

**Designation of Critical Habitat
National Workshop Project**

Digest of the Process and Results

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Executive Summary

Background:

In February 2000 the US Fish and Wildlife Service (USFWS) held two national workshops to help them form new policy and procedures for the designation of critical habitat for species listed under the Endangered Species Act. Participating in the two workshops in Reston, Virginia, and Tempe, Arizona, were 28 and 35 invitees respectively, representing different interest groups, regulatory entities and federal agencies with a stake in the direction chosen by the USFWS. Observers were also in attendance. The goal of the workshops was to create a forum where specific issues relating to designation could be discussed openly and honestly, and where increased understanding and the generation of new ideas could occur. There was no intent to reach agreement or develop group recommendations. The issues, agenda and format for the workshops were determined through a series of interviews with over sixty people who had commented on the agency's Federal Register Notice of June 14, 1999, and through which guidance on the designation issue was solicited.

To implement this initiative, USFWS contracted with the U.S. Institute for Environmental Conflict Resolution (USIECR) in Tucson, Arizona. The USIECR, which assists parties in resolving environmental conflicts that involve federal agencies or interests, oversaw the project and contracted with three facilitators experienced in multi-party, multi-issue natural resource conflict resolution – Lewis Michaelson, Lucy Moore and Suzanne Orenstein – to conduct background stakeholder interviews and to design and facilitate the workshops.

Issues Discussed:

During the interviews and workshops, the focus was on key issues, including:

- § criteria for designation of both occupied and unoccupied habitat;
- § designation process (including timing, specificity, and data);
- § potential for exclusions from designation;
- § economic impacts of designation, and the evaluation of those impacts; and
- § communication, incentives and partnering approaches.

Throughout the discussions, conflicting interests and needs emerged, such as:

- § the need for timely designation and the need for adequate data;
- § the need for specific designation that gives predictability and the need for flexibility of designation that can adapt to dynamic ecologies;
- § the need for maximum protection of the species and the need to minimize impact to landowners;
- § the need for regulatory authority and the need for cooperative local partners; and
- § the need to implement the critical habitat laws and the scarcity of resources.

A more detailed description of discussions of these issues appears in Section V of the report.

Suggestions and Proposals:

During discussions with each other, and with USFWS, participants identified several ideas for improving the designation process, and for building support for those designations. These ideas DO NOT represent consensus, and in some cases may have been supported by only a few. Offered in more detail in Section VI, they are highlighted here:

Designation Process: Participants advised USFWS not to look for one global answer to the designation process, but rather consider different approaches, depending on each situation. They suggested the agency look to state models, a wide range of data bases to create predictive models, and the use of both maps and descriptors in designating habitat. There were also suggestions for criteria for the designation of unoccupied habitat.

Timing of Designation: Participants were divided on the priority of early designation versus the priority of more complete data. There was some support for a phased approach, with an interim designation and a final designation at the time of the Recovery Plan.

Economic Impacts Analysis: Some urged an economic evaluation that considers the impacts of listing as well as designation. There were requests that economic evaluations be holistic, and cover costs of not protecting species. USFWS could improve the process by informing and including local stakeholders and regulators, hiring additional economists (local, if possible), and combining or coordinating the process with the National Environmental Policy Act (NEPA) process, or the draft designation process. Peer review and publication of the analysis with the designation could increase its credibility and value.

Prudency Criteria: Some offered criteria for prudency determination, understanding that prudency will now be the rule, not the exception.

Interagency Coordination: Participants hope that the USFWS will work closely with other federal agencies for agreement on when a Section 7 consultation process is appropriate. Specifically, they ask for coordination with the National Marine Fisheries Service (NMFS) to develop new policy, and jointly administer new policy and regulations.

Increase Public Outreach and Education: There was considerable support for increased efforts to educate, communicate with, and to the extent possible, involve stakeholders, local regulators, affected landowners, and the public in USFWS activities and decisions. It was suggested that state, regional and field USFWS staff could help reduce polarization among the groups concerned with designations, with some skillful interactions.

Look for Local Partners and Offer Incentives: Participants agreed that working with local partners is a beneficial approach, but struggled with balancing the need to foster public-private partnerships, and the need to recover the species. Many spokespersons from different interests agreed that voluntary habitat protection should be encouraged wherever possible. The USFWS is encouraged to identify incentives, like tax credits, that can produce cooperation and support for species recovery.

Link Designation to Recovery Planning Process: Many spoke in favor of moving the critical habitat designation process to link with the recovery planning process.

Additional Funding: Many suggested unified approaches to acquire additional congressional funding. Some thought a successful pilot project, that included satisfied stakeholders, could make a big impression.

Alternative Approaches to Protecting Critical Habitat: Many participants felt that protecting critical habitat could be accomplished without designation, through stakeholder agreements and coordinated planning and management with state and local agencies.

Additional Topics for Future Forums: Participants were appreciative of the USFWS's willingness to engage in discussion on the designation of critical habitat, and suggested related topics for future discussion.

I. Purpose of the Digest:

This report summarizes the process and the results of an initiative of the US Fish and Wildlife Service (USFWS) to re-evaluate its policy and procedures for the designation of critical habitat for species listed under the Endangered Species Act. The process used to identify issues and stakeholders, conduct interviews and design, conduct and facilitate two national workshops is described, and the issues and suggestions raised during the project are discussed. Hard copies of this report will be mailed to all invited workshop participants. The Executive Summary will be mailed to all workshop observers (who can download full copies via the Internet). This report will become part of the USFWS public record on its re-evaluation of critical habitat designation. The public record will also include written comments solicited by the Federal Notice that opened the comment period in which these workshops were held.

II. Background:

Critical Habitat Designation: Section 3 of The Endangered Species Act of 1973 defines critical habitat as the specific areas within the geographic area occupied by a species, at the time of its listing, which contain features that are essential to the conservation of the species and that may require special management or protection. Areas unoccupied by the species may also be designated critical habitat, if those areas are also essential for conservation. Under certain circumstances, the USFWS, or its sister agency National Marine Fisheries Service (NMFS), may choose not to designate critical habitat, or to exclude certain areas from a designation.

Implementation of this section has proved troublesome for the USFWS and for many who have interests within these areas. The need for the designation of critical habitat, procedures for the designation and the exclusions, and impacts of the designation have been the subject of numerous lawsuits in recent years. The debate has become more and more complex, as issues of timing, scope, adequacy of data, relation to other processes, economic impacts, public perception and acceptance have become part of the designation puzzle.

Seeking Public Input: Anticipating the need for new policy and procedures, and possibly new regulations, to govern the designation of critical habitat, the USFWS began a re-evaluation process with a Federal Register Notice, June 14, 1999. In an attempt to clarify the role of habitat in endangered species conservation, the Notice invited comment on how the USFWS might use critical habitat designation as a more effective tool for species conservation, and how that tool might be used in the most cost effective manner. Over 300 comments were received by the USFWS.

Opening the Dialogue: The USFWS felt that the participation of stakeholders and interested parties was vital to its efforts to re-evaluate the critical habitat designation process and the role of habitat in endangered species conservation. In the hope of beginning a dialogue concerning critical habitat designation with interested parties, the USFWS contracted with the

U.S. Institute for Environmental Conflict Resolution (USIECR) in Tucson, Arizona. Created by the 1998 Environmental Policy and Conflict Resolution Act, USIECR assists parties in resolving environmental conflicts that involve federal agencies or interests. (Information on the USIECR is found in Appendix A). In consultation with USFWS, the Institute defined a scope of work, which included two national critical habitat workshops in February 2000. A critical component of the scope of work was the preliminary assessment of issues and interests, which required individual interviews with over 60 identified stakeholders. Three facilitators under contract to the USIECR, Lucy Moore, Lewis Michaelson and Suzanne Orenstein, began work in October 1999.

III. The Process:

Phase I - Interviews: In the first phase of the project, the facilitators reviewed the comments submitted in response to the Federal Register notice, and selected individuals to interview as part of the workshop design. They interviewed over 60 individuals and entities who had been among the Federal Register commentators and/or who had been plaintiffs in litigation on the critical habitat issues. The purpose of the interviews was to better understand the issues at the heart of the debate, and to identify those issues that might lend themselves to discussion at the workshops. Those interviewed also offered guidance on the workshop format and agenda, numbers of participants, and locations. A summary of the findings of the assessment process was prepared and distributed to the USFWS.

Phase II - Design of the Workshops: The facilitators designed two national workshops, based on the advice of those interviewed, the needs of the USFWS, consultation with the USIECR, and their own experience as designers and facilitators of multi-issue, multi-party dialogues.

§ Goal: to gather ideas for improvements in the critical habitat designation process for USFWS to consider in its policy re-evaluation process, and to plan for future cooperation and coordination in implementing the policy improvements and revisions with the workshop participants and others. The workshops were *not* intended to be consensus building or agreement-seeking forums, but to provide a forum for open, clear discussion of issues.

§ Locations: To accommodate the different kinds of experience with critical habitat issues in the east and the west, and to make participation more convenient, the workshops were located in Reston, Virginia (February 8, 2000) and Tempe, Arizona (February 11, 2000).

§ Format: Most interviewed favored a facilitated plenary discussion among all parties, focusing on certain aspects of the subject. There was little support for panel presentations, or for small group work. Facilitators chose to use the small group format for a 30-minute period in the beginning of the workshop to discuss on-the-ground impacts, and to allow for more informal exchanges. In Tempe,

there was an additional breakout in the afternoon for 30 minutes.

- § Size of Group: Most favored a roundtable format, with a small, knowledgeable group of participants, even though this decision meant that not all those interviewed would be guaranteed a seat.
- § Observers: In order to accommodate those who were not invited to the workshop, but wanted to attend and learn, an observers category was created. Any interested person was welcome to observe the workshop, and two opportunities during the day were given for observers to make comments.
- § Issues: Those interviewed suggested discussing certain practical concerns that arise as critical habitat is designated. Those most amenable to discussion included:
 - § critical questions for designation, including data adequacy, method of description, the role of unoccupied habitat, and links with the recovery planning process;
 - § exclusions from designation, including specific types of land, and criteria for exclusion;
 - § evaluation of economic impacts, including improving the process, and criteria for exclusions on economic impact grounds.
- § Background Information: It was suggested that background material be provided to participants in advance of the workshops. Materials included: agenda, participant list, the summary of the findings of the interview process, and copies of relevant Federal Register Notices.

Phase III - Workshop Facilitation: Two national workshops were held on February 8, in Reston, Virginia, and February 11, in Tempe, Arizona. The letter of invitation, agendas, groundrules, lists of participants, and lists of observers for each workshop are included in Appendix B-F. Thirty participants and 27 observers attended the Reston workshop. Thirty-five participants and 49 observers attended in Tempe. The Reston workshop was facilitated by Suzanne Orenstein and Lucy Moore, the Tempe workshop was facilitated by Lewis Michaelson and Lucy Moore. Facilitators took notes on flip charts for the benefit of the group; additional sets of more complete notes were taken by the third facilitator in the audience.

Phase IV - Summary and Evaluation: Summaries of the process and results of the two workshops, as well as of the interview phase, are included in this report. Some participants and some observers filled out evaluation forms following the workshops. These will be used by the facilitators, the USIECR, and the USFWS in measuring the success of the project, and in identifying ways to improve similar efforts in the future.

IV. Opening Workshop Remarks by the U.S. Fish and Wildlife Service

Jamie Rappaport Clark, Director, and Gary Frazer, Assistant Director for Ecological Services, offered welcoming remarks to the workshop participants in Reston and Tempe, respectively. Nancy Gloman, Chief, Division of Endangered Species, also spoke in Tempe. The following is a summary of their opening remarks, which were intended to offer their commitment to a new approach with respect to critical habitat designation, and to describe their current activities and short-term plans.

They thanked the participants for spending time with USFWS to think about the challenges posed by the designation of critical habitat. They also acknowledged the work of the US Institute for Environmental Conflict Resolution, and the facilitators who designed and facilitated this process.

These workshops were inspired, they said, because the USFWS has come to a crossroads on the critical habitat issue. Too much energy has been spent on conflict and controversy, and not enough on building common ground. Over the past several months, they explained, the USFWS has come to realize that by making critical habitat a low agency priority they were not fulfilling their responsibility to work for habitat conservation as a primary means of recovering listed species. Whatever its imperfections, critical habitat is the available tool, and all those interested in the recovery of species need to use it in the best way possible. Agency spokespersons said they were committed to making a fresh start and that their hope for this process was to begin a real dialogue that results in a strategy for progressing.

They spoke of the inadequate USFWS listing budget. Although the agency has requested increases in the past, Congress has not been accommodating. For FY 2001, the request is \$ 115 million for the endangered species program, \$ 7.2 million of which is for listing and critical habitat designation (a \$ 1 million increase over the previous year). With 258 candidate species awaiting listing decisions, the USFWS has focused limited resources on listing, not designation of critical habitat. Clearly the courts and the public have not agreed with this choice. Over 200 species have court-ordered critical habitat designations pending, and additional species are awaiting designation.

They explained that USFWS is seeking public comment and consultation before determining their strategy for the best way to designate critical habitat. In the meantime, they are complying with the 9th Circuit decision that designation is the rule, not the exception. They plan to designate critical habitat for all new listings, and will comply with court orders for critical habitat designation. By June 2000, critical habitat should be designated for 211 species, and a policy will be in place for dealing with the future listings. As a consequence, fewer species will be listed.

This year, they said, the agency has not requested a spending sub-cap on critical habitat appropriations, although there is a cap on the full listing budget. In the past, they did request caps

on designation of critical habitat in order to keep the court from ordering the use of all the listing moneys for habitat designations.

They described their efforts to negotiate with many interests Senate Bill S 1100, which would move the habitat designation process to the recovery planning process, and added that it is unclear whether or not it will ever pass. USFWS has no current plan to ask Congress to eliminate critical habitat designation from the Endangered Species Act.

They told the workshop participants that USFWS is looking for new approaches to designating critical habitat. The comments from the June 14 Federal Register notice were helpful in beginning the dialogue about new policy directions. Commentators suggested increased budget, prioritizing the backlog, clarifying the adverse modification definition, and improving the economic analysis. Following these workshops, they concluded, the agency will develop policy, guidance or changes in regulations, and will publish these in the Federal Register.

V. Summary of Issues Raised During the Project:

This section summarizes the issues and questions relating to the designation of critical habitat, which were raised during both the interviews and the workshops.

1. USFWS Plans for Critical Habitat Designation: Participants were uniformly interested in new policy or approaches toward the designation of critical habitat. The agency noted that it plans to adhere to the 9th Circuit Opinion prohibiting them from using the Anot prudent@ determination as the rule. Participants raised several questions about the future approach of the agency. How will USFWS determine Aprudency@ given this new environment? What will be their policy and procedure for designating habitat? Specifically, there were concerns about:

§ **Prioritizing species for designation:** Will the Listing Priority Guidance change in regard to critical habitat? The agency answered that given the large backlog of listed species without designated habitat, and inadequate resources for the task, they will have to prioritize among species. Possible criteria could be:

§ those where there are court orders

§ those with statutory deadlines

§ those with urgent biological needs

§ **Resources for designation:** Many participants were concerned that USFWS has inadequate resources to fulfill its obligations. Some felt that the agency has not requested sufficient funds, and question the designation funding Acap@ that has been part of funding requests in the past. (The USFWS responded that a habitat designation cap for habitat designation was not requested for FY 2001.) They also criticized USFWS for spending valuable dollars defending themselves in court, instead of Ajust following the law.@ Others pointed out that increased litigation

has not resulted in increased funding from Congress, and asked for unified support for USFWS budget requests.

§ **Legislative changes:** Several participants had been involved in the negotiations for Senate Bills S 1100 and S 1180, and were interested in continuing discussion of legislative fixes for the issue of critical habitat designation.

2. **Intent/Benefit of Critical Habitat Designation:** Many raised the question about the intent and benefit of critical habitat designation. Is it:

- § a tool for conservation and recovery?
- § a hammer for regulation and enforcement?
- § a legal mechanism for requiring consultation?
- § a way of providing information?
- § an incentive?

§ **Value of designation:** Participants suggested that critical habitat designation may be considered useful when:

- § a listed species= habitat would not be protected without it
- § the designation is needed to provide advance notice to the regulated community
- § it is needed to inform biological opinions after consultation
- § habitat is appropriate to a formal designation, such as land that is not disturbed, a species whose needs will not change and does not require active management.

Environmentalists argued that designation of critical habitat focuses conservation on specific areas and leads to better understanding of what the species needs. Critical habitat designation can protect food sources. The designation process also affords an opportunity for evaluation of indirect and economic impacts, and may result in the stimulation of local zoning and land trust efforts. Most commentators and workshop participants agreed that critical habitat can offer additional protection for unoccupied lands if the unoccupied habitat is really essential to the species. The designation is also a trigger for federal consultation under Section 7, and has enforcement teeth, where partnerships and other conservation efforts do not.

§ **When designation might be unnecessary:** Some argued that critical habitat designation is duplicative of the listing process itself. The process is costly, they said, offers little additional protection, and may have negative impacts on the landowners. The same benefits to the species, some said, could be given through policy. In some cases, designation may actually discourage cooperation and

coordination of conservation efforts, or even lead to destruction of habitat in order to avoid designation. Others interests suggested that critical habitat may not be a viable concept for species A where you can count the number left on your two hands.@

§ **Additional benefit beyond listing:** There was much discussion about whether habitat designation offers additional benefit beyond the Section 7 consultation required in the listing. Environmentalists felt strongly that the benefits are great, and that Section 7 is not adequate to protect habitat. The USFWS policy of using adverse modification standards to protect habitat was based on their view that the policy was valuable especially with respect to unoccupied habitat.

3. Criteria for Designation of Critical Habitat: Ideally the designation of critical habitat would provide predictability and allow for adaptability at the same time. Conservation interests, landowners and regulators all need certainty about which lands are to be protected. However, it is clear there is a need for some flexibility, given the dynamism in both the species and the habitat, and given the impact of new data. This was the dilemma many grappled with during the interview and workshop process.

There was also a tension between the concept of a widely defined critical habitat, which includes the greatest possible area, and the need to draw the area as specifically as possible for the least impact on private landowners and regulators. Some recommended looking at critical habitat as a zone where regulation occurs, but also acknowledged that activities outside the area can have impacts as well.

Participants identified issues for the designation of critical habitat:

§ **Biologically based:** Participants supported the use of biological components, constituent elements, to determine the designated critical habitat area.

§ **Critical elements:** The USFWS should define which elements of the habitat are critical, and what activities would cause adverse modification. The focus should be on what will benefit or harm the species.

§ **Size of Area:**

§ **Key areas:** Some areas may be critical to recovery because of their location, as a corridor, for instance, rather than as habitat. It may be important to include these in critical habitat, as long as it is feasible for them to become suitable habitat.

§ **Percentage:** Would it be possible to quantify critical habitat as a certain percentage of land within the much larger habitat area?

§ **Dynamic condition of habitat:**

§ **Disturbed lands:** Especially in disturbed areas, it may be necessary to allow for adaptation. Lands that have burned, or been cleared, or otherwise disturbed, may be critical habitat, or may be critical for only certain periods

§ **Changing ecologies:** There is a time, as well as a spatial, dimension to designations. Forests wax and wane, landscapes change due to natural causes. Designations may need to shift with those changing conditions.

§ **Changing species preference:** A species may shift its preferences. The Hawaiian goose now favors golf courses to the natural habitat already identified. Other animals need different habitat at different stages of their life cycles.

§ **Conflicts between species:** It is not uncommon to find conflicting needs between listed species in the same area, between plants and animals, or among animals.

4. Method of Describing Critical Habitat Designation: There was much discussion about the use of maps and/or narrative description to indicate the habitat. The map is favored for its clarity of Ain@ or Aout.@ The descriptors are favored for their specificity of what is needed, and as a guide for recovery efforts. Most seemed to prefer a combination of the two.

§ **Maps:** Maps, with lines showing critical habitat, are important for their specificity, and predictability, allowing landowners or resource managers to see instantly if they are included or not. In the case of defining excluded areas, maps with lines are a necessity. Dealing without lines, in a Afloating mosaic,@ is difficult, and can serve as a disincentive for cooperating and perhaps an incentive for making land unsuitable to avoid designation.

§ **Descriptions:** The more descriptive approach outlines habitat elements that must be preserved, without necessarily bounding it with lines. It helps if the descriptors are as specific as possible, although a development interest feared that the use of descriptors would shift the burden of proof to the applicant to show that the project does not compromise the species= needs.

§ **Use of models:** Models, using many databases, can produce templates to identify core areas, and can be used to extrapolate certain conditions. A study, *Seven Types of Rarity*, may offer some ideas about categories of requirements and models. The data bases can be assembled into a standard tool from which to develop a standard predictor program to which locations of the threatened and endangered species might be mapped. Predictors could be determined with computer programs, like GARP, at the San Diego Supercomputer Center, which could inform the USFWS on the distribution and location of the species. Depending on the degree of resolution of the land use input data, an initial map of critical habitat could be drawn. An expert estimated that the cost to develop this model as an ongoing tool would be \$ 1 million.

§ **Batching:** Planning for multiple species and *batching* designations for similar species were favored by some. The USFWS noted that they will be doing more of these types of designations, but they still require species-specific evaluations.

5. Definitions of Adverse Modification: Participants frequently returned to questions about adverse modification and its definition. Many felt that clarifying the definition, especially with respect to jeopardy, is key to determining the eventual impacts of policies for critical habitat designation.

§ **Distinction from jeopardy:** Many environmentalists favored the clear separation of the two concepts. Jeopardy refers to *survival* of the species, while adverse modification of habitat protects against *compromising recovery* of the species. With the two distinct, there is opportunity to apply a higher standard to protect habitat.

A court decision on adverse modification, for instance, protected the food source of the Stellar sea lion from trawlers.

Environmentalists advised the USFWS that defining adverse habitat modification by only the jeopardy standard has little value, because it means modifications that will not jeopardize the survival are likely to be allowed to go forward. One environmental spokesperson further stated that litigation will probably continue unless the definition of adverse modification changes.

§ **Impact on landowners and resource managers:** Both public and private landowners and resource managers were concerned with the potential restrictions on activities to avoid adverse modification to critical habitat. Some welcomed the 10th Circuit decision that critical habitat designation is a major federal action, requiring NEPA compliance. Specific concerns included:

- § **Permitting restrictions:** Regulators and resource managers may find it problematic to seek biological opinions on 404, stormwater, National Pollutant Discharge Elimination System, other Clean Water Act permits, among others.
- § **Land management restrictions:** There was concern that land managers might be restricted in their activities, even if those activities might benefit the species. Adaptive management crucial for habitat conservation, and management activities must be feasible, without the risk of adverse modification, argued some. There are situations where pro-active land management is necessary to create or maintain suitable habitat, like burning growth, or cleaning water, or controlling deer populations. There were questions about how land could be managed to benefit species in wilderness areas.
- § **Property values and pursuit of livelihood:** Developers and private landowners are uncertain as to the meaning of designation, and are unable to make investments in their properties with the cloud of designation, or future designation, hanging over them. The prospect of restrictions may drive some landowners to destroy potential critical habitat before designation can occur. If adverse modification is defined as meeting the standard for recovery, the economic impacts may be more evident and significant.

6. Timing of Designation: Participants were found on both ends of this spectrum: desiring designation at the time of listing, and wishing designation would never happen. Many discussed the inevitable trade-offs between designation at, or close, to the time of listing, and designation one year later, or more. The balance to be struck lies between the need for a rapid designation for the certainty it gives landowners and the protection it gives to species, versus the need for accurate designation based on adequate data and an economic analysis, which may take time to gather.

- § **Prior to listing:** A participant suggested applying critical habitat to candidate species, prior to their listing.
- § **At time of listing:** Many felt that it was crucial to have at least Acore@ habitat designated at the time of listing. There was discussion about the amount of data necessary for designation. Some felt that if a species is listed, there should be enough data about the species and its needs to designate at least some critical habitat. Others felt that there often is not enough data at the time of listing to designate a final, static habitat, and that an adaptive approach is necessary to keep the lines flexible.

Some were concerned that urgency in designating critical habitat could lead to a process which excludes stakeholders and other interests, as well as the data they could contribute.

The early designation would offer protection to the species, and would give clarity and predictability to landowners and state and local regulators. Environmentalists felt strongly that there should be some designation of habitat at the time of listing, even if the final designation occurs later. (This was part of their objection to Senate Bill S 1100). If more data is collected after the listing, then a more specific, possibly less impacting, habitat could be designated later. This led to a discussion of a phased approach, with interim designation at the time of listing, and final designation later, or with the recovery planning process. There was concern that a phased process not result in a limbo period before the final designation during which either uncontrolled development or no habitat alteration could occur. There were also questions about how the USFWS would grant permits or exemptions after listing, but before designation of critical habitat.

§ **With Recovery Planning Process:** There was some support for linking recovery planning and critical habitat designation, particularly with the addition of an interim survival habitat at the time of listing. Some suggested that linking the designation to recovery planning would afford an opportunity for more partnerships and better communication among stakeholders. If designations are made prior to the recovery plan, many argued for provisions to insure the revision of those designations when the recovery plan is complete.

7. **Unoccupied Habitat:** Many agreed that there can be benefits, above listing, to the designation of unoccupied habitat, and that the economic analysis should play a greater role and carry more weight in these situations. Designation of unoccupied habitat is important, said some, especially for transient species. Some suggested that unoccupied habitat designation is moot for a rapidly declining species, since it is unlikely it will recover to the point where it can expand into unoccupied habitat. Ranchers consider themselves to be the group most impacted by potential unoccupied habitat designations. They spoke of valuing habitat on their land, but expressed the need for help in managing it. Perhaps the biggest disincentive for the rancher, is the designation requirement for consultation, which can be costly, time consuming and confusing. Some federal land managers felt it was important to designate unoccupied habitat to avoid disproportionate impacts on their operations, particularly Department of Interior lands.

8. **Exclusions:** The USFWS has discretionary authority to exclude areas from critical habitat designation if they do not contain the constituent elements, or if, as a result of the economic analysis, they determine the costs outweigh the benefits of designation. Participants had additional thoughts on criteria for exclusions:

- § **Exclude the minimum:** Environmentalists felt strongly that exclusions should be given out very sparingly, and that there is no biological reason for an exclusion. They urged that any exclusion for economic reasons must prove that the recovery of the species will not be impacted. Some felt there should be no exclusions, and that every landowner should be proud to be included in critical habitat, that it should be seen as a privilege to participate in the recovery of a species.
- § **Federal lands:** Some felt it was logical to exclude federal lands, because of the link between critical habitat and federal consultation. Others argued that excluding federal lands results in a greater burden on adjacent landowners within the designation area.
- § **Military bases:** Department of Defense representatives argued that their comprehensive natural resources management plans are often superior to what would be required under critical habitat. They also reminded USFWS that military readiness concerns need to be met. Military lands have more endangered species per land area managed than any other federal lands, according to Navy spokespersons, and the burden of protection is heavy. They see the Recovery Plan Process more suitable for habitat conservation, and wish that they could be developed more quickly. DOD asked to be included in the development of USFWS policy and offered to share their data. Others felt there was little accountability afforded on military lands and that only National Parks and wilderness areas deserve to be excluded.
- § **Habitat Conservation Plans, and other actively managed areas:** Many spoke in favor of excluding HCPs, believing that protection is already afforded, and that including them would require landowners to go through a second round of consultation. Including HCPs could become a disincentive to creating HCPs.
- Others felt there is value in the HCP, but that critical habitat designation provides an important regulatory backup. All HCPs are not created equal, said one participant, and there were concerns that they do not address long-term connectivity needs. There were discussions about future HCPs, and whether they could be automatically excluded, or would require new rulemakings for exclusion. The future of safe harbor programs was also raised. Some felt HCPs should only be excluded if a consistent standard were established and followed in creating them, which would still leave the problem of how to address prior HCPs that do not meet these standards.
- § **Actively managed areas:** Some argued against exclusion because these areas could not guarantee the permanence and the enforcement capabilities of critical habitat, since politics, changing local priorities, economics and other factors could take these lands out of protection in the future. A participant noted that excluding

an area does not necessarily exempt it from regulation later under the ESA.

§ **Private lands:** These interests argued for exclusion of private land because of the uncertainty, loss of land value, and economic hardship possible with designation. They noted that exclusions should be awarded to prevent the disincentive to protect the species and provide habitat that can come with designation. Additional protection against incidental take enforcement would provide an incentive for some private landowners to protect rather than destroy habitat, they said. Voluntary efforts, partnerships, and incentive programs would be more effective in recruiting the cooperation of private landowners, than designation of critical habitat.

Others suggested that the time for voluntary efforts is when the species is first identified as threatened. If those efforts prove successful, listing will never happen. They were also concerned that any loosening of incidental take would not be in the interest of recovery. While encouraging voluntary efforts, some still felt there is little evidence to suggest that volunteer efforts have been sufficient to provide survival, let alone recovery of a species.

§ **Unoccupied habitat:** It was suggested that economic impacts should weigh heavily in the consideration of designating unoccupied habitat as critical, and that exclusions in unoccupied areas on the basis of economic impacts might be warranted.

§ **Small areas:** Some felt it would be appropriate to exclude areas under 5 acres.

9. **Economic Impacts of Critical Habitat Designation:** Here, as elsewhere, there were balances that needed to be struck. There was a desire to make the economic analysis process on the one hand more streamlined and less costly, and on the other hand to make it more comprehensive and holistic. Although economics are not factored into the listing, USFWS does an economic impact analysis on critical habitat designation between the proposal and the final rule. The analysis only applies to the incremental economic impact over and above the listing impacts. Some reminded the agency that the goal of the ESA and critical habitat is to recover species, and that recovery is not an economic luxury, but an end in itself. A participant suggested that a thorough economic analysis might argue against designation and in favor of another path for protection.

§ **Incremental principle:** There was criticism of the application of the economic analysis to only the above-listing impacts, rather than to the listing and designation impacts together. Many urged USFWS to reconsider this premise, some feeling it is unrealistic, others that it is unfair.

- § **Land values and development delays:** Landowners and developers spoke of the decrease in land values resulting from designation, or threat of designation. Time is lost waiting for the designation, and then for required permits. Both large projects and individual homebuilders can be affected.
- § **Need for broad, holistic economic analysis:** Many felt that the economic analysis should be broad enough to include the full range of impacts to the economy, not just to development or industry. For instance, the economic analysis should consider the inherent value of the wilderness and wildlife resources, and the costs of not protecting the species. There can be a loss in terms of positive, non-traditional economic benefits and impacts, such as the benefits derived from eco-tourism. Costs of moving units from one location to another, or the comparative costs of recovering the species now or later should also be counted. Some argued to include indirect costs from meeting other regulations, like coastal zone management rules, that are triggered by the designation of critical habitat.
- § **Unoccupied habitat:** Many agreed that economic impacts should play a greater role in the designation or exclusions of critical habitat in unoccupied areas, than in occupied areas.
- § **Economic Analysis Methodology:** Landowners and managers said they are often left out of the economic analysis process, and asked for a more formalized way of contributing information and opinions. Many felt that the time frame for the economic analysis is much too short to do the comprehensive job that is necessary.

10. Data: There was much discussion on the role, amount, and source of data for designation purposes, and the relationship between adequacy of data and timing of designation.

- § **How much data:** Lack of data adds to the public perception problem for the USFWS. An agricultural interest emphasized, "If the critical habitat is not based on good data, it will not work." But others warned that an endless search for adequate data could delay the designation past the point of usefulness. A participant pointed out that the same data is needed for listing and critical habitat designation, and that waiting to gather enough accurate data could actually delay listing until too late. Some believed that the standard of "best available" is insufficient and that the standard ought to be "adequate data."
- § **Sources of data:** Academics urged the USFWS to use existing databases of all kinds: land use, tax records, climate information, wildlife/habitat interaction, etc. to develop a sound basis for designation. There were warnings about the need to "ground truth" GIS data. Some criticized the USFWS for ignoring available data, or "losing it" when it is provided by others. In some cases, where a habitat

Conservation Plan is already in place, there may be good data available; in other cases, where there are very few of the species, there will be much less data.

Improving relationships and developing partnerships with other entities will increase the data base for everyone.

Participants urged the USFWS to define Aexpert@ broadly, to include local, on-the-ground people with valuable experience and knowledge.

§ **Knowing what=s there:** It was suggested that the USFWS analyze how it collects, stores and uses data, in order to maximize the use of available data. It was also suggested that the USFWS analyze its future listing and designation activities and plan for the systematic collection of data to anticipate its long term needs.

§ **Credibility of data:** Some encouraged the USFWS to communicate its data gathering process and the results to affected interests, and allow for a debate on the data=s conclusions about what habitat is critical. This kind of openness may help build public support for the designation.

11. USFWS Coordination and Communication: Participants were concerned that the agency has not coordinated and communicated effectively with other agencies, federal, state, local and tribal, in planning and activities related to critical habitat designation.

§ **Coordination with National Marine Fisheries Service:** This sister agency, responsible for implementing the Endangered Species Act, has much to offer the USFWS, and could benefit from close coordination. Participants are concerned that this coordination and mutual education may not be happening consistently. It is not clear to what extent new policies and programs will be jointly created or administered.

§ **Communication with local interests:** Many participants, representing a variety of interests, felt that USFWS is failing to use an important tool in the protection of habitat. Communication with local interests, both governmental and non-governmental, regularly and openly, and Aeyeball to eyeball@ could gain support for efforts that fail because of ignorance of the need and suspicion of government in general, and USFWS in particular.

§ **Consultation with tribes:** Tribal representatives clarified that tribal lands are not federal lands, but are held in trust by the federal government. This means that all federal agencies are responsible for providing assistance to tribes, including in the area of conservation. They urged USFWS to look to tribes as partners in the protection of habitat. Although Secretarial Order 3206 defines a working

relationship between the agency and tribes on the ESA, tribal spokespersons have seen little consultation prior to listing. The agency admitted that information often does not reach tribes far enough in advance for meaningful consultation.

Santa Ana Pueblo offered an example of tribal leadership in habitat protection. The Pueblo has undertaken to restore 6.5 miles of Rio Grande ecosystem to benefit the Silvery minnow, and is cooperating in the development of an HCP. They favor the HCP as a vehicle for conservation because they feel it protects their tribal sovereignty and right to determine what happens on tribal lands.

§ **Outreach to rural communities:** The Federal Register is not adequate notice for many, especially those in rural areas. The USFWS is missing a valuable opportunity to work with rural land owners and managers who are actually implementing habitat protection in their areas.

12. **Public Education and Outreach:** A variety of participants criticized the USFWS for not giving public education and outreach a high priority. In many areas, especially throughout the west, there is the perception that designation of critical habitat will stop all ongoing activities. The result can be panic and strong anti-government sentiment, which makes allying with local communities to protect species very difficult. The average citizen needs information that is understandable and inviting in order to become a supporter of habitat protection. Otherwise, USFWS actions appear heavy-handed and abusive.

Some noted that requiring NEPA compliance when designating critical habitat will bring with it public outreach and public scoping processes. NMFS representatives said they routinely do Environmental Assessments on their designations.

Representatives of a wide variety of interests wished for more focus on communication skills within the agency, and felt that improvement in this area would be a crucial step in beginning to build trust between the agency and the public.

VI. **Critical Habitat Designation Suggestions and Proposals:**

The following suggestions were raised over the course of the project, by those interviewed and by those attending the workshops. They DO NOT represent consensus, and in some cases may have been supported by only a few. They emerged from the issues and questions described in Section V and are offered to USFWS for its consideration.

Designation Process: Participants struggled with the need to balance consistency of process for predictability and efficiency, and flexibility of process to adapt to particular circumstances of each case.

§ **Do not look for a global answer:** Many participants suggested that there need not be

one global answer to the designation process. USFWS was urged to take some experimental approaches with mixed land ownership, and to use a modular approach to create templates and the ability to extrapolate for different situations.

- § **Predictive models:** USFWS was urged to use the many state, local and national data bases available on climate, environment and land use to create predictive models. Predictors could be determined with computer programs, like GARP, at the San Diego Supercomputer Center, which could inform the agency on the distribution and location of the species. Depending on the degree of resolution of the land use input data, an initial map of critical habitat could be drawn. An expert estimated that the cost to develop this model as an ongoing tool would be \$ 1 million.
- § **Look to states for models:** The State of Wisconsin used an HCP-like process for the Karen blue butterfly which did not carry with it regulatory designation. The process included input from affected groups, and resulted in an agreement to protect this essential habitat without a formal designation.
- § **Use best judgment about specificity:** Although a high degree of specificity is desirable in the designation, participants understand that this is not always possible. USFWS was encouraged to do your best in striking the balance between timely designation and specificity of designation.
- § **Combine map and descriptors:** Most participants saw value in both the map and description of elements, and suggested USFWS to combine the two in ways that provide the best focus for the species habitat. Participants asked for the greatest possible clarity of designation.
- § **Focus on habitat conservation and use best science:** Many participants urged USFWS to designate critical habitat using the best science available, rather than administrative or political boundaries, or current land management patterns.

Criteria for Designation of Unoccupied Habitat: There was some support for the following criteria for when it may be desirable to designate unoccupied habitat:

- § habitat is suitable, or it is feasible that it can become suitable
- § habitat contains critical elements, without which the species would not exist
- § impacts to landowners are considered and evaluated in economic analysis to be worth the cost
- § habitat location is critical
- § habitat is in need of, or is amenable to, management

Timing of Designation: Participants grappled with the need to balance urgency for designation and need for adequate data. In general, there was some support for a phased approach, where an

interim designation would be made at the time of listing, based on available data, and a revised designation would be made later, perhaps as part of the Recovery Plan, if there was not too great a time lapse. Some favored a conservative (widest possible area) approach on the interim designation, with modifications later; others favored a narrower designation in the beginning, with additions later if needed.

Economic Impacts Analysis: Some participants asked for a change in the premise of evaluating only those impacts, which are additional to impacts of the listing itself. They urged an economic evaluation that considers the impacts of listing and designation. Participants also asked for broad, comprehensive economic analyses, which include costs of not protecting the species and indirect costs, associated with additional state and local regulations that are sometimes triggered.

There were also suggestions for improved methods for economic impact analysis:

- \$ hire additional resource economists
- \$ combine analysis with NEPA process, to insure comprehensive study, with public education and involvement
- \$ seek and use information and views from landowners and resource managers, such as real estate values, costs of surveys, flooding or drying up of irrigated land, etc.
- \$ use a local firm to perform the economic analysis, for increased credibility with local landowners
- \$ carefully and patiently explain the weighing process to those affected by the designation
- \$ use peer review of the economic analysis
- \$ publish the economic analysis with the critical habitat designation, to emphasize its value and role in the process
- \$ use the batching method for economic analyses
- \$ make economic analysis part of the draft designation process

Prudency Criteria: Some suggested that critical habitat designation may be considered especially prudent when:

- \$ a listed species= habitat would not be protected without it
- \$ the designation is needed to provide advance notice to landowners
- \$ it is needed to inform biological opinions after consultation
- \$ habitat is appropriate to a formal designation, such as land that is not disturbed, the species whose needs will not change and the habitat does not require active management.

Coordination with NMFS: Participants hope that USFWS will work closely with the National Marine Fisheries Service to develop new policy, and that the two agencies will jointly administer new policy and regulations.

Section 7 Consultation Criteria: USFWS was urged to work with other federal agencies for agreement on when a Section 7 consultation process is appropriate in critical habitat.

Increase Public Outreach and Education: There was considerable support for increased efforts to educate, communicate with and to the extent possible involve, stakeholders, local regulators, affected landowners, and the public in USFWS activities and decisions. This outreach should begin before listing, and could result not only in a better, more supported protection program, but a reduction in the current level of mistrust of the agency. The more data sharing and explanation, in clear, timely language, of the processes for designating critical habitat the better.

A series of workshops in each region on difficult issues like critical habitat could improve communication and result in more support of USFWS decisions.

Some suggested that USFWS insure a higher level of people/political/communication skills within its agency at all levels, perhaps through specialized trainings or workshops.

A Mediating Role for the USFWS: It was suggested that state, regional and field USFWS staff could play a mediating role to reduce polarization among the groups concerned with designations. Timely and skilled interactions with these parties from a leadership agency like USFWS could help to move all interests forward in a less hostile way.

Look for Local Partners: Participants agreed that working with local partners is a beneficial approach, but struggled with balancing the need to foster public-private partnerships, and the need to recover the species. A wide variety of local entities are potential partners, with data to share and on-the-ground expertise, in protecting habitat. They include cities, counties, irrigation districts, soil and water conservation districts, and rural land managers, both public and private.

Develop Incentives for Private Landowners to Protect Habitat: Many spokespersons from different interests agreed that voluntary habitat protection should be encouraged wherever possible. USFWS is encouraged to identify incentives, like tax credits, that can produce cooperation and support for species recovery. Incidental take enforcement remains a controversial issue B a disincentive for landowners, a necessary protection for environmentalists. Again, public education, regular communication and outreach can play a role in helping shift landowner perceptions away from designation as a punishment, to designation as a privilege.

Link Designation to Recovery Planning Process: Many spoke in favor of moving the critical habitat designation process to link with the Recovery Planning process. There was general support for S 1100, with caveats about the need for an interim designation at the time of listing.

Additional Funding: Many suggested unified approaches to acquire additional congressional funding. Some thought a successful pilot project, that included satisfied stakeholders, could make a big impression.

Alternative Approaches to Protecting Critical Habitat: Many participants supported the protection of habitat without a formal regulatory designation. Options include:

- § stakeholder processes to reach agreement on protection of habitat;
- § coordination with management and conservation plans developed by states, or other federal agencies;
- § sound coordinated land use planning early on to prevent the need for listing.

Additional Topics for Future Forums: Participants were appreciative of USFWS willingness to engage in discussion on the designation of critical habitat. They identified several additional related topics, which they felt would benefit from the same attention:

- § Definition of adverse modification
- § Criteria for prudency
- § Relationship between Habitat Conservation Planning and Critical Habitat Designation; the impact of designation on existing and future Habitat Conservation Plans
- § Incremental nature of economic analysis
- § Nature of critical habitat designation B tool, weapon, incentive?
- § Models useful for several species, or categories of species, allowing Abatching@ of several designations