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# CRITICAL HABITAT DESIGNATIONS UNDER THE ENDANGERED SPECIES ACT: GIVING MEANING TO THE REQUIREMENTS FOR HABITAT PROTECTION

Amy Armstrong, Esquire<sup>1</sup>

## I. INTRODUCTION

[T]he designation of critical habitat is more important than the designation of an endangered species itself. In many cases, it will not be until habitat is declared to be critical to the continued existence of an endangered species that it will have impacts in the real world. Certainly, it is not until habitat is determined to be critical that federal agencies can begin the kind of consultative process contemplated by the Culver-Baker Amendment, or any other amendment offered during this debate.

The Culver-Baker Amendment simply requires that at the time a species is declared to be threatened or endangered, the appropriate habitat be designated as critical. Obviously, an analysis of the environmental and economic effects of this designation should be made, but the Amendment does not make them controlling. Environmental and economic effects must simply be stated for the record.<sup>2</sup>

Senator Jake Garn's 1978 address to the Senate in proposing the critical habitat amendment to the Endangered Species Act (ESA)

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<sup>2</sup> 124 Cong. Rec. 21575 (1978). Senator Garn further stated that "[w]hen a Federal land manager begins consideration of a project, or an application for a permit, it is essential that he know, not only of the existence of an endangered species, but also of the extent and nature of the habitat that is critical to the continued existence of that species. Unless he knows the location of the specific sites on which the endangered species depends, he may irrevocably commit Federal resources, or permit the commitment of private resources to the detriment of the species in question."

illustrates the Congressional intent in mandating designation of critical habitat concurrently with the listing of an endangered or threatened species.<sup>3</sup> This amendment to the ESA defined critical habitat as "the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (i) essential to the continued existence of the species, and (ii) which require special management considerations or protections . . . includ[ing] areas . . . into which the species can be expected to expand naturally."<sup>4</sup> When Congress enacted this amendment it "observed that protection of the habitat of listed species was the key to protection of the species themselves"<sup>5</sup> because the loss of habitat is the universally recognized reason for the extinction of species.<sup>6</sup>

Now, in the year 2002, the future of critical habitat designation is at a turning point. Under the ESA, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) are required to designate critical habitat at the same time a species is listed as threatened or endangered.<sup>7</sup> However, only nine percent of all listed species actually have critical habitat designations.<sup>8</sup> After recent court orders compelling designation of critical habitat for listed species, the FWS is seeking to change the current system of designation. In 1999 the FWS published a *Notice of Intent to Clarify the Role of Critical Habitat in Endangered Species Conservation*, in which they requested public comment on how the FWS could more effectively meet the critical habitat designation requirements under the ESA.<sup>9</sup> Over five hundred comments were submitted in response, evidencing the controversy and importance of the issue.<sup>10</sup> In addition, a recent bill, Sen. 911, proposes changes to the current system of critical habitat designation, primarily through extending the deadline for formal critical habitat designations until 3 years after the final listing is published in the Federal Register.<sup>11</sup>

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<sup>3</sup> See *id.*

<sup>4</sup> *Id.*

<sup>5</sup> Sen. Rpt. 106-126, at 4 (July 28, 1999).

<sup>6</sup> Sen. Rpt. 93-307 (July 1, 1973).

<sup>7</sup> 16 U.S.C. § 1533 (2000).

<sup>8</sup> See 64 Fed. Reg. 31871, 31872 (June 14, 1999).

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* nn. 94, 97, 106, 107, 120, 123, 128, 130, 133, 157, 163, 179, 181, 189, 198 and 209 for some of the Comment Letters.

<sup>11</sup> *The Endangered Species Recovery Act of 2001*, Sen. 911, 107th Cong. (2001).

Section II(A) of this paper will discuss the Congressional intent in promulgating the ESA, which is bringing the species to the point at which it no longer needs ESA protection: the goal of recovery. Looking at Congressional intent and its goal of recovery reveals that the ESA is not being implemented to reach this goal. Section II(B)(1) of this paper will define and explain critical habitat, the jeopardy and adverse modification standards of section 7 and the FWS's and NMFS's duty to designate critical habitat. Any time the federal government undertakes an action in an area where a threatened or endangered species is known to exist or use habitat, the action agency must consult with the FWS or the NMFS under section 7 of the ESA to ensure that the activity will not destroy or adversely modify critical habitat or jeopardize the continued existence of a species.<sup>12</sup> Under the ESA, section 7 consultations require a two-pronged review of the impact of the federal action on the species and their habitat: the jeopardy standard and the adverse modification standard.<sup>13</sup>

Section II(B)(2) of this paper will evaluate the legal function of critical habitat designation and how the two section 7 standards set out to accomplish this function. This section will also explain how these designations further the ESA's goal of bringing the species to the point where it does not need the protection of the ESA.<sup>14</sup> Section II(C) of this paper will discuss recent court orders compelling the FWS to designate critical habitat. Numerous courts have held that the FWS and NMFS have a mandatory duty to designate critical habitat, which cannot be overlooked. Section II(C) will lead into a discussion in section II(D) of court decisions that have distinguished the adverse modification and jeopardy standards. These decisions also substantiate the fact that the adverse modification standard does provide additional protection beyond that of listing and demonstrate that courts consistently compel designation where the FWS has failed to fulfill this duty.<sup>15</sup> Section II(E) of this paper explains the FWS's critical habitat designation policies and how it has defined the adverse modification and jeopardy standards. This section also discusses the interpretational merging of these standards in violation of congressional intent. Unoccupied habitat and the benefits of designating unoccupied critical habitat for listed species will be discussed

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<sup>12</sup> 16 U.S.C. § 1536(a)(2) (2000).

<sup>13</sup> *Id.* section 7 of the ESA requires that any federal action must not (1) destroy or adversely modify the habitat of an endangered species or (2) jeopardize the continued existence of any endangered species. The FWS interpretation of these standards is discussed below in section II(E). For a discussion of cases that distinguish these two standards see section II(D).

<sup>14</sup> See 16 U.S.C. §§ 1531(b), 1532(3) (2000).

<sup>15</sup> See *infra* nn. 62-91 and accompanying text.

in section II(F) of this paper. Although unoccupied habitat is not habitat currently being used by the listed species, designating this habitat furthers the goal of recovery. The FWS's *Notice of Intent to Clarify the Role of Habitat in Species Conservation*, which seeks to change the current method of designating critical habitat, will be discussed in section II(G).<sup>16</sup> Section II(H) follows with a look at proposed amendments to the ESA. This includes a comparison of past legislative efforts to current efforts and the strengths and weaknesses of the current bill.

The benefits of designated critical habitat to an endangered species are numerous.<sup>17</sup> Section II(I) of this paper will explore the value of critical habitat designations beyond listing, the problems involved in designating, including costs and delays involved with designating. Finally, possible alternatives to the role of critical habitat and the current system of designation will be explored in section III of this paper. This section will analyze the benefits and drawbacks of extending the deadline for critical habitat beyond the time of listing to the time of recovery plan publication as proposed by current legislation, as well as the benefits and drawbacks of changing the current method of designating habitat.

The Endangered Species Recovery Act of 1997 (Sen. 1180) and the Bill to Amend the ESA of 1973 (Sen. 1100) will be used as examples of proposed changes to the ESA involving critical habitat designations.<sup>18</sup> Both Sen. 1180 and Sen. 1100 sought, in part, to remedy the FWS's nondesignation or very delayed designation of critical habitat by requiring that critical habitat be designated with the formulation of the recovery plans. Although the bills did not pass, they provide a starting point for the possibility of legislative changes to the ESA. The most recent bill, the Endangered Species Recovery Act of 2001 (Sen. 911) could potentially have the same problem that the ESA is facing today. The use of the ESA as a back-up measure has resulted in few critical habitat designations, and few species removed from the endangered species list partially because they do not have federally protected habitat.

## II. THE ESA'S PURPOSE: REACHING THE RECOVERY OF LISTED SPECIES THROUGH DESIGNATING CRITICAL HABITAT

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<sup>16</sup> See 64 Fed. Reg. at 31871.

<sup>17</sup> For a discussion of the benefits of designated critical habitat, review Section II(G) of this paper.

<sup>18</sup> *Endangered Species Recovery Act of 1997*, Sen. 1180, 105th Cong. (1997). For the Bill to Amend the Endangered Species Act of 1973 to provide that the designation of critical habitat for endangered and threatened species be required as a part of the development of recovery plans for those species, see Sen. 1100, 106th Cong. (2000).

### A. *Reaching the Goal of Recovery*

The purpose of the ESA is to conserve threatened and endangered species: to bring the species to the point at which it no longer requires the protection of the ESA, the point of recovery.<sup>19</sup> The ESA “provide[s] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”<sup>20</sup> The ESA then equates conservation with recovery.<sup>21</sup> Because the purpose of the ESA is to bring species to the point of recovery, recovery is the overall goal of the ESA, which is attained through review under the adverse modification standard. Critical habitat is habitat that is essential to the conservation of a species, so the protection of critical habitat promotes the goal of recovery.<sup>22</sup>

Section 7 consultations require the FWS and the NMFS to ensure that federal action does not jeopardize the continued existence of or destroy or adversely modify the critical habitat of any threatened or endangered species.<sup>23</sup> When reviewing the federal action in question, the agencies must look to the purpose of the ESA: to conserve or recover the listed species.<sup>24</sup> The science community agrees that critical habitat is essential to the conservation of endangered species and the FWS has acknowledged this need for critical habitat.<sup>25</sup> If habitat is essential to the conservation of species, then the goal of recovery can only be reached if critical habitat is designated and the adverse modification standard of section 7 is enforced. In reviewing section 7 consultations the FWS and the NMFS must designate critical habitat so they can evaluate the action under this heightened adverse modification standard.

### B. *Congressional Intent*

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<sup>19</sup> See 16 U.S.C. § 1531(c) (2000). This goal of recovery is being reached by the ESA as evidenced by recent FWS determinations that the American Alligator, the Palau Ground Dove, the American Peregrine Falcon, the Brown Pelican, the Gray Whale, and a list of other species are considered “recovered” and are or will be delisted. See [http://ecos.fws.gov/webpage/webpage\\_delisted.html?&listings=0](http://ecos.fws.gov/webpage/webpage_delisted.html?&listings=0).

<sup>20</sup> 16 U.S.C. § 1531(b) (2000).

<sup>21</sup> 16 U.S.C. § 1532(3) (2000).

<sup>22</sup> See *supra* n. 4 and accompanying text.

<sup>23</sup> See 16 U.S.C. § 1536 (2000).

<sup>24</sup> See *id.*

<sup>25</sup> See Karen Hazel, *In ESA Listings: Pertinence of Critical Habitat is Questioned* <<http://www.wlj.net/editorial/July5esa.htm>>; 57 Fed. Reg. 1796 (Jan. 15, 1992); Pamela Baldwin, *The Role of Designation of Critical Habitat under the Endangered Species Act*, Congressional Research Council <<http://cnie.org/NLE/CRS/abstract.cfm?NLEid=16458>> (July 19, 1999).

1. Explaining Critical Habitat, the Adverse Modification Standard, and the Duty to Designate

Critical habitat is defined in the ESA as the specific areas within the area currently occupied by a species at the time it is listed that have the physical and biological features necessary for the conservation of a species or unoccupied areas necessary for the conservation of a species.<sup>26</sup> This conservation of the ecosystems upon which endangered species depend is then essential to the recovery of the species because "conservation is defined as using all means necessary to bring a species to the point it no longer needs the protection of the ESA – i.e. recovery."<sup>27</sup>

Congress mandated that the FWS and the NMFS shall designate critical habitat "to the maximum extent prudent and determinable" at the same time that a species is listed.<sup>28</sup> The FWS's regulations give guidance for the prudent and determinable exceptions to the mandatory duty to designate critical habitat.<sup>29</sup> Congressional intent was for these exceptions to be used in very rare circumstances.<sup>30</sup> Critical habitat designation would be imprudent if it (1) would increase the threat to the species or (2) would provide no additional benefit to the species (i.e., identification of habitat could lead to taking or other human activity harmful to the species).<sup>31</sup> Critical habitat is not determinable when (1) information sufficient to perform required analyses of the impacts of the designation is lacking or (2) the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.<sup>32</sup> The FWS uses the "not prudent" exception as the rule, rather than the exception, even though courts have repeated that the exception is to be used rarely.<sup>33</sup>

The adverse modification standard works to prevent any alteration to the designated critical habitat that would destroy or adversely affect that habitat.<sup>34</sup> So, while the jeopardy standard focuses on harm to the species,

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<sup>26</sup> 16 U.S.C. § 1532(5) (2000).

<sup>27</sup> Baldwin, *supra* n. 25, at 1.

<sup>28</sup> 16 U.S.C. § 1533(a) (2000).

<sup>29</sup> 50 C.F.R. § 402.12(a) (2002).

<sup>30</sup> See H.R. Rep. No. 95-1625 (1978).

<sup>31</sup> 50 C.F.R. § 424.12(a)(1) (2002).

<sup>32</sup> 50 C.F.R. at § 424.12(a)(2).

<sup>33</sup> See *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998); *Sierra Club v. U.S. Fish & Wildlife Service*, 245 F.3d 434 (2001).

<sup>34</sup> 16 U.S.C. § 1536(a) (2000).

the adverse modification standard goes further in giving protection to that species' current or anticipated habitat, which is essential to the conservation of the species.<sup>35</sup>

## 2. The Legal Function of Critical Habitat Designation

The regulatory impact of designated critical habitat falls under the section 7 consultation of federal action to determine whether or not adverse modification of critical habitat will occur.<sup>36</sup> The adverse modification prong thus protects habitat that is necessary for the conservation of the species.<sup>37</sup> The FWS's 1986 amendments to their regulations, however, "equate the modification of critical habitat with jeopardy. No separate protection is provided for critical habitat."<sup>38</sup> Although Congress intended critical habitat to add additional protection for listed species, the FWS has written its own interpretation of the two distinct standards (jeopardy and adverse modification) in their regulations that equate the two standards and render the designation of critical habitat meaningless.<sup>39</sup>

Congress set out a two-pronged test in the ESA to determine whether an agency's action will warrant a jeopardy opinion: the adverse modification standard, which is meant to provide for the protection of habitat essential to the conservation of the species, and the jeopardy standard, which is meant to protect the survival of that species.<sup>40</sup> Under the ESA, the jeopardy standard is much easier to overcome because it allows actions as long as they will not affect the *survival* of the species. For example, the species can be merely hanging on, but as long as the status quo is maintained, the action does not violate the jeopardy prong. The adverse modification standard, however, is geared toward the *recovery* of the species, not just its continued existence or survival.<sup>41</sup> This standard requires that habitat sufficient for the recovery of the species is

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<sup>35</sup> See *infra* nn. 36-46 and accompanying text.

<sup>36</sup> See 16 U.S.C. § 1536(a)(2); See James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 Harv. Envtl. L. Rev. 311 (1990).

<sup>37</sup> See 16 U.S.C. § 1532(5) (2000).

<sup>38</sup> Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 277, 299 (1993).

<sup>39</sup> See *infra* nn. 92-125 and accompanying text.

<sup>40</sup> Houck, *supra* n. 38, at 299-300; Salzman, *supra* n. 36.

<sup>41</sup> See 16 U.S.C. § 1536 (2000).



protected by ensuring that federal action will not adversely modify designated critical habitat.<sup>42</sup>

The ESA requires that FWS and NMFS must designate critical habitat sufficient for the conservation of the species, where conservation is equated with recovery: the point at which the species no longer needs ESA protection.<sup>43</sup> Congress chose to define critical habitat "not in terms of 'survival' but, rather, in terms of 'conservation.'"<sup>44</sup> It has "consistently recognized that preserving habitat is the most important factor for promoting the ESA's goals for species conservation."<sup>45</sup> "Without critical habitat designation, [section 7] consultation is only required to meet the minimal goal of avoiding extinction of the species [via the jeopardy standard], rather than the higher goal of recovery from endangerment [reached through the adverse modification standard]," the goal of the ESA.<sup>46</sup>

### C. Court orders compelling designation of critical habitat

Because the FWS and the NMFS have failed to designate critical habitat for over ninety percent of all listed species,<sup>47</sup> environmental advocates have brought numerous suits against these agencies.<sup>48</sup> Courts have consistently ruled against the FWS and the NMFS in these suits for failure to designate critical habitat.<sup>49</sup>

In *Conservation Council for Hawaii v. Babbitt*, the plaintiffs sought review of the FWS's final rules determining that no critical habitat would be designated for 245 threatened or endangered plant species in Hawaii.<sup>50</sup> The court interpreted the ESA as requiring critical habitat to be designated with very rare exceptions: "[t]he ESA . . . requires the designation of critical habitats in all but rare cases. Congress anticipated the threat of taking to some endangered or threatened plants, but it declared that

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<sup>42</sup>

*Id.*

<sup>43</sup>

See 16 U.S.C. §§ 1533(b)(6)(c)(ii), 1532(5)(A)(ii) (2000).

<sup>44</sup>

Houck, *supra* n. 38, at 298.

<sup>45</sup>

Thomas F. Darin, Student Author, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 Harv. Envtl. L. Rev. 209, 223 (2000); see Jack McDonald, *Critical Habitat Designation Under the Endangered Species Act: A Road to Recovery?*, 28 Envtl. L. 671 (1998).

<sup>46</sup>

McDonald, *supra* n. 45, at 671.

<sup>47</sup>

64 Fed. Reg. at 31872-31873.

<sup>48</sup>

See *infra* nn. 50-59 and accompanying text.

<sup>49</sup>

64 Fed. Reg. at 31872-31873.

<sup>50</sup>

2 F. Supp. 2d 1280, 1281 (D. Haw. 1998).

designation is the general rule . . . .”<sup>51</sup> Federal defendants claimed that designation could not provide additional benefits beyond those provided by listing species as endangered or threatened, but the court ruled that FWS’s reasoning was not a rational basis for nondesignation. The court stated that the purpose of designation is to ensure that proper attention and focus is provided in determining a recovery plan.<sup>52</sup> In addition, the FWS’s claim of “no benefit” in designating critical habitat contradicts their eleventh hour designation of critical habitat for the Mississippi Sandhills Crane in *National Wildlife Federation v. Coleman*.<sup>53</sup>

In *Forest Guardians v. Babbitt*, the plaintiffs brought an action against the Department of the Interior for failure to designate critical habitat for the Rio Grande Silvery Minnow within the statutorily prescribed two years.<sup>54</sup> The FWS concluded that the habitat for the silvery minnow was not determinable at the time of listing. The statute gave them up to a 2 year extension, but after 3 1/2 years the critical habitat was still not designated. The FWS claimed that they had inadequate funding to designate critical habitat for the minnow and that other mandatory duties under the ESA had priority on their Listing Priority Guidance (LPG).<sup>55</sup> The court, however, held that resource limitations could not justify failure to comply with the mandatory duty to designate critical habitat.<sup>56</sup> The court also found that when an agency fails to meet a statutory deadline, the agency has unreasonably delayed action and the court must compel such action and held that the FWS must designate critical habitat for the minnow.<sup>57</sup>

In *Butte Environmental Council v. White*, the District Court compelled designation of critical habitat for four species of Fairy Shrimp after six years had passed since the species had been listed.<sup>58</sup> The court stated that

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<sup>51</sup> *Id.* at 1283.

<sup>52</sup> *Id.*

<sup>53</sup> *See* 529 F.2d 359 (5th Cir. 1976).

<sup>54</sup> 174 F.3d 1178, 1181 (10th Cir. 1999).

<sup>55</sup> The FWS has a Listing Priority Guidance (LPG) that governs its decisions as to which non-discretionary duties to perform and which to delay. Making critical habitat determinations is on the lowest tier of priority on the LPG and thus gets delayed. *See* 61 Fed. Reg. 24722, 24724-24725 (May 16, 1996); 64 Fed. Reg. 27596, 27597 (May 20, 1999). The guidance was set to aid the FWS and the NMFS in prioritizing activities under the ESA after the FY 1995-96 moratorium and funding rescission that created backlogs. *See* 64 Fed. Reg. 31871, 31873 (June 14, 1999).

<sup>56</sup> *Babbitt*, 174 F.3d 1178, 1184.

<sup>57</sup> *Id.* at 1193.

<sup>58</sup> 145 F. Supp. 2d 1180 (E.D. Cal. 2001).

the Administrative Procedure Act directs the reviewing court to compel agency action that has been unlawfully withheld or unreasonably delayed.<sup>59</sup> Because the FWS had a mandatory duty under the ESA to designate critical habitat within a maximum of two years and because they failed to meet this duty, the court ordered the agency to designate critical habitat for the Fairy Shrimp within six months.<sup>60</sup>

*D. Court interpretation of the adverse modification prong  
as a separate test under the ESA*

"[I]f critical habitat is not designated, then the courts are unlikely to enjoin a project."<sup>61</sup> Courts have implied that the FWS must look at both the jeopardy standard and the adverse modification standard in determining whether or not to issue a jeopardy opinion. A few courts have treated the two standards as having separate requirements, even relying on designated critical habitat to find section 7 violations, as illustrated by cases discussed in this section.<sup>62</sup> Recently, one court even went so far as to hold the regulations defining the adverse modification standard were invalid.<sup>63</sup> These courts have interpreted the ESA's adverse modification standard as a higher standard than the jeopardy standard.

McDonald concludes that in *Natural Resources Defense Council (NRDC)*, the court "found significance in the lack of critical habitat designation for the tollroad land and placed a requirement on NRDC to prove that the affected land would be critical habitat had FWS designated it."<sup>64</sup> The trial court, in *National Wildlife Federation v. Coleman*, held that the plaintiffs failed to meet their burden of proving a section 7 violation because the project at issue did not jeopardize the continued existence of the Mississippi Sandhills Crane or result in the destruction or adverse modification of its critical habitat.<sup>65</sup> Plaintiffs appealed the case

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Jack McDonald, *supra* n. 45, at 689; see also *Coleman*, 529 F.2d 359, (discussed below as a case in which the lower court refused to find jeopardy to the species, but on appeal, after critical habitat had been designated, the court held that the federal action would jeopardize the continued existence and adversely modify the habitat of the Mississippi Sandhills Crane).

<sup>62</sup> See *infra* nn. 64-74 and 79-91 and accompanying text.

<sup>63</sup> See *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001).

<sup>64</sup> McDonald, *supra* n. 45 at 689.

<sup>65</sup> 400 F. Supp. 705, 712 (S.D. Miss. 1975). (rev'd and rem'd, 529 F.2d 359 (5th Cir. 1976) (held "that the requirements of section 7 of the Endangered Species Act of 1973 were not complied with by the appellees").

and the day before trial the FWS issued an emergency determination of critical habitat for the crane.<sup>66</sup> The FWS made the emergency critical habitat determination because without designated critical habitat the court could not review the federal action under the adverse modification standard. Because the FWS knew that the appellate court could review the project under the adverse modification standard once critical habitat had been designated, they made the emergency designation the day before the trial to prevent the action from occurring.<sup>67</sup>

The Court of Appeals interpreted the ESA's section 7 adverse modification standard as a higher standard than the jeopardy standard: "[t]he duty of the appellees is to insure that their actions will not destroy or modify this 'critical habitat.'"<sup>68</sup> The court found that the excavation of borrow pits within the designated critical habitat would destroy and modify that habitat in violation of section 7. In *National Wildlife Federation*, the Court of Appeals ruled that critical habitat would be adversely modified and that the cranes' existence would be jeopardized. They ordered the trial court to issue an injunction from performing activities that would violate section 7.<sup>69</sup>

The court's order was based on the fact that critical habitat had been designated for the crane.<sup>70</sup> Although the court spoke, simultaneously, of both adverse modification and jeopardy to the crane, the designation of critical habitat the night before the trial was the salient factor that led the court to finding a section 7 violation. Had the jeopardy standard been sufficient to protect the crane, then "there would have been no cause for an emergency designation of its habitat."<sup>71</sup> Without this eleventh hour designation, the court's determination of a section 7 violation would have been much more difficult to reach.<sup>72</sup> The fact that the lower court found no section 7 violation when no critical habitat was designated and the Court of Appeals found a section 7 violation after critical habitat was designated illustrates that the critical habitat designation does provide more protection for a species and makes it easier for plaintiffs to show

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<sup>66</sup> *Coleman*, 529 F.2d 359, 367.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 374.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Houck, *supra* n. 38, at 309.

<sup>72</sup> *Id.*

section 7 violations because they do not have to show the steps to jeopardy.<sup>73</sup>

In *Sierra Club v. Froehlke*, the court found that the construction of a dam would not jeopardize the continued existence of an endangered bat.<sup>74</sup> The court noted that because the FWS had not designated critical habitat, as in *National Wildlife Federation*, it was far more difficult to reach the jeopardy standard.<sup>75</sup> Had the FWS designated critical habitat, the adverse modification standard could have been analyzed and probably met under *National Wildlife Federation*.

One author, however, disagrees that courts treat the two standards separately. James Salzman states "the synthesis of critical habitat and jeopardy is found throughout section 7 case law, for there appear to be no successful section 7 cases finding adverse modification of critical habitat without also finding jeopardy."<sup>76</sup> He points out that courts have coupled the two statutorily separate analyses of the two prongs in their opinions and because jeopardy encompasses more than critical habitat, adverse modification to critical habitat "has evolved into an important catalyst, a judicial red flag, to jeopardy violations."<sup>77</sup> Critical habitat, however, is beneficial because it gets rid of the necessity of showing the steps to jeopardy,<sup>78</sup> making it easier for environmental plaintiffs to bring suits for section 7 violations. Even though courts fail to recognize the distinction between the two standards, the "lack of promulgated habitats . . . may undermine the effectiveness of section 7 consultations."<sup>79</sup>

In *Conservation Council of Hawaii v. Babbitt*, discussed above, the court held that the FWS incorrectly assumed that critical habitat designations have no benefit outside of the consultation requirement.<sup>80</sup> In addition, the court found that the FWS's conclusions that the "considerations under the jeopardize prong would be no different than the considerations under the critical habitat prong" and that the "designation of critical habitat would not increase the considerations under the consultation requirements" were in direct contravention to its own

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<sup>73</sup> Salzman, *supra* n. 36, at 330.

<sup>74</sup> 534 F.2d 1289, 1304 (5th Cir. 1976).

<sup>75</sup> *Id.*

<sup>76</sup> Salzman, *supra* 36, at 326.

<sup>77</sup> *Id.* at 326-327.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 330.

<sup>80</sup> 2 F. Supp. 2d 1280, 1286 (Rule 12.21(c)). See also *supra* nn. 50-52.

interpretation of the ESA under *NRDC*.<sup>81</sup> The court agreed that the ESA “clearly established two separate considerations, jeopardy and adverse modification,” although these standards “overlap to some degree.”<sup>82</sup> Chief Judge Kay continued:

... the FWS also fails to recognize that there are significant substantive and procedural protections that result from the designation of critical habitat outside of the consultation requirements of section 7 . . . [D]esignation establishes a uniform protection plan prior to consultation . . . [and] in the absence of such designation, the determination of the importance of a species’ environment will be made piecemeal . . . This may create an inconsistent or short-sighted recovery plan . . . Thus the designation ensures that the proper attention and focus is provided in determining a recovery plan.<sup>83</sup>

The Court of Appeals ruled that the lower court’s order to designate is binding and the FWS must comply with the order.<sup>84</sup> The court “observed that critical habitat designation had the separate value of a holistic approach to habitat conservation, whereas merely relying on the jeopardy clause in section 7 resulted in a piecemeal approach to preservation.”<sup>85</sup>

In *Forest Guardians v. Babbitt*, the court stated that “[w]ithout a designated critical habitat, the ESA’s requirement that ‘[e]ach federal agency shall . . . insure that any [of its actions] is not likely to . . . result in the destruction or adverse modification of habitat becomes unenforceable.’”<sup>86</sup> The court thus implied that the adverse modification standard is a separate prong that cannot be enforced unless critical habitat is actually designated.<sup>87</sup>

In *Greenpeace v. National Marine Fisheries Service*, the court stated that the ESA establishes two separate standards for reviewing section 7 consultations, even though these standards overlap to some degree.<sup>88</sup> The court ruled “[j]eopardy relates to the overall continued existence of a

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<sup>81</sup> *Id.* at 1286-1287; see also *Natural Resources Defense Council v. Dept. of the Interior*, 113 F.3d 1121 (9th Cir. 1997).

<sup>82</sup> *Babbitt*, 2 F. Supp. 2d at 1287.

<sup>83</sup> *Id.* at 1288.

<sup>84</sup> *Babbitt*, 2 F. Supp. 2d 1287.

<sup>85</sup> See Darin, *supra* n. 45, at 227.

<sup>86</sup> *Babbitt*, 174 F.3d 1178, 11865 (quoting 16 U.S.C. § 1536(a)(2)).

<sup>87</sup> *Babbitt*, 2 F. Supp. 2d 1287.

<sup>88</sup> 55 F. Supp. 2d 1248, 1265 (W.D. Wash. 1999).

species, and examines the effects of an action on the species. Adverse modification, in contrast, concerns the effects of an action on the species' critical habitat. Although there is considerable overlap between the two, the Act establishes two separate standards to be considered."<sup>89</sup>

Recently, Sierra Club brought a facial challenge to the FWS's regulations defining the adverse modification standard.<sup>90</sup> The Court of Appeals for the Fifth Circuit held that the regulatory definition of the destruction/adverse modification standard is invalid because it is inconsistent with Congress' unambiguous intent expressed in the ESA.<sup>91</sup> Reasoning that the agency's definition of the adverse modification standard conflicts with the ESA's definition of critical habitat, the court ruled that the agency's decision not to designate critical habitat for the threatened Gulf Sturgeon was arbitrary and capricious because it was made in reliance on an invalid regulation.<sup>92</sup> Further, the court found that "[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits."<sup>93</sup>

Some courts do not distinguish the standards, but the practical outcome of *National Wildlife Federation* is that the court does treat the prongs as separate. Likewise, in *Forest Guardians*, the court recognizes that critical habitat must be designated to prevent adverse modification from occurring. Some courts may not distinguish the separate analyses required for the two standards because in most section 7 cases, the species does not have critical habitat designated, so the analysis under the adverse modification standard is meaningless.<sup>94</sup> Part of the reason that the adverse modification standard has become meaningless is that the FWS has defined that standard as equal to the jeopardy standard in providing for both the recovery and survival of the species.

*E. The Fish & Wildlife Service's Regulations:  
A Misinterpretation of the Jeopardy  
and Adverse Modification Standards*

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<sup>89</sup> *Id.* at 1265.

<sup>90</sup> *Sierra Club*, 245 F.3d at 445.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 442.

<sup>94</sup>

Four out of five listed species do not have critical habitat designations. See Salzman, *supra* n. 36, at 312.

The FWS and the NMFS have published regulations interpreting the jeopardy prong and the adverse modification prong.<sup>95</sup> By giving nearly the same definition for both the two separate standards, the FWS has gone against the basic rule of statutory construction that avoids finding redundancy in language of the ESA.<sup>96</sup> Every clause and word of a statute must be given meaning, rather than interpreting away their significance.<sup>97</sup> The FWS interpretation, however, finds these two standards, by definition, nearly identical<sup>98</sup> and thus “emasculates the critical habitat section and renders it meaningless.”<sup>99</sup>

The FWS defines an action that jeopardizes the continued existence of a species as any action that would “reduce appreciably the likelihood of *both the survival and recovery of a listed species*.”<sup>100</sup> The FWS also defines an action that destroys or adversely modifies critical habitat as any action that “appreciably diminishes the value of critical habitat for *both the survival and recovery of a listed species*.”<sup>101</sup> Defining the two standards in this way merges them, so that any action meeting the adverse modification standard will almost always meet the jeopardy standard.<sup>102</sup>

“The use of the ‘both . . . and’ language means that destruction or adverse modification of habitat is not deemed to occur unless the species is put in jeopardy.”<sup>103</sup> These definitions equate the two standards, rendering the adverse modification standard meaningless.<sup>104</sup> Unless an “action’s impact on critical habitat jeopardizes the survival of the species,

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<sup>95</sup> 50 C.F.R. § 402.02 (Oct. 1, 2000).

<sup>96</sup> The general assumption is that Congress avoids redundant language in adopting legislation. See Comment Letter from Northwest Environmental Defense Center (Aug. 10, 1999) (on file with Author and available from the FWS).

<sup>97</sup> See *Bennett v. Spear*, 117 S.Ct. 1154, 1166 (D. Or. 1997) (citations omitted).

<sup>98</sup> 64 Fed. Reg. 31871, 31872 (June 14, 1999).

<sup>99</sup> Comment Letter from Northwest Environmental Defense Center at 4 (Aug. 10, 1999) (on file with Author).

<sup>100</sup> 50 C.F.R. § 402.02 (emphasis added).

<sup>101</sup> *Id.* (emphasis added).

<sup>102</sup> See Jeffery B. Slaton, Note, *Natural Resources Defense Council v. United States Department of the Interior: Making Critical Habitat Critical*, 21 Env’tl. L. & Pol’y J. 75 (1998); McDonald, *supra* n. 45; Yagerman, *supra* n. 99, at 843 (the regulatory definitions of jeopardy and adverse modification equate these two standards and “render any finding of adverse modification a virtual redundancy”).

<sup>103</sup> Yagerman, *supra* n. 99 at 841.

<sup>104</sup> *Id.*



there is no prohibition.”<sup>105</sup> Therefore, the “regulations currently reduce critical habitat to a point where species are on the brink of extinction.”<sup>106</sup> The FWS reasoned that the “very concept of ‘jeopardy’ is that a federal agency should not authorize, fund, or carry out an action that would injure a listed species’ chances for survival to the point that recovery is not attainable.”<sup>107</sup> This interpretation reduces the ESA’s goal of recovery to a subset goal of survival. These regulations are unlawful because they have removed the separate consideration of critical habitat from the ESA by restricting critical habitat to mere survival of the species.<sup>108</sup> Although other groups do not find the regulations unlawful, they agree that the regulations erroneously interpret the two standards.<sup>109</sup>

In the *Final Determination of Critical Habitat* for the Southwestern Willow Flycatcher, the FWS states that their implementing regulations define the jeopardy and adverse modification standards in “virtually identical terms” and that “actions satisfying the standard for adverse modification are nearly always found to also jeopardize the species concerned, and the existence of a critical habitat designation does not materially affect the outcome of consultation.”<sup>110</sup> However, “[n]ot all actions that adversely modify a species’ critical habitat will jeopardize a species, because critical habitat includes habitat necessary for recovery. Without full consideration of critical habitat beyond actions that jeopardize a species, critical habitat has no meaning under the ESA.”<sup>111</sup> The FWS stated that they added the word “both” to the definitions of adverse modification and jeopardy to emphasize that injury to recovery alone would not support the issuance of a “jeopardy” opinion.<sup>112</sup> By the addition of the word “both,” the FWS has limited the focus of section 7 consultations to survival.<sup>113</sup> Under the FWS interpretation of the section 7 requirements, a federal agency could modify a species’ habitat without

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<sup>105</sup> John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 Env’tl. L. 501, 570 (1994).

<sup>106</sup> Slaton, *supra* n. 99, at 101.

<sup>107</sup> 51 Fed. Reg. 19926, 19934 (June 3, 1986).

<sup>108</sup> See Houck, *supra* n. 38, at 298; Comment Letter from Northwest Environmental Defense Center (Aug. 10, 1999) (on file with Author).

<sup>109</sup> Comment Letter from Earthjustice Legal Defense Fund at 4 (Aug. 13, 1999) (on file with Author); Comment Letter from Environmental Protection Information Center at 2 (Aug. 12, 1999) (on file with Author).

<sup>110</sup> 62 Fed. Reg. 39129, 39130 (July 22, 1997).

<sup>111</sup> McDonald, *supra* n. 45, at 697.

<sup>112</sup> 51 Fed. Reg. 19926 (June 3, 1986).

<sup>113</sup> See Houck, *supra* n. 38, at 277.

warranting a jeopardy opinion. The ESA, however, appears to require that injury to recovery could support the issuance of a jeopardy opinion because the adverse modification standard protects habitat essential to the conservation or recovery of a species.<sup>114</sup>

In the *Final Determination of Critical Habitat for the Northern Spotted Owl*, the FWS acknowledges that the jeopardy standard is geared toward survival and the adverse modification standard is geared toward recovery as follows:

As a result of the link between critical habitat and recovery, the prohibition against destruction or adverse modification of the critical habitat should provide for the protection of the critical habitat's ability to contribute fully to a species' recovery. Thus, the adverse modification standards may be reached closer to the recovery end of the survival continuum, whereas, the jeopardy standard traditionally has been applied nearer to the extinction end of the continuum.<sup>115</sup>

The FWS has foregone designation of critical habitat for most listed species on the basis that designation would not provide any net benefit to the conservation of the species.<sup>116</sup> They are seeking to abandon the requirement to designate critical habitat because they believe that critical habitat is not an efficient or effective means of securing the conservation of a species.<sup>117</sup> The FWS has determined that the federal action can proceed as long as the species survival will not be impacted regardless of its effect on recovery. Thus, the FWS sees no benefit in designating critical habitat because their definition of critical habitat provides no protection for the species.<sup>118</sup>

In the Northern Spotted Owl's critical habitat determination, the FWS stated that "[c]ritical habitat helps focus conservation activities by identifying areas that contain essential habitat features" regardless of whether or not the species currently occupies the area.<sup>119</sup> They continued that "[t]he requirement to consider adverse modification of critical habitat is an incremental section 7 consideration above and beyond section 7

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<sup>114</sup> See 16 U.S.C. §§ 1532(3), 1532(a)(i) (2000).

<sup>115</sup> 57 Fed. Reg. 1796, 1822 (Jan. 15, 1992).

<sup>116</sup> See 62 Fed. Reg. at 39131.

<sup>117</sup> See *id.*; see also 64 Fed. Reg. 31871 (June 14, 1999).

<sup>118</sup> McDonald, *supra* n. 45.

<sup>119</sup> 57 Fed. Reg. at 1796.

review necessary to evaluate jeopardy and incidental take.”<sup>120</sup> So, contrary to their own policy and their definitions of adverse modification and jeopardy that essentially equate these two standards, the FWS does acknowledge that the adverse modification standard can give more protection to the species.

This contradiction makes it hard to believe the FWS’s assertions in its *Notice of Intent* and elsewhere that the critical habitat does not provide any net benefit to the conservation of a species.<sup>121</sup> If the adverse modification standard can give more protection, how can it not also provide a net benefit to the conservation of a species? Clearly the FWS does not want to spend the time or money on designation. The FWS has repeatedly asked Congress to cap the budget for critical habitat designations.<sup>122</sup> If these designations help conserve the species, why do they want to avoid designation? One reason has been to avoid a public outcry of “takings” claims.

All of this debate begs the question: if critical habitat designations do not provide any additional benefits beyond listing, why would stakeholders be fighting so hard to avoid such designations? If the designation of critical habitat does not provide any additional benefit beyond listing, then the economic impacts of designation should be minimal and the economic analysis should likewise be minimal.<sup>123</sup> If, as the FWS asserts, critical habitat does not provide additional protection beyond listing, the economic analysis performed for the listing of the species would be the only economic analysis necessary and designation would only require the scientific knowledge of the species’ habitat needs.<sup>124</sup>

The FWS must educate the public on the actual impacts, benefits, and functions of critical habitat and its applications to private lands. The FWS must amend their definition of critical habitat to reflect the additional protection critical habitat affords species beyond the protections provided

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<sup>120</sup> *Id.* at 1823.

<sup>121</sup> See 64 Fed. Reg. 31871 (June 14, 1999); 57 Fed. Reg. 1796 (Jan. 15, 1992); 62 Fed. Reg. 39129 (July 22, 1997).

<sup>122</sup> Comment Letter from Defenders of Wildlife (Aug. 13, 1999) (on file with Author).

<sup>123</sup> The FWS asserts that the required economic impacts analysis is expensive and leads to delays in the designation of critical habitat, however, in the same notice the FWS asserts that designation does not provide any additional benefits beyond listing, except when designating unoccupied habitat. See 64 Fed. Reg. 31871 (June 14, 1999). Salzman argues that “the requirement that rules designating critical habitat be analyzed for probable economic consequences means that such rules take longer to process ....” Salzman, *supra* n. 36 at 337.

<sup>124</sup> *Id.*

by merely listing.<sup>125</sup> The definition of adverse modification should be amended to resolve the ambiguity in the definitions of jeopardy and adverse modification to prohibit activities that will impede the recovery of the species, not just its survival.<sup>126</sup> The best way for the FWS to accomplish this goal is to remove the “both the survival and” language from the definition of adverse modification to read: an action that would “reduce appreciably the likelihood of recovery of a listed species.”<sup>127</sup> The deletion of this survival language would strengthen the adverse modification standard by prohibiting any federal action that would adversely affect the *recovery* of the species and distinguish the adverse modification standard from the jeopardy standard, which focuses on survival.<sup>128</sup>

#### *F. The Purpose of Designating Unoccupied Habitat*

The 1978 ESA amendments provide that the Secretary may designate “specific areas outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of section 1533 ... upon determination by the Secretary that such areas are essential for the conservation of the species.”<sup>129</sup> Designation of critical habitat allows for the migration and expansion of species and their range.<sup>130</sup> The designation of this unoccupied habitat provides protection that Congress intended in promulgating the ESA because it promotes the ESA goal of conservation or recovery of the species.<sup>131</sup> Some argue that designation of critical habitat is the only way that critical habitat can give additional protection beyond listing, and, therefore, the FWS and NMFS should only designate this unoccupied habitat.<sup>132</sup> However, designation of occupied habitat does

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<sup>125</sup> See Comment Letter from Earthjustice Legal Defense Fund (Aug. 13, 1999) (on file with Author).

<sup>126</sup> See *id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Greenpeace v. National Marine and Fish Services*, 55 F. Supp. 2d 1248, 1265 (W.D. Wash. 1999).

<sup>129</sup> 16 U.S.C. § 1532(5)(A)(iii) (2000).

<sup>130</sup> See Comment Letter from California Native Plant Society (Aug. 12, 1999) (on file with Author).

<sup>131</sup> See Comment Letter from California Native Plant Society (Aug. 12, 1999) (on file with Author). The FWS acknowledges the value and benefit of designating unoccupied habitat. 64 Fed. Reg. 31871 (June 14, 1999).

<sup>132</sup> See Comment Letter from County Sanitation Districts of Los Angeles County (Aug. 12, 1999) (on file with Author).

provide additional benefits to the listed species beyond the protections afforded by listing.<sup>133</sup>

For example, the FWS designation of unoccupied habitat for the Palila played a significant role in ensuring that federal actions did not hinder the recovery of that species.<sup>134</sup> The FWS designated this unoccupied habitat to guarantee that the Palila's habitat "would be 'large enough to allow space for the population to expand' as it recovered."<sup>135</sup> Now that the U.S. Army and the U.S. Department of Transportation want to pave a road that falls within the designated habitat, these agencies are planning on spending close to \$17 million to mitigate the impacts of the project on the critical habitat.<sup>136</sup>

By the time a species gets to the point of being listed as endangered, often they are already extirpated from much or most of their historical habitat.<sup>137</sup> For most species the critical habitat at that point would be habitat currently occupied and used by the species.<sup>138</sup> By designating only the currently occupied habitat, the FWS is not fulfilling its duties to recover species. It is only providing for the continued survival of endangered species. The FWS should make a point to designate unoccupied habitat so that they have habitat that can be managed for future occupation by the listed species. They should not designate only enough habitat for the species to merely "hang on."

*G. The Fish and Wildlife Service's Notice of Intent  
to Clarify the Role of Critical Habitat  
in Endangered Species Conservation:  
Weakening the Function of Critical Habitat*

The state of critical habitat designations has led the FWS to indicate that it "believes that critical habitat is not an efficient means of securing the conservation of a species."<sup>139</sup> In its *Notice of Intent to Clarify the Role*

<sup>133</sup> See *infra* nn. 155-186 and accompanying text (explaining the benefits of designating both occupied and unoccupied habitat in endangered species conservation).

<sup>134</sup> See *Palila v. Haw. Dep't of Land and Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979).

<sup>135</sup> Comment Letter from Earthjustice Legal Defense Fund at 5 (Aug. 13, 1999) (on file with Author) (citing 42 Fed. Reg. 40685, 40687 (Aug. 11, 1977)).

<sup>136</sup> *Id.*

<sup>137</sup> See *Science and the Endangered Species Act*, Report by the Committee on Scientific Issues in the Endangered Species Act, National Academy of Sciences <<http://www.nap.edu/books/0309052912/html>> (1995).

<sup>138</sup> See *id.*

<sup>139</sup> 62 Fed. Reg. 39129, 39130 (1997).

of *Habitat in Species Conservation* the Service states that the designation of critical habitat “is of little additional value for most listed species, yet it consumes large amounts of conservation resources.”<sup>140</sup> Because the adverse modification and jeopardy standards are the same for almost all species, the critical habitat designations are “an expensive regulatory process that duplicates the protection provided by the jeopardy standard.”<sup>141</sup> The adverse modification standard only adds extra protection when unoccupied habitat is designated as critical habitat.<sup>142</sup> The FWS suggests that it would be better to describe critical habitat in broader terms with more general habitat location delineations used in designating.<sup>143</sup> The current methods of making critical habitat determinations involve identifying specific populations and marking boundaries on maps surrounding these populations.<sup>144</sup> The broader method that the FWS suggests involves using general habitat descriptions, rather than marking specific boundaries around habitat on maps.<sup>145</sup>

Although the FWS acknowledges the need to protect critical habitat, it wants to move back the time frame by which it must have critical habitat designated. It claims that more time is needed to study the habitat needs of the listed species, but the FWS has designated critical habitat for only 133 species or nine percent of all listed species.<sup>146</sup> The problem does not seem to be that they do not have enough time to make the determinations, which is what past and current legislation try to remedy by extending the time to designate critical habitat from the time of listing to the time that the recovery plans are promulgated.<sup>147</sup> Rather, the FWS has not designated for many species because they do not see the benefit of designating critical habitat beyond that of listing the species.<sup>148</sup> What would lead Congress and the public to believe that if the time allotted to designate critical habitat is extended then the FWS and NMFS would designate critical habitat at a greater rate than the current system?

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<sup>140</sup> 64 Fed. Reg. at 31872.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 31873.

<sup>144</sup> See U.S. Fish & Wildlife Service, *Critical Habitat: What is it?* <<http://endangered.fws.gov>> (Revised May, 2000).

<sup>145</sup> *Id.*

<sup>146</sup> 64 Fed. Reg. at 31872.

<sup>147</sup> Sen. 1100, 106th Cong. (1999).

<sup>148</sup> 64 Fed. Reg. at 31872.

The FWS does not designate because they fail to see the benefit and base this decision on unrequired economic analysis; lack of funding, which they requested; and the lack of knowledge of the species' needs. The NMFS is not involved in the proposal to make the regulatory or legislative changes that the FWS supports. Part of the reason is that the NMFS has not been subjected to as much pressure through lawsuits to designate as the FWS. In addition, the FWS has responsibility for ninety percent of the species currently listed by the ESA and therefore feel more political and financial pressure to designate critical habitat.<sup>149</sup>

### *H. Proposed Legislative Reform Weakens the Purpose and Spirit of the Act*

Introduced as the Endangered Species Recovery Act of 1997, Sen. 1180 sought to reauthorize the ESA.<sup>150</sup> Although Sen. 1180 was not enacted in the 105th Congress, it contained provisions to change the current method of designating critical habitat, which re-emerged in the Bill to Amend the ESA in the 106th Congress, Sen. 1100.<sup>151</sup> Like the Endangered Species Recovery Act of 1977, Sen. 1100 proposed to require designation of critical habitat concurrently with the development of the recovery plan, rather than at the time of listing.<sup>152</sup>

Recently referred to Senate Environmental and Public Works Committee, The Endangered Species Recovery Act of 2001 (Sen. 911) is modeled after its predecessors. Sen. 911 deletes the language in 16 U.S.C. section 1533(a) - the section that requires the Secretary to designate critical habitat concurrently with the listing of a species.<sup>153</sup> Sen. 911 establishes a recovery team that must provide the Secretary with a description of any of the species' habitat that is recommended for designation as critical habitat within nine months of listing.<sup>154</sup> However, the Secretary does not have to publish final regulations designating critical habitat until 2 1/2 years after listing.<sup>155</sup> Further, if recovery plans are not developed the FWS and the NMFS will have up to three years from the date of listing to designate critical habitat. The bill goes further to allow

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<sup>149</sup> Michael Bean, *Endangered Species, Endangered Act?*, 41 Environment 12 (Jan./Feb. 1999).

<sup>150</sup> Endangered Species Recovery Act of 1997, Sen. 1180, 105th Cong. (1997).

<sup>151</sup> *Id.*; Sen. 1100.

<sup>152</sup> *See id.*

<sup>153</sup> The Endangered Species Recovery Act of 2001, Sen. 911, 107th Cong. (2001).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

the Secretary to consider economic impacts, impacts to military training and operations, and any other relevant impacts of designating critical habitat.<sup>156</sup>

The problem of long time delays in designating habitat for species will have negative impacts on the recovery of those species. Supporters of Sen. 911 want the agencies to undertake the proper economic analysis of the critical habitat designations, but the ESA only requires *consideration* of economic factors, not a lengthy, in-depth analysis.<sup>157</sup> In addition, if the designation does not provide added protection beyond listing, then the economic analysis performed for the listing should also be sufficient for the designation. Sen. 911 gives the FWS more time to complete an action that has already been delayed beyond current statutory deadlines. The rationalization that the FWS will promulgate critical habitat designations any more quickly or efficiently under Sen. 911 has no basis.

### *I. Benefits of Designating Critical Habitat Outweigh Costs Associated with Designation*

Critical habitat is a basic requirement of all living organisms. "The relationship between vanishing habitats and vanishing species is well documented . . . [S]pecies diversity is positively correlated with habitat areas."<sup>158</sup> With this in mind, critical habitat should be used as a tool for managing and restoring habitats and promoting species recovery.<sup>159</sup> Generally, the fact that "species whose habitats occur almost exclusively on federal lands are faring better than those found elsewhere is a strong indication that section 7 has been one of the more successful innovations of the Endangered Species Act."<sup>160</sup> Even though a species is not actually de-listed forty-one percent of the listed species have stabilized or

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<sup>156</sup> *Id.*

<sup>157</sup> 16 U.S.C. § 1533 (1999).

<sup>158</sup> National Research Council, *Science and the Endangered Species Act* (National Academy Press, 1995).

<sup>159</sup> Comment Letter from John F. Kostyack, Counsel, Office of Federal and International Affairs, National Wildlife Federation to the Chief of the Division of Endangered Species, U.S. Fish and Wildlife Service, 64 *Fed. Reg.* 321871 (Aug. 6, 1999) (on file with Author).

<sup>160</sup> Michael Bean, *Endangered Species, Endangered Act?*, 41 *Environment* 12, 18 (Jan./Feb. 1999) (citing D.S. Wilcove et al., *Rebuilding the Ark: Toward a More Effective Endangered Species Act for Private Land* (Wash., D.C.: Environmental Defense, 1996)).



increased their populations.<sup>161</sup> Other species, such as Red Wolves and California Condors, would probably not exist today without the protection of the ESA.<sup>162</sup>

The FWS asserts that critical habitat is not useful or beneficial,<sup>163</sup> but critical habitat designation (1) provides the benefit of notice to government agencies and the public, (2) give environmental plaintiffs a legal foothold to challenge projects, and (3) provide a basis for judicial review.<sup>164</sup> Because it is much easier for a plaintiff to show that critical habitat has been adversely modified, the adverse modification prong provides the best way for plaintiffs to challenge federal projects. Critical habitat alerts federal, state, and local governments to management steps that may be necessary for the conservation of a species through long-term management or restoration of such habitat.<sup>165</sup> The designation of critical habitat would alert these government agencies to possible land acquisition and mitigation sites for Habitat Conservation Plans (HCP).<sup>166</sup> The FWS agrees that "the beneficial impacts of critical habitat designation may include . . . clear notification to Federal agencies and the public of the existence and importance of critical habitat."<sup>167</sup> Along with the FWS, the NMFS stated that designation should "provide clear notification to agencies, private entities, and the public of . . . the boundaries of the habitat and protection provided for that habitat by the section 7 consultation process."<sup>168</sup>

In addition, the adverse modification standard provides a more objective standard than the jeopardy standard because adverse modifications to habitat are more objectively measurable and

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<sup>161</sup> See CRS Report 98-32, *Endangered Species Act List Revisions: A Summary of Delisting and Downlisting available at* <<http://www.cnire.org/nle/crsreports/biodiversity/biodv-18.cfm>>.

<sup>162</sup> *Id.*

<sup>163</sup> See 64 Fed. Reg. 31871 (1999).

<sup>164</sup> Jack McDonald, *Critical Habitat Designation Under the Endangered Species Act: A Road to Recovery?*, 28 *Envtl. Law* 671, 688 (1998).

<sup>165</sup> See Letter from Joy Keniston-Longrie, Manager, Resource Planning and Asset Management Division, Washington State Dept. of Natural Res. to the Chief of the Division of Endangered Species, FWS, comment on *Notice of Intent to Clarify the Role of Habitat* (Aug. 30 1999) (on file with Author).

<sup>166</sup> *Id.*

<sup>167</sup> *Proposed Designation of Critical Habitat for the Pacific Coast Population of Western Snowy Plover*, 60 Fed. Reg. 11768, 11773 (Mar. 2, 1995).

<sup>168</sup> *Critical Habitat Determination for the Delta Smelt*, 59 Fed. Reg. 65256, 65272 (Dec. 19, 1994).

quantifiable.<sup>169</sup> In most cases, critical habitat designation provides identifiable boundaries on maps that mark the designated area. Degradation of this habitat can be objectively measured through the habitat factors necessary to the species recovery, such as nutrients, cover, areas for breeding and rearing young, and foraging requirements.<sup>170</sup> Using the adverse modification standard, a plaintiff would not have to go through the more difficult process of proving jeopardy to a species.

Critical habitat designation requires time and money that the FWS thinks would be better spent on getting species listed, so their policy has been to avoid designation arguing that the costs outweigh the benefits.<sup>171</sup> Their main argument is that designation does not give protection beyond listing, except when designating unoccupied habitat.<sup>172</sup> They claim that by listing, at least the species is afforded some protection under the ESA.

The FWS's current methods are causing delays in designations that Congress did not intend. Many difficulties arise when designating critical habitat. Often, little information about a species' habitat will require long time-series data and specialized survey techniques.<sup>173</sup> In addition, the economic analyses that the FWS perform are time consuming and costly.<sup>174</sup> However, the ESA does not require an economic analysis before critical habitat is designated, it merely requires the consideration of economic and other factors, not a full-blown study of all economic impacts.<sup>175</sup> The ESA does provide the Secretary with the ability to exempt certain critical habitat from designation to prevent adverse economic impacts.<sup>176</sup> This exemption provides the remedy when the economic burdens are too great to designate critical habitat, saving the FWS the time and money required to perform economic analyses prior to designation. Another part of the cost of designating critical habitat includes the expense of promulgating designations through the rule making process.<sup>177</sup> This cost could be avoided by promulgating critical habitat designations concurrently with listing, as required by the ESA.

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<sup>169</sup> *Science and the Endangered Species Act*, Report by the Committee on Scientific Issues in the Endangered Species Act, National Academy of Sciences <<http://www.nap.edu/books/0309052912/html>> (1995).

<sup>170</sup> *Id.*

<sup>171</sup> McDonald, *supra* n. 161 at 684.

<sup>172</sup> *Id.*

<sup>173</sup> *Science and the Endangered Species Act*, *supra* n.169.

<sup>174</sup> *Id.*

<sup>175</sup> 16 U.S.C. § 1532 (2000).

<sup>176</sup> 16 U.S.C. § 1533(b)(2) (2000).

<sup>177</sup> McDonald, *supra* n. 161 at 691.

Jamie Rappaport Clark, the FWS director, stated that the FWS "believes that protection of habitat is paramount to successful conservation and recovery of threatened and endangered species," but that "designation of critical habitat under the ESA has provided little additional protection to most listed species."<sup>178</sup> With the designation of critical habitat for the Northern Spotted Owl the FWS acknowledges the importance and necessity of critical habitat in the conservation of threatened and endangered species, yet they are saying that designation provides little benefit beyond listing.<sup>179</sup> They contradict themselves with this statement. Perhaps the reason that the FWS and the public do not see much benefit beyond listing a species is that (1) only nine percent of all listed species have critical habitat designations, so we cannot effectively determine whether or not critical habitat does or does not provide extra benefit and (2) the FWS's interpretation of the adverse modification standard reduces the effectiveness of critical habitat by lowering the standard to one of survival.<sup>180</sup> If the FWS does not see the benefit to a species beyond listing, then it should make a commitment to finding ways to create added value through critical habitat designations and to eliminate unnecessary costs and delays.<sup>181</sup>

Private property rights groups argue that the ESA has harmful economic impacts when endangered species exist and critical habitat is designated on private property. They claim that the ESA has caused lost jobs, decreased property values, closed businesses, halted resource development, and even resulted in "takings" of private property.<sup>182</sup> "In reality, the ESA has seldom resulted in the blocking of a project. Of over 73,560 federal actions reviewed under the ESA between 1987 and 1991, only 18 were blocked, cancelled or terminated."<sup>183</sup> Critical habitat will

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<sup>178</sup> Karen Hazel, *In ESA Listings: Pertinence of Critical Habitat Questioned*, W. Livestock J. (July 5, 2000) (quoting Jamie Rappaport Clark).

<sup>179</sup> 57 Fed. Reg. 1796 (1992).

<sup>180</sup> See 50 C.F.R. § 402.02 (2001); see also *supra* nn. 95-114 and accompanying text.

<sup>181</sup> Comment Letter from Andrew E. Wetzler, Project Attorney, Natural Resources Defense Council to the Chief of the Division of Endangered Species, FWS, 64 Fed. Reg. 31871, (Aug. 13, 1999) (on file with Author).

<sup>182</sup> See American Land Rights Association, *Endangered Species Act* <<http://www.landrights.org/esa.htm>> (Last modified Mar. 8, 2000); Grassroots ESA Coalition, *Mission Statement* <<http://www.nwi.org/GrassrootsESA.html>>.

<sup>183</sup> Letter from Mary MacLean Asbill, Staff Attorney, Southern Environmental Law Center, to Nancy Gloman, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, *Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation* 5 n. 2 (Aug. 12, 1999) (on file with Author) (citing Don Barry et al., *For*

only have legal ramifications on private property if federal action is involved. Otherwise, the landowner is only subject to the section 9 prohibition against "taking" a listed species.<sup>184</sup> The Grassroots ESA Coalition further claims that the ESA has not worked because species are not recovering.<sup>185</sup> The problem with this argument is that only nine percent of all listed species have critical habitat designations.<sup>186</sup> For the majority of species "it is too early to tell whether their stories will have happy or tragic endings."<sup>187</sup> Because the law is not being carried out as intended, we cannot say whether it is working.

In addition, there are some cases where critical habitat designations of unoccupied habitat have proven successful.<sup>188</sup> Species that lose a significant part of their historic habitat cannot be conserved without preserving unoccupied habitat. The Red Wolf is an example of a species that is showing improvement. Formerly existing only in captivity, the Red Wolf was reintroduced into its former habitat. In this case, the critical habitat designation provided a way to protect and preserve a species' habitat when it did not occupy that habitat.<sup>189</sup>

### III. THE FUTURE OF CRITICAL HABITAT DESIGNATIONS

#### A. *The Need to Change the Current System*

Scientists, federal employees, and other stakeholders generally agree that the current system of designating critical habitat is not an efficient or effective means of conserving endangered species.<sup>190</sup> Almost all of the 504 public comment letters received in response to the FWS's *Notice of Intent to Clarify the Role of Critical Habitat in Species Conservation* supported stronger legislation and enforcement of the current provisions

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*Conserving Listed Species, Talk is Cheaper than We Think—The Consultation Process Under the Endangered Species Act* (1992).

<sup>184</sup> 16 U.S.C. § 1533 (2000).

<sup>185</sup> Grassroots ESA Coalition, *Mission Statement 3* <<http://www.nwi.org/GrassrootsESA.html>>.

<sup>186</sup> See 64 Fed. Reg. 31871.

<sup>187</sup> Michael Bean, *Endangered Species, Endangered Act?*, 41 Environment 12 <<http://www.heldref.org>> (Jan./Feb. 1999).

<sup>188</sup> See *supra* nn. 127-133.

<sup>189</sup> *Proposed Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina*, 51 Fed. Reg. 26564 (July 24, 1986).

<sup>190</sup> See generally 64 Fed. Reg. 31871 (June 14, 1999); Constance Holden, *Endangered Species Act in Jeopardy*, 215 Science 1212 (Mar. 5, 1982); *Science and the Endangered Species Act*, *supra* n. 169; Baldwin, *supra* n. 25.

and opposed any weakening of the ESA through the methods employed to make critical habitat designations.<sup>191</sup> Rather than “watering down” the current requirements seeking to define habitat in broader terms, these citizens and public and private organizations expressed the need to enforce and strengthen current provisions for critical habitat and its designation.<sup>192</sup> There was equal support and opposition to merging the development of recovery plans with the designation of critical habitat.<sup>193</sup> However, those who supported merging the critical habitat designation with the promulgation of recovery plans often supported the issuance of a mandatory “survival habitat” designation concurrently with listing.

### B. Alternatives

The FWS and environmental groups diverge when the issue of the timing of critical habitat designations arises.<sup>194</sup> The federal agencies have multiple alternatives in dealing with critical habitat designations that would uphold the purpose and spirit of the ESA, rather than denigrating the goal of recovery to one of survival or weakening the ESA through legislation. The FWS and the NMFS should clarify the purpose and

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<sup>191</sup> See Letter from Jay Keniston-Longrie, Manager, Resource Planning and Asset Management Division of Washington State Dep’t of Natural Res., to Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, *Review of Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation* (Aug. 30 1999) (on file with Author); Letter from David L. Henkin, Staff Attorney, Mid-Pacific Office, Earthjustice Legal Defense Fund, to Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, *Comments Regarding Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation* at 5 (Aug. 13, 1999) (on file with Author); Letter from California Native Plant Society, to Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, *Regarding: Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation* (Aug. 12, 1999) (on file with Author); Letter from Margaret H. Nellar, Head, Monitoring Section, County Sanitation Districts of Los Angeles County, to Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, *Comments on Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation* (Aug. 12, 1999) (on file with Author); Letter from, Environmental Protection Information Center (Aug. 12, 1999) (on file with Author); Letter from Southern Environmental Law Center (Aug. 12, 1999) (on file with Author); Letter from George J. Gomes, Administrator, California Farm Bureau Federation, to Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, *Comments on Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation* (Aug. 11, 1999) (on file with Author).

<sup>192</sup> See *id.*

<sup>193</sup> See *supra* n. 10.

<sup>194</sup> Catherine Lazaroff, *Critical Habitat for Endangered Species Faces New Threats*, Environmental News Service <<http://ens.lycos.com/ens/jun99/1999L-06-15-04.html>> (accessed Oct. 14, 2000).

process of designation to make designations more time and money efficient by redefining the adverse modification prong. It also should work to attain compliance with the ESA to prevent future litigation.<sup>195</sup>

Under the FWS regulations, critical habitat is defined as *specific* geographic areas that are essential for the conservation of a threatened or endangered species and that may require special management and protection.<sup>196</sup> Traditionally, following the definition of critical habitat, the FWS and the NMFS have published defined boundaries around designated critical habitat. General areas are mapped using the constituent elements necessary for the species and habitat is precisely described.<sup>197</sup> Constituent elements include: "space for individual and population growth and for normal behavior; cover or shelter; food, water, air, light, minerals, or other nutritional or physiological requirements; sites for breeding and rearing offspring; and habitats that are protected from disturbances or are representative of the historic geographical and ecological distribution of a species."<sup>198</sup> Because large areas are often shown as critical habitat, the landowners and managers must rely on the federal action agency to determine whether or not the constituent elements occur on their particular tract of land.<sup>199</sup> "Clear lines on a map help give land managers, property owners and citizen advocates a clear and indisputable area to consider in enforcement and planning, but they also result in the exclusion of much suitable habitat including vital corridors and migration routes. Large scale designations can ameliorate this, but the Services worry that such designations would be over-inclusive . . . ."<sup>200</sup>

The defined, mapped areas comply with the ESA, but the FWS would like to broaden the definition of the critical habitat area.<sup>201</sup> It proposes to give "more general habitat location delineations and broad descriptions of

<sup>195</sup> See *supra* nn. 118-119, 122-125 and accompanying text.

<sup>196</sup> 50 C.F.R. § 424.02(d) (2000).

<sup>197</sup> U.S. Fish & Wildlife Service, Division of Endangered Species, *Critical Habitat: What is it?* ¶ 14 <[http://endangered.fws.gov/listing/critical\\_habitat.pdf](http://endangered.fws.gov/listing/critical_habitat.pdf)> (revised May 2000).

<sup>198</sup> *Id.* at ¶ 12.

<sup>199</sup> *Id.* at ¶ 15.

<sup>200</sup> Letter from Jennifer P. Joseph, Conservation Associate, Northwest Ecosystem Alliance, to Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, *Comments on Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation* at 3 (Aug. 13, 1999) (on file with Author). However, landowners and managers have more resources and more incentive to assess these elements.

<sup>201</sup> See 64 Fed. Reg. 31871 (June 14, 1999).

habitat types" when identifying critical habitat.<sup>202</sup> The reason for using broad descriptors in designating habitat is because this "less specific" method of delineating habitat is less costly. Boundaries would not be marked on a map and the agency would have to determine whether a particular tract meets these broad habitat descriptions.<sup>203</sup>

This broad method of designating critical habitat could potentially protect more habitat because of its generalized description, but it has some problems. First, this method would not give habitat protection to species found outside of their generally described habitat. Further, since habitat will not be identified on maps, landowners and managers will not know whether they have potential critical habitat on their land until they consult with the FWS or the NMFS.<sup>204</sup> Because this approach does not delineate specific areas, the door will be opened for discretionary agency determinations of whether a specific tract of land meets the general habitat requirements of critical habitat for a species, and the effect could be diminished protection. In addition, these general habitat descriptions would not satisfy the current purposes of designating critical habitat: "to trigger the section 7 consultation requirements; to provide clear notification to Federal agencies of the necessity of a section 7 consultation; and to alert private developers and the public to the location of areas essential to species conservation . . . ."<sup>205</sup> However, this method would allow the FWS or the NMFS to make more timely designations with a less lengthy analysis of defining areas on maps, which could result in increased protection in the immediate future.

This method would be ideal for an initial designation of habitat that would be made concurrently with the listing of the species.<sup>206</sup> This broad habitat description can be used until the recovery team has adequately studied the species and its required habitat. Then they can modify the critical habitat when they have more knowledge of habitat needs. When the recovery plans are complete, the areas of species occurrence, along

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<sup>202</sup> *Id.* at 31873.

<sup>203</sup> *See id.*

<sup>204</sup> *See id.* However, if the descriptions were specific enough, the landowners would be put on notice that habitat meeting these specific criteria would be critical habitat and would have the burden of determining whether the specific habitat criteria were met.

<sup>205</sup> Letter from Andrew E. Wetzler, Project Attorney, National Resources Defense Council, to Nancy Gloman, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, *Comments on Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation* at 7 (Aug. 13, 1999) (on file with Author).

<sup>206</sup> *See Science and the Endangered Species Act*, Report by the Committee on Scientific Issues in the Endangered Species Act, National Academy of Sciences <<http://www.nap.edu/books/0309052912/html>> (1995).

with the unoccupied habitat necessary to the conservation of the species, can be designated and will trump the prior general “survival” habitat designation.<sup>207</sup> The FWS could then reduce the amount of time and money spent on initial designations until the recovery team could streamline the process for determining critical habitat with the process of recovery planning.

This mandatory “survival habitat” designation could be employed as a stop-gap measure between the time of designation and the time the recovery plans are published to give the protection required under the ESA. The National Academy of Sciences recommends that “some core amount of essential habitat should be designated for protection at the time of listing a species as endangered as an emergency, stop-gap measure” that should be identified without reference to economic impact.<sup>208</sup> This “survival habitat” would be defined as the habitat necessary to support the population and ensure short-term (twenty-five to fifty years) survival.<sup>209</sup> Rather than weakening the ESA, as Sen.1100 proposes, the provision requiring the designation of critical habitat concurrently with listing should remain in effect, with redefinition of the “initial critical habitat,” allowing it to be later modified when the final recovery plans are published.

Because the petition for listing requires that known historic and current ranges be identified, the FWS or the NMRS could use this information in designating the “survival habitat” that would later be modified at the issuance of a recovery plan when more information is gathered on the precise habitat location and habitat needs. With this “survival habitat” in place, the species would benefit from immediate protection of critical habitat. Designating whatever critical habitat is known, especially in historic ranges, and then allowing these areas to be modified when a federal action is sought, would at least provide some protections beyond mere listing and waiting up to three years (or indefinitely in some cases) for critical habitat determinations to be made.

The FWS could also save money and delays by making an initial designation of critical habitat only on federal lands. Presumably, the FWS or the NMRS have a working knowledge of listed species locations on federal lands as well as general habitat types, so the initial designation at the time of listing could include only habitat on federal lands because the designations will have no regulatory impact on private lands, unless

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 5.

<sup>209</sup> *Id.* at 5.



federal action is involved.<sup>210</sup> In the case where the landowner is seeking a federal permit or license, the FWS can perform a case-by-case analysis to make critical habitat determinations for that particular tract until the recovery plans with final critical habitat designations are promulgated. Using this method, the FWS would not have to formally designate critical habitat on private lands that are not subject to section 7 consultations for federal actions until the recovery plans are published. Once the private landowner applies for a federal license or permit or otherwise invokes section 7 consultation, the requirement to designate critical habitat would be triggered. When the landowner is in the planning process where federal action will be involved, general habitat descriptions can be used to help the landowner determine whether or not critical habitat exists on that tract.

Another alternative to help the FWS reduce its workload and the number of critical habitat designations would be to designate only unoccupied habitat.<sup>211</sup> If, as the FWS asserts, the only time designation provides additional protection beyond listing is when designating unoccupied habitat,<sup>212</sup> then the FWS should at least attempt to designate unoccupied habitat for the species' future growth and expansion. If the FWS is not going to give separate meaning to the jeopardy standard and the adverse modification standard, then they should designate unoccupied habitat that will certainly not be protected under the jeopardy standard.

Although delays caused by designating critical habitat on an individual basis would likely be unavoidable, these delays would be much less than the delays caused by potential litigation over failure to designate and over the issuance of "no jeopardy" opinions. With a case-by-case determination of critical habitat, the landowner, who knows more about his tract of land, can have direct input and work with the FWS or the NMFS in designating the critical habitat that will be on his or her land. By allowing the landowners to have direct input in the designation process on their land and by not designating critical habitat immediately on private lands, private landowners' fears that critical habitat will impose severe

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<sup>210</sup> Critical habitat designation may, however, affect the way large tracts of privately owned land are managed. For example, a landowner may plan the management of his land based on whether or not critical habitat is designated on that tract.

<sup>211</sup> Letter from Margaret H. Nellar, Head, Monitoring Section, County Sanitation Districts of Los Angeles County, to Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, *Comments on Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation* at 1 (Aug. 12, 1999) (on file with Author).

<sup>212</sup> 64 Fed. Reg. 31871, 31872 (June 14, 1999).

restrictions on the use of their land will be reduced.<sup>213</sup> However, having direct input into the designation process may put pressure from donors on the federal agencies to limit federal funding programs for critical habitat designations.

Currently, "most landowners have no financial incentive to practice beneficial management, and most have a strong regulatory disincentive for doing so."<sup>214</sup> To compensate for lost time and money waiting for these critical habitat designations to be made on a case-by-case basis, an "insurance policy" could be put in place to compensate landowners.<sup>215</sup> Tax credits or payments from the government could be made for proven economic losses resulting from the designation of critical habitat.<sup>216</sup> This compensation would "raise the public's consciousness of endangered species issues and, more important, defuse criticism of wildlife protection programs ...."<sup>217</sup> Industries such as American Forest Products want the law amended to permit governmental compensation to companies for money spent protecting habitat and sacrifices the company has to make for threatened and endangered species.<sup>218</sup> Currently a landowner incentive program is in place in Texas, funded by the FWS and implemented by the Texas Parks and Wildlife Department, which pays landowners for part of the cost of starting programs that will benefit listed species.<sup>219</sup>

Earthjustice Legal Defense Fund has suggested that using multispecies/geographic species groupings would improve efficiency by designating critical habitat for several plant taxa at one time.<sup>220</sup> Because many of the listed plants have overlapping habitat needs and face similar threats, by grouping the critical habitat designations as the FWS has done

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<sup>213</sup> Karen Hazel, *ESA Legislation Introduced; Critical Habitat Main Focus*, W. Livestock J. (1999) <<http://www.wlj.net/editorial/June7esaleg.htm>> (accessed Oct. 14, 2000).

<sup>214</sup> Bean, *supra* n. 187, <<http://www.heldref.org>> (Jan./Feb. 1999).

<sup>215</sup> See Salzman, *supra* n. 36. The author recognizes the problem of proving economic loss due to critical habitat designations.

<sup>216</sup> See Salzman, *supra* n. 36.

<sup>217</sup> *Id.* at 340.

<sup>218</sup> Constance Holden, *Endangered Species Act in Jeopardy*, 215 Science 1213 (Mar. 5, 1982).

<sup>219</sup> Bean, *supra* n. 187, <<http://www.heldref.org>> (Jan./Feb. 1999).

<sup>220</sup> Letter from David L. Henkin, Staff Attorney, Mid-Pacific Office, Earthjustice Legal Defense Fund, to Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, *Comments Regarding Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation* at 8 (Aug. 13, 1999) (on file with Author).

with plant listings, the FWS could reduce the time and money spent during the designation process.<sup>221</sup>

### III. CONCLUSION

The importance of habitat in conserving threatened and endangered species is evident.<sup>222</sup> The ESA requires federal agencies not only to take actions to prevent the further loss of listed species, but also "to pursue actions to recover species to the point at which they no longer require special protection" and can be delisted.<sup>223</sup> By redefining the definition of adverse modification, the FWS can give meaning to the second prong of the section 7 consultation requirement. The FWS's regulations implementing section 7 of the ESA merge the jeopardy prong with the adverse modification prong in their definitions of the two standards.<sup>224</sup> Its policy has been to avoid critical habitat designation, as evidenced in its *Notice of Intent to Clarify the Role of Critical Habitat in Endangered Species Conservation* and by numerous lawsuits filed against the FWS for failure to designate critical habitat.<sup>225</sup> Its failure to designate critical habitat has resulted in court orders compelling the FWS to designate critical habitat and noting that the adverse modification standard is a separate prong from the jeopardy standard in reviewing section 7 consultations. Rather than weakening the ESA through a more general description of critical habitat, the FWS can use the broad habitat descriptions to issue "survival habitat" concurrently with the listing of a species. Then the portion of bill Sen. 911 could be enacted to provide that the final determination of critical habitat be published up to three years after final listing. Now that the ESA is up again for reauthorization, its original purpose of bringing threatened and endangered species to the point of recovery, must be remembered.

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<sup>221</sup>

*Id.*

<sup>222</sup>

See 64 Fed. Reg. 31817(1999); *Science and the Endangered Species Act*, Report by the Committee on Scientific Issues in the Endangered Species Act, National Academy of Sciences <<http://www.nap.edu/books/0309052912/html>> (1995).

<sup>223</sup>

U.S. Fish & Wildlife Service, Division of Endangered Species, *Critical Habitat: What is it?* ¶ 8 <[http://endangered.fws.gov/listing/critical\\_habitat.pdf](http://endangered.fws.gov/listing/critical_habitat.pdf)> (revised May 2000).

<sup>224</sup>

See Salzman, *supra* n. 36.

<sup>225</sup>

See 64 Fed. Reg. 31871 (1999); *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998); *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991); *Natural Resources Defense Council v. U.S. Dep't of Interior*, 113 F.3d 1121 (9th Cir. 1997).