifth Circuit 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 and does not comport with the language and legislative history of the ESA.¹⁶ 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 If CH must include habitat necessary for the recovery of a species, CH designation and consultations under § 7 of the act would be more meaningful.

More recently, the agencies have excluded areas from designation on the grounds that the areas do not need “special management or protection” because other habitat management plans or agreements are in effect. As a result, the agencies assert, the areas do not meet the definition of CH, or designation is not “prudent” in light of the non-federal efforts, or that the benefits of exclusion outweigh the benefits of designation because excluding CH would encourage the non-federal efforts.¹⁸ Critics have asserted that often the alternative non-federal management relied upon in reaching these conclusions, in some instances is not a firm program, is too uncertain as to timetables and effects, and is unenforceable. Therefore, they also assert, failure to designate CH in these circumstances does not comport with the law.¹⁹

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 NMFS, 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*, 378 F. 3d 1059, 1069 - 1070 (9th Cir. 2004), *amended* 387 F. 3d 968 (2004).

¹⁸ See, e.g. the final rule for the Colorado Butterfly Plant, 70 Fed. Reg. 1940 (January 11, 2005), and the proposed rule for Seven Evolutionarily Significant Units of Pacific Salmon (*Oncorhynchus tshawytscha*) and Steelhead (*O. mykiss*) in California, 69 Fed. Reg. 71880 (December 10, 2004).

¹⁹ See comments of various environmental organizations and citizens regarding proposed CH designations for salmon and steelhead, available from those organizations, including American Rivers, Center for Biological Diversity, Natural Resources Defense Council, National Wildlife

Changes 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 species²⁰ — arguably a low threshold to meet.

Legislation in the 109th Congress

In the 109th Congress, H.R. 1299 would change the definition of CH to be areas 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. 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 “action” authorized by a §10 incidental take permit, a § 7 incidental take statement (the equivalent of a § 10 permit), or under a state or federal land conservation or species management program that the Secretary determines provides substantially equivalent protection. This last provision appears likely to eliminate CH designations on federal lands such as national forests and the lands managed by BLM, (which have comprehensive land management plans and programs), thereby eliminating the current focus on designating CH on federal lands in order to minimize CH on private lands, and eliminating consultation with the wildlife agencies on proposed agency actions. The bill also would expand 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.

¹⁹ (...continued)

Federation, Trout Unlimited, and Pacific Federation of Fishermen’s Associations.

²⁰ P.L. 108-136, Div. A, Title III, § 318, 117 Stat. 1433. (Emphasis added.)

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