Comments of the North American Section of the Society for Conservation Biology on H.R. 2933, The Critical Habitat Reform Act of 2003[1]

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In this document, we provide a section-by-section analysis of certain sections of H.R. 2933, highlighting various scientific issues pertaining to the conservation of endangered species and the designation of critical habitat.

ANALYSIS OF KEY SECTIONS OF H.R. 2933

Section 2: Designation of Critical Habitat concurrent with approval of Recovery Plan
Issue 1. Proposed change in language to Sec 4 (a) General.- section 4 (a) (3) **FROM** "The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable--designate…..critical habitat…" **TO** "The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent practicable, economically feasible, and determinable—….designate….critical habitat"

Comment: This proposed text is a significant change in the criteria for determination of critical habitat. The current inclusion of the word "prudent" places the emphasis on the benefit to the species that may accrue both biologically and functionally through designation of critical habitat and implementation of its associated regulations. Currently, the Fish and Wildlife Service (hereafter, FWS) examines the biological importance of any designated habitat in terms of survival and recovery. Agency biologists also consider their ability to reliably determine and evaluate the elements needed to define critical habitat. This approach relies on a scientific analysis of benefits. The proposed change in wording shifts the focus to matters of "practicality" and "economic feasibility" as well as determinability. The proposed wording is a significant change in focus away from the needs of the species. Loss of the term "prudent" essentially removes the concept of biological importance to the species from the criteria. It weakens the ability of critical habitat to serve as a conservation tool under the Endangered Species Act.

The 'prudency' standard also provides an important exemption from critical habitat designation in cases where designation would likely *increase* a species risk of extinction, as could be the case when specific georeferencing would enable vandals or collectors to locate and damage the population (this issue is particularly pertinent for populations of at-risk plants or species such as raptors with few nesting locations). Although FWS use of the 'prudency' exemption has far outstripped this intention, we are concerned that loss of the possibility of a 'prudency' exemption could actually damage protection and recovery efforts by forcing designation in cases where 'take' of a species could increase

[1] This document represents the opinions of the North American Section of the Society for Conservation Biology only. It does not necessarily represent the opinions of the Society for Conservation Biology as a whole or of any of its other sections.

as a result. Although this issue likely affects the minority of listed species, it could be highly damaging to them.

Furthermore, these new criteria of "practicality" and "economic feasibility" are not well defined. As written they introduce great uncertainty to the process. We anticipate that, as written, the proposed legislation would lead to additional litigation. A careful definition of terms and a clear understanding of the implications of the wording are essential in preventing legislative and judicial gridlock. We thus fear that this proposed wording change will do little to stem the existing problems with ESA implementation.

We are also concerned that imposing a criterion of "economic feasibility" rather than the present requirement of "taking into consideration the economic impact" may reduce the decision to one of current or near term budgetary and economic factors, rather than emphasizing long-term stewardship or benefits of designation to the species, habitat function, and economic sustainability. This concern is amplified by the suggested removal of the prudency standard. Under the proposed wording, "practicality" and "economic feasibility" could be volatile and inconsistently interpreted on the basis of agency staff priorities, budgets, or current economic conditions. For example, a strict interpretation of these proposed criteria today could be grounds for making no critical habitat designations simply given current limitations in FWS staff levels and budgets—regardless of potential benefits to the species under consideration. Similarly, significant areas necessary for the survival and recovery of the species could be excluded based on temporary economic conditions which may be the result of the same forces that make the species vulnerable. Failure to designate critical habitat based on economic issues alone would increase the risk of extinction.

Issue 2. Proposed language further amending the current section 3 **FROM** "The Secretary…..(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat…" **TO** "The Secretary….(i) shall, concurrent with the approval of a recovery plan for a species under subsection (f), designate any habitat of such species which is then considered to be critical habitat…"

Comment: Many scientists and practitioners believe this change has some advantages. At the time of listing there is seldom as much information about the species, its range, and its habitat requirements as there is following the development of a recovery plan. Hence, the process of evaluating critical habitat would be enhanced by the recovery planning process, and allowing more time may yield more well-defined designations and give the FWS more time to work with the public to help them understand the process. Further, critical habitat is supposed to meet the needs of the species for survival and recovery, but at the time of listing recovery criteria have not been determined. Consequently, estimated recovery goals must be used.

However, the potential drawback to having critical habitat designation concurrent with recovery planning is that some species are under severe threat from ongoing activities, and the legal protection afforded by critical habitat would be delayed. In cases where

there are immediate threats to an at-risk population from human-induced habitat alteration, then delaying critical habitat designation and the attendant protections afforded to the species could substantially increase the risk of extinction. Further, recovery plans in many cases lag behind statutory requirements, and many species do not have approved recovery plans,[1] which means that the potential benefits of critical habitat might not be realized even if designation were delayed until the recovery planning stage.

In 1995, at the request of Congress, a panel of the National Research Council[2] reviewed some ESA issues. They recommended that at least some habitat be designated at the time of listing, which can then be modified at a later date—whether or not the entire designation process is deferred. This suggestion remains viable. Species are listed on the biological grounds that they are threatened with extinction: listing implies that human activities in their ranges need to be controlled in order to reduce the risk of extinction. For species where populations have dangerously low viability, threats are imminent, or there are clear current land use controversies, delaying the use of species recovery tools such as critical habitat designation would increase extinction risks, and perhaps may also increase species protection costs when actions are finally implemented. In such cases, we think it is essential to preserve the ability to act early and then refine the protection. This option is clearly biologically preferable to delaying such decisions. Such a policy could be developed as a parallel to the existing "emergency listing," with only some species receiving a temporary critical habitat designation at the time of listing. While it may be feasible for all newly listed species to receive some critical habitat protection that is later modified during recovery planning, the costs and logistics of doing so for species with less critical situations needs to be weighed against the benefits that accrue to the community by taking more time to define recovery needs and inform the public about the process, and putting those dollars to more direct recovery implementation.

Finally, for some species, full recovery is not possible (for example, when very few patches of suitable habitat remain) and the best we can hope for is that population size will be stabilized. In such cases, critical habitat may be important to protect the remaining patches of habitat, but a recovery plan will not be developed. To ensure that critical habitat can be used as a protection tool in such cases, there should be a requirement for critical habitat designation at the time a recovery plan is approved or a determination is made that such a plan will not benefit the species.

Issue 3. Addition of a new section 4 (a)(3) (B) {the previous section (B) having been amended to become 3 (A)(ii)} adding the following language:

"(B) Notwithstanding subparagraph (A), the Secretary may not designate an area as critical habitat of a species, and any designation of critical habitat of a species shall not apply to an area**,** if the area is subject to—

"(i) a habitat conservation plan under section 10 (a)(2) that the Secretary determines provides protection for habitat of the species that is substantially equivalent to the protection that would be provided by such designation; or

"(ii) a State or Federal land conservation program that the secretary determines provides protection for habitat of the species that is substantially equivalent to the protection that would be provided by such designation"

Comment: This exemption permits the FWS to exclude certain areas from the designation of critical habitat based on current protection afforded to the habitat by other plans, programs or regulations. This proposed change further reduces the biological emphasis on whether a conservation benefit to the species would occur, with little justification for this proposed change. The phrase "substantially equivalent to the protection that would be provided by such designation" is undefined. The basis for the Secretary to make a determination of "equivalence" is unclear, and could be subject to abuse and inconsistent application if left discretionary. We expect inconsistency in application as differences emerge in the way it is interpreted, followed by litigation as people challenge those interpretations. Such lack of clarity has two likely impacts. First, it could significantly reduce the areas benefiting from critical habitat designation. Second, the contention and litigation that would follow would deepen rather than reduce the existing problems in ESA implementation. At-risk species are the ultimate losers in this scenario.

Furthermore, the Act already provides for exclusions based on benefits comparison. Under Section 4 (b) 2 the Secretary may exclude any area from critical habitat, "if he determines the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." It seems that the existing provision for exclusions is sufficient.

The existing language emphasizes benefit to the at-risk species, whereas the proposed text is less clear in demanding careful benefits analysis. The exclusion from critical habitat designation of areas with state and federal conservation programs may damage recovery efforts. Areas currently under conservation programs are often areas where many types of federal funding and jurisdiction are involved. Costs of evaluation and implementation of critical habitat are likely lower in these areas, as there is often more information, and federal and state agencies have staff able to undertake the process. It makes little sense to exempt areas where federal actions are common and conservation of the species is likely to be both cost effective and relatively uncontroversial.

Plant species make up more than half of the federally listed species under ESA, and critical habitat for listed plants on federal lands managed for conservation has the potential to benefit these species. Prohibitions on activities harmful to listed plants are limited on private lands. Federal lands are those where damage and destruction of listed plants are violations of the Act and listed plants receive more protection. These are exactly the situations where critical habitat is most likely to benefit plant species via the consultation process, and may significantly assist reaching recovery objectives.

Moreover, exemptions based on today's activities and protections may be shortsighted. Under this proposed amendment, habitat conservation areas and areas covered by state and federal conservation programs would be exempted from designated critical habitat

based on our current perception of what constitutes substantially equivalent levels of habitat protection, and our estimation of likely activities that might affect the species and trigger Sec. 7 consultation requirements. This determination would not allow for unanticipated future activities that "may affect" listed species and which current HCP provisions or state and federal conservation programs may not protect against. This provision would then foreclose options for future benefits from the process.

Furthermore, once we allow designated critical habitat to exclude lands covered by other protections, shifts in the protections afforded by these other plans, programs or permits and regulations would open species to additional hazards. To be sure that species receive the same benefits from other protections as would accrue from critical habitat , the FWS would have to constantly review and re-certify these exclusions. The more cost-effective and assured approach for habitat protection of listed species would be to designate critical habitat even in areas protected under other plans, programs, or regulations.

These exclusions from critical habitat designation are not likely to reduce the regulatory process for permits and approvals. With or without critical habitat, in most cases a "may affect" activity would still trigger the need for a section 7 consultation and biological opinion, so exempting these areas from critical habitat designations is not particularly advantageous, nor is it likely to cut costs beyond the initial savings of not designating critical habitat. Designating critical habitat in these areas is still important because it highlights the issue that species protection requires more than just the prohibition on 'take,' since habitat is necessary for the behaviors and reproduction for the species to maintain itself.

Listed species and the regulated public are probably better served in the designation of critical habitat if sound biological information is used to identify all the areas necessary for the survival and recovery of the species. Otherwise, critical habitat designation becomes a piecemeal approach that does not reflect the biological needs of the species. Under the proposed amendment, we anticipate that critical habitat designations would not be accurate reflections of areas where it is advisable to avoid any adverse modification. As a result, the public and agencies would not be as well informed for determining "may affect" findings, evaluating recovery needs, and tracking the condition of the habitat and the species.

We oppose provisions for exempting areas under other programs, plans, permits, or regulations from the designation of critical habitat, with the exception of areas covered by safe harbor agreements, where the potential imposition of critical habitat could deter private landowners from participating in habitat restoration and enhancement efforts. We believe that at a minimum, it should be clear that the Secretary may not exclude areas when the failure to designate such an area will result in the extinction of the species, as currently required under Section 4 (b)(2)—and indeed, increasing the extinction risk of a species would mean that the jeopardy standard in ESA was being transgressed. We feel that this provision should instead be broadened to include "may significantly increase the likelihood of extinction" rather than the current "will result in the extinction of the species."

Section 3: Bases for Determination

Issue 4. Adding to Section 4(b)(2) a requirement (B) "that in determining whether an area is critical habitat, the Secretary shall seek and if available, consider information from local governments in the vicinity of the area, including local resource data and maps."

Comment: It is our understanding that the FWS usually seeks this sort of information now, and provided that the FWS is not required to give undue credence or emphasis to locally provided information over information from other sources, this change poses no particular problems or added expense over current practice. We think the major issue with using information during critical habitat designation is to ensure that information from more credible sources is given more weight than information from less credible sources, rather than assigning emphasis based on the geographical origin of such information. It could weaken critical habitat designation if very poor but local information was given more credence than very strong information from a different location.

Issue 5. Adding to Section 4(b)(2) a requirement "(C) Consideration of economic impact under this paragraph shall include—

"(i) the direct, indirect, and cumulative economic impacts of the designation, including consideration of lost revenues to landowners and to the Federal Government and State and local governments;"

Comment: This is an extension of the existing requirement that economic impacts be considered in designating critical habitat (see Sec. 4 (b) (2)). The ESA currently requires economic evaluation and we feel the appropriate place for specifying how that evaluation is to be undertaken should be in agency guidelines, where more detail can be provided. This more explicit requirement will require additional guidance, implementing standards, and regulations, at considerable expense. It may also open additional areas for litigation, as estimating indirect and cumulative costs is difficult. It will also likely increase the costs and time needed to evaluate potential determinations, to the detriment of intended protection and progress toward recovery objectives.

"(ii) costs associated with the preparation of reports, surveys, and analyses required to be undertaken, as a consequence of a proposed designation of critical habitat, by landowners seeking to obtain permits or approvals required under Federal, State or Local law."

Comment: This provision puts an expensive burden on the FWS that is not justifiable when one examines the differences between consultation regarding areas with and without critical habitat. Because critical habitat regulations only come into play in the context of Section 7 consultations, and in most cases exclusion from critical habitat would not obviate the need for a Section 7 consultation altogether, the landowner's and agency expenses for biological reports, surveys, and analyses associated with the process

are likely similar. We do not think this provision would enhance species protection nor reduce implementation costs.

Section 5. Clarification of the Definition of Critical Habitat
Issue 6. This section adds more language to define the terms "geographical area occupied by the species" and "essential to the conservation of the species" as used in Section 3 (5)(A).

The statute currently states: "The term 'critical habitat' for a threatened or endangered species means—

(i) 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 conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed….upon a determination by the Secretary that such areas are essential for the conservation of the species."

The proposed legislation adds a section 5(D)(i) (I) and (II), as follows:

Adding language: 5(D)(i) for purposes of subparagraph (A)(i)—
(I)"the term 'geographical area occupied by the species' means the specific area currently used by the species for its essential behavioral patterns, including breeding, feeding and sheltering; and

(II) "the term essential to the conservation of the species means, with respect to a specific area, that the area has those physical or biological features which are absolutely necessary and indispensable to conservation of the species concerned."

Comment:
The proposed wording change establishing the definition of 'geographical area occupied by the species' is potentially damaging to species recovery efforts. There are two issues here. First is how habitats that are sometimes occupied are classified. Some species may use particular habitats for only part of a year or part of a life cycle. It is essential that these habitat types be recognized as 'occupied,' despite the periods of time when they are not being used by the species. Insofar as the proposed wording would enable this classification, it could be useful.

However, the second issue, and the more important one, is to what extent unoccupied habitat can be designated as critical habitat. ESA makes it very clear that species recovery is the ultimate aim, and species recovery in many if not most cases will require reoccupation of former areas of a species' range. Thus it is essential that critical habitat designation be possible for currently unoccupied habitat so that it is available for recolonization during recovery. The proposed wording change would hinder designation

of non-occupied habitat. Thus the proposed wording change would make it so that critical habitat designation collapses down to being a bare minimum of where populations are continuously present, which is a minimalistic approach to species protection and recovery, and is counter to ESA's mandate.

The addition of a specific definition of ‘essential for the conservation of the species’ as “absolutely necessary and indispensable to conservation of the species concerned” does not provide any biological or semantic clarification. It therefore is not helpful in evaluations or determinations. We think it aggravates imprecision, and might actually increase confusion and subsequent litigation.

References

1. Hoekstra, J. M., W. F. Fagan, and J. E. Bradley. 2002. A critical role for critical habitat in the recovery planning process? Not yet. Ecological Applications 12:701-707.

2. National Research Council. 1995. Science and the Endangered Species Act. National Academy Press, Washington, D.C.