



Questions & Answers on the NOAA Fisheries Service Endangered Species Act Final Critical Habitat Designation for Southern Resident Killer Whales

(November 2006)

Q. What is critical habitat?

A. The Endangered Species Act (ESA) defines critical habitat as specific areas: 1) within the geographical area occupied by the species at the time of listing, if they contain physical or biological features essential to conservation, and those features may require special management considerations or protection; and 2) outside the geographical area occupied by the species if the agency determines that the area itself is essential for conservation.

Q. How does critical habitat get designated?

A. The ESA requires that NOAA and the U.S. Fish and Wildlife Service designate critical habitat for species that have been listed as threatened or endangered. In so doing, the agencies must use the best scientific information available, in an open public process, within specific timeframes. Before designating critical habitat, careful consideration must be given to the economic impacts, impacts on national security, and other relevant impacts of specifying any particular area as critical habitat. The Secretary of Commerce may exclude an area from critical habitat if the benefits of exclusion outweigh the benefits of designation, unless excluding the area will result in the extinction of the species concerned.

Q. Why designate critical habitat now?

A. The ESA requires the agency to designate critical habitat at the time of listing, or within one year if critical habitat is not determinable at that time. On Nov. 18, 2005, NOAA Fisheries Service listed the Southern Resident killer whales as endangered under the ESA. The agency proposed critical habitat for these animals on June 15, 2006. We held public meetings and received comments on the proposal during the public comment period.

Q. Is the final critical habitat different than what NOAA proposed?

A. No. The final critical habitat is the same as that proposed. While we received comments about including the shallow nearshore areas and Hood Canal, the information was not sufficient to consider these areas as occupied by the whales at the time of listing. They were not included in the final critical habitat designation. We also received information on several small, shallow coves, inlets and bays where the whales have not been seen. Those small water bodies (~15 square miles) have not been included in the final critical habitat designation. The exclusions for military sites in the final rule are the same as the proposed rule.

Q. What areas did NOAA exclude from this proposal and why?

A. The ESA gives the Secretary of Commerce discretion to exclude areas from designation if he determines that the benefits of exclusion outweigh the benefits of designation. We are proposing to

exclude military areas in Puget Sound because of the high priority on national security, the potential for critical habitat designation to have some impact on military readiness, and that collectively, the military sites represent only a small percentage of the total habitat. Based on these considerations we concluded that the national security benefits of exclusion outweigh the conservation benefits of designation. We are not proposing to designate 18 military sites (112 square miles total) as critical habitat.

We are not proposing to exclude any areas based on economic impacts. We considered the endangered status of the whales, the uniqueness of their habitat, that threats to habitat are a primary concern leading to the endangered finding, and that designation will enhance our ability to protect the habitat through Section 7 consultations. We concluded that the economic benefits of excluding each of the three critical habitat areas do not outweigh the conservation benefits.

Q. What happens now that critical habitat is designated and how does it change what federal agencies must do to satisfy the ESA?

A. The ESA protects threatened and endangered species in several ways. Under Section 7, all *federal agencies* must ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species, or destroy or adversely modify its *designated critical habitat*. These complementary requirements apply only to federal agency actions, and the latter only to habitat that has been designated. A critical habitat designation does not set up a preserve or refuge, and applies only when federal funding, permits or projects are involved. Critical habitat requirements do not apply to citizens whose actions do not involve a federal agency.

Many actions that adversely modify a species' critical habitat will also jeopardize its continued existence. In practice, we'll continue to be concerned about the same activities that harm killer whales and their habitat, regardless of whether that habitat is designated. We expect that where critical habitat is designated, it will more precisely focus our analysis on how the action will alter the habitat, and how that will affect the ability of the habitat to support the population's conservation.