

Critical Habitat—Questions and Answers

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Is the question of critical habitat designation and the litigation surrounding it a new issue?

The Fish and Wildlife Service throughout the existence of the ESA has often not met the requirement to make critical habitat designations at the time of listing. This has been the result of several factors, including lack of information, lack of resources, and lack of apparent benefit to species. In the prior administration, the Service usually found most critical habitat designations to be “not prudent”, one of the situations in which the Act allows critical habitat not to be designated. As a result, numerous species were listed without critical habitat being designated. By 1997, the Service had designated critical habitat for only a handful of the more than 1,200 species on the threatened and endangered list.

In 1997, a court ruled that this “not prudent” standard violated the ESA. There has been a flood of lawsuits since that time.

The court-ordered deadlines currently at issue—dealing with 32 species—result primarily from lawsuits over the failure of the Service to designate critical habitat as required during previous administrations, or subsequent challenges to the adequacy of designations.

Why does the Interior Department view critical habitat as a low priority?

Designating critical habitat for species already on the endangered species list provides little conservation benefit to species.

Federal agencies are required to consult with the Fish and Wildlife Service (or for some marine species, the National Marine Fisheries Service) to ensure that agency actions do not “adversely modify” this designated habitat. However, Federal agencies are already required under the ESA to consult with the Service to ensure that these same types of actions do not jeopardize the existence of the species. In most cases, the species protection benefits from a critical habitat designation largely duplicate those already in place as a result of the species being listed.

Moreover, after 30 years of experience in administering the ESA, it is clear that active conservation measures are far more important, and even essential, to recovery of listed species than the mere prohibition on adverse modification of that habitat by Federal agency action, particularly when this protection is generally provided through consultations required due to the listing of the species.

The ESA can compel agencies and landowners or managers not to harm listed species or not to adversely impact their designated critical habitat. It cannot compel them to take the positive steps needed to recover most species. Those must be done voluntarily. Inasmuch as most listed species are found in whole or part on State and private lands, and we have found both to be generally strongly opposed to having their property designated as critical habitat, “critical habitat” has become a significant obstacle to obtaining landowner cooperation in species conservation. As such, it is an obstacle to recovery for many species. This is a classic example of good intentions failing the test of reality.

Why is it so difficult and time-consuming to designate critical habitat?

The Service must prepare detailed maps of species’ habitats, provide time for public comment, and complete economic analyses of the critical habitat designation before it can be finalized. These requirements make critical habitat designations costly and time-consuming.

In addition, the ESA requires critical habitat determinations to be based on those physical or biological features essential to the conservation of the species. However, for many species, particularly plants, no one currently knows what those features are. Because both the statutory deadlines in the ESA and the court orders generally do not allow time to research these matters, the Service must often make decisions on incomplete information, or base decisions on where to designate critical habitat on inferences from the needs of similar species, or from the occurrences of types of vegetation often associated with a species, rather than actual knowledge of the needs of a species.

This in turn leads to sometimes successful lawsuits challenging the designations on the grounds that they were not properly done. The result is a never-ending cycle of litigation in which one lawsuit orders the Service to designate critical habitat despite the lack of adequate information and of time or resources to acquire it; a second lawsuit orders the designation to be redone due to (often predictable) defects in the initial designation; and on and on into the foreseeable future.

Don't delays in designating critical habitat imperil threatened and endangered species?

No. As both Bush and Clinton administration officials have testified before Congress, conserving habitat is essential for endangered species, but critical habitat as mandated by the ESA is not an effective way to undertake this conservation. The designation of critical habitat adds little, if any, value to the conservation of threatened and endangered species. The reason: in the vast majority of cases, the designation of critical habitat duplicates habitat protection found elsewhere in the Act.

Species recovery is often dependent upon active conservation measures, not regulatory prohibitions such as accompany critical habitat designations. Most listed species are found in whole or significant part on State and private lands, and these landowners are generally strongly opposed to critical designation on their land. The absence of critical habitat is far more likely to secure the sort of voluntary cooperation needed to recover species than to imperil them.

Why do all these lawsuits actually hurt endangered species conservation?

Because staff time and appropriated funds that should be going to on-the-ground conservation efforts, such as working with landowners on conservation projects to keep imperiled species from needing listing under the Act, consultation with other federal agencies to protect listed species, and working to recover species already listed. They can't get to this work because litigation is forcing biologists to do the lower-priority work of designating critical habitat.

Isn't it true that the Fish and Wildlife Service only lists species or designates critical habitat when forced by a lawsuit?

This is completely false. Because of all the court-ordered deadlines, Fish and Wildlife no longer has the funding to act outside of those deadlines. However, prior to this situation arising late in 2000 the Service was regularly listing species on its own initiative. As noted above, there was some but less designation of critical habitat. At current budget levels for the listing program, all of its funds will be required to be used for court-ordered actions through 2008.

It is ironic that the very groups whose lawsuits have caused this problem now criticize the Service for failure to act outside the court orders.

Why did the Service ask for a cap on funding for critical habitat when it was apparent that there were not going to be enough funds to complete all of the lawsuits?

The previous Administration asked for the cap on critical habitat spending—which this Administration has continued—to keep courts from ordering the Service to spend funds from other important program areas

(such as recovery of already listed species and conservation efforts for species in decline, so they do not have to be listed) on critical habitat designations.

Why hasn't the Interior Department asked for enough funds from Congress to do all the designations?

The President's FY 2004 budget request for listing totals nearly \$12.3 million, an amount that, if approved by Congress, is almost double the \$6.2 million appropriated in FY 2000 and a 35 percent increase over FY 2003. However, no matter how much funding was provided, it would take many years to complete this process. The real question is whether the benefits of critical habitat warrant the large expenditures that would be required were it to be designated for all listed species.

What is critical habitat?

Critical habitat is a term within the Endangered Species Act. It is defined as an area occupied by a species listed as threatened or endangered within which are found physical or geographical features essential to the conservation of the species, or an area not currently occupied by the species which is itself essential to the conservation of the species. As defined in the ESA, "conservation" means any and all methods and procedures, and the use of those, needed to bring a species to recovery—the point at which the protections of the ESA are no longer needed.

What benefits does critical habitat provide a species?

Federal agencies are required to consult with the Fish and Wildlife Service about the effect of actions they authorize, fund or carry out, on designated critical habitat. As noted below, however, this is not an additional benefit of critical habitat since federal agencies are required to consult if their actions may affect listed species even without critical habitat.

Does that mean that without critical habitat, Federal agencies do not need to consult with the Service if they are going to authorize or conduct an activity that could impact a threatened or endangered species?

No, the Endangered Species Act prohibits unauthorized take of listed species and requires consultation for federal agency activities that may affect them, including habitat alterations, regardless of whether critical habitat has been designated.

How much does it cost to designate critical habitat?

The average cost of designating critical habitat for a species is approximately \$400,000. The Service could list approximately 2 species for the same amount of funds.

When does critical habitat really help a species?

Critical habitat may have some marginal value when it covers "unoccupied" habitat which is Federally-owned or which might be impacted by a Federal activity. In those instances, Federal agencies may not already be consulting with the Service, unless other listed species are present. "Unoccupied" habitat constitutes a relatively small amount of habitat designated as critical habitat.

Would the Service rather not designate critical habitat for any species?

The present statutory scheme for critical habitat designations is broken. The Service believes that critical habitat would be much more valuable if the statute allowed identification without the strict deadlines and at a point at which there is better science on the needs of the species than is generally available at the time of listing.

How many species are not being listed because of all of the critical habitat law suits?

There are 259 species in the pipeline to be considered for listing under the Endangered Species Act. The Service needs "listing" funds to develop proposals, seek and analyze public and scientific comment, and

make final listing decisions for these species. The more funds that are devoted to critical habitat, the less that are available for listing. However, because none of these species has been fully evaluated or gone through the listing process, there is no basis for concluding that any particular number of these would actually be listed even if unlimited funds were available.