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AN EMPIRICAL ASSESSMENT OF THE IMPACT OF CRITICAL HABITAT LITIGATION  
ON THE ADMINISTRATION OF THE ENDANGERED SPECIES ACT

by

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Background

As Congress considers amendments to the Endangered Species Act of 1973 (ESA),<sup>1</sup> one of the most contentious issues to be resolved involves the designation of critical habitat<sup>2</sup> for listed species. Initially, the ESA did not specify when critical habitat was to be designated. In 1978, however, to underscore the important role that critical habitat was intended to play in the recovery process, Congress amended the Act to require that critical habitat be designated at the same time a species is listed unless the Secretary deemed it “imprudent” to do so because it would subject the species to added risk.<sup>3</sup> The Act was further amended in 1982 to give the Secretary an additional 12 months to designate critical habitat where it is “not determinable” at the time of listing.<sup>4</sup> At the end of this 12 month extension, however, the Secretary “must publish a final regulation, based on such data as may be available at that time, designating to the maximum extent prudent, such habitat.”<sup>5</sup>

Despite these clear congressional commands, the U.S. Fish and Wildlife Service (FWS), the agency that is primarily responsible for administering the ESA, has, since at least the mid-80's, taken a hard line position against designating critical habitat, not just at the time of listing,

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<sup>1</sup> 16 USC § 1531-1540.

<sup>2</sup> Critical habitat is defined as “the specific areas within the geographical area occupied by the species at the time of listing 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.” 16 USC §1532 (5) (A)(i). Unoccupied habitat can also be designated upon a finding by the Secretary of Interior that such areas are “essential for the conservation of the species.” 16 USC §1532 (5)(A)(ii)

<sup>3</sup> 16 USC §1533 (a) (3)(A). As the 1978 House Report stated, “the ultimate effectiveness of the Endangered Species Act will depend upon the designation of critical habitat.” *See* H.R.Rep. No. 95-1625, at 7-8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9458.

<sup>4</sup>16 USC § 1533 (b) (6) (C) (ii)

<sup>5</sup> 16 USC § 1533 (b) (6) (C) (iii)

but ever.<sup>6</sup> By contrast, National Marine Fisheries Service (NMFS), which manages listed marine species, has taken a very different approach to the issue. While NMFS has been slow to designate critical habitat, it has a much better track record than FWS of initiating designations voluntarily, without the need for litigation.<sup>7</sup>

Shortly after the FWS pulled back from critical habitat designations, it was forced to ramp up listings due to a series of environmental lawsuits and petitions which caused more species to be added to the endangered list in the 1990s than at any other time in the history of the ESA.<sup>8</sup> This combination of events produced a huge backlog of critical habitat designations. The number of species with critical habitat dropped from about 20% to 10%.<sup>9</sup> Alarmed at this situation, and facing a six year statute of limitations to bring suit to force designations,<sup>10</sup> the

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<sup>6</sup> Commentators have surmised that FWS changed its position on critical habitat sometime around 1986 when it published revised regulations that redefined the “adverse modification” standard under § 7 (a) (2) so that it was subsumed within the “jeopardy” standard. *See Hicks, “Designation Without Conservation: The Conflict Between the Endangered Species Act and Its Implementing Regulations,” Virginia Environmental Law Journal, 491 (2000).* For many years, FWS used this rule change as justification for its position that critical habitat designation provides no additional protection for species beyond what the listing itself provides. This position was eventually invalidated by the courts. *See Sierra Club v U.S. Fish and Wildlife Service, 254 F.3d 434 (5<sup>th</sup> Cir. 2001); Gifford Pinchot Task Force v U.S. Fish and Wildlife Service, 378 F.3d 1059 (9<sup>th</sup> Cir 2004); American Motorcycle Assn. v Norton, 2004 WL 1753366 (N.D.Cal. 2004); see also, Senatore, Kostyack, and Wetzler, “Critical Habitat at the Crossroads: Responding to the G.W. Bush Administration’s Attacks on Critical Habitat Designation Under the ESA,” 33 Golden Gate U L. R. 447 (2003).*

<sup>7</sup> For example, of the 30 critical habitats NMFS has designated since January 1, 1990, only 7 were forced by litigation. *See generally, <http://www.nwr.noaa.gov/1salmon/salmesa/crithab/CHsite.htm> (last visited August 22, 2005).* During the same period, FWS designated 357 critical habitats, 350 due to litigation. Moreover, NMFS has historically disagreed with FWS’ contention that critical habitat does not benefit species. In its Draft Critical Habitat Policy/Guidance (May 2000), NMFS states: “[A]ny policy that NMFS agrees to jointly with FWS must clearly state that the Services believe that designation of critical habitat can provide a significant benefit to listed species if used as intended in the Act.”

<sup>8</sup> *See e.g., Timothy Noah, “Caught in a Trap: Democrats Get Snared By GOP Pact on List Of Endangered Species --- A Bush-Era ‘Critic Quota’ Boosts Animal Protection -- And Antiregulatory Ire” Wall Street Journal (Eastern edition) (February 17, 1995).*

<sup>9</sup> Currently, approximately 35% of species have critical habitat.

<sup>10</sup> 28 USC § 2401 (a) (“every civil action against the United States shall be filed within six years after the right of action first accrues”). Courts have interpreted this provision to apply to

environmental community launched a targeted series of lawsuits aimed at getting as many critical habitat designations as possible before the clock ran out and left hundreds of species stranded without critical habitat. Gradually, through a combination of settlements and court orders, the backlog of critical habitat designations has been whittled down. At this point, as discussed below, this first wave of critical habitat lawsuits filed by environmental groups has essentially run its course, and has been replaced by a second emergent wave of industry lawsuits seeking to rescind critical habitat designations.

### The Current Debate

The fight over critical habitat has now moved to Congress, which is considering a number of bills to amend the ESA. Critics contend the Act is “broken” and must be fixed. Leading the charge in the House is Representative Richard Pombo (R, Calif), Chair of the House Committee on Resources, which has jurisdiction over the ESA. Mr. Pombo blames “environmental extremists” for bringing a flood of “rampant environmental litigation” that has “bankrupted” the critical habitat and listing programs.<sup>11</sup> Mr. Pombo supports amendments that would make it harder to designate critical habitat, and change the substantive standards that courts have used to require additional protection for designated critical habitat.<sup>12</sup>

The Bush Administration has also attacked the critical habitat provision and is supporting Mr. Pombo’s efforts to amend the ESA. Testifying before the Senate Subcommittee on Fisheries, Wildlife, and Water, Craig Manson, the Assistant Secretary of the Interior for Fish,

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critical habitat designations under the ESA. *See Missouri v Secretary of Interior*, 158 F. Supp.2d 984, 989 (W.D. Mo. 2001)(right of action accrues when Secretary makes a “not prudent” determination); *Center For Biological Diversity v Hamilton*, No. 1:04-CV-2573 (JTC) (N.D. Ga. 2005) (Slip Opinion at 13-15)(right of action accrues when Secretary fails to meet the 12 month deadline after making a “not determinable” finding); *but see, Southern Appalachian Biodiversity Project v USFWS*, 181 F.Supp.2d 883 (E.D.Tenn.,2001) (failure to designate critical habitat is an ongoing violation that resets the clock every day).

<sup>11</sup> Richard Pombo, “The Endangered Species Act at 30: Why We Need to Change It,” available at: <http://resourcescommittee.house.gov/Press/editorials/esa30.htm>

<sup>12</sup> *See* Threatened and Endangered Species Recovery Act of 2005 (June 2005). Available at: <http://www.eswr.com/605/pombodraftbill.pdf> For example, the bill redefines critical habitat as habitat “necessary to avoid jeopardy to the continued existence of the species.” *Id.* at §3 (c) (7) (A). Under the existing definition critical habitat means habitat “essential for the conservation of the species.” 16 USC §1532 (5) (A). The difference between using a “jeopardy” standard and a “conservation” standard has enormous legal consequences. Courts have ruled that the term “conservation” is much broader than jeopardy and mandates that critical habitat must be protected for recovery even if it is not strictly necessary for bare survival. See cases cited at FN 6, *supra*. Mr. Pombo’s bill would effectively nullify this entire line of caselaw and leave listed species with a bare survival standard of protection.

Wildlife and Parks stated:

This flood of litigation over critical habitat is preventing the Fish and Wildlife Service from protecting new species and reducing its ability to recover plants and animals already listed as threatened and endangered.

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The problem is that the law requires that critical habitat be designated at the time of listing. There are 1200 listed species, something less than 400 have critical habitat designated. So there are 800 that are without critical habitat. So there are 800 that are essentially in default, if you will.<sup>13</sup>

Conservation organizations dispute these claims, arguing that designating critical habitat is key to recovering most species.<sup>14</sup> These groups assert that the real problem with the listing, designation and recovery process is a lack of commitment to follow the law on the part of the Administration, and an unwillingness to fully fund the program on the part of the Congress.

#### Methodology for Assessing the Impact of Critical Habitat Litigation on the ESA

To assess the claims that litigation is having a dramatic and deleterious impact on the administration of the ESA, I used data that FWS compiles on litigation under the ESA,<sup>15</sup> re-arranged it somewhat, and compiled it into spreadsheets.<sup>16</sup> The USFWS database describes all critical habitat lawsuits filed from April, 1999 to the present. It indicates the name of the suit, the date filed, the species involved, and whether an order has been issued, a settlement entered, or whether the case has not yet been resolved. It also indicates whether the agency is currently implementing an order or settlement to designate critical habitat. The USFWS information was updated in a few instances to reflect recently issued court orders, settlement agreements, and critical habitat designations. I augmented the FWS database with suits filed prior to April,

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<sup>13</sup> Testimony of Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior, Before the Senate Environment and Public Works Subcommittee on Fisheries, Wildlife, and Water, May 19, 2005. Available at: <http://www.doi.gov/oc/2005/ESA.htm>

<sup>14</sup> See e.g., Earthjustice and National Wildlife Federation, "Salmon Under Attack: How the Bush Administration's proposal Undermines Critical Habitat in the Northwest." Available at: [http://www.earthjustice.org/policy/pdf/salmon\\_habitat\\_report\\_small2.pdf](http://www.earthjustice.org/policy/pdf/salmon_habitat_report_small2.pdf)

<sup>15</sup> This data is published at: <https://ecos.fws.gov/litigation/index.jsp> This is a dynamic database that can change, literally, on a daily basis. This assessment is based on data available as of August 15, 2005.

<sup>16</sup> These spreadsheets are available from the author upon request: [pparenteau@vermontlaw.edu](mailto:pparenteau@vermontlaw.edu)

1999 through a review of federal register publications of all critical habitats designated prior to 1999. The National Marine Fisheries Service does not have a publicly accessible database, but maintains similar information on salmonid critical habitat at <http://www.nwr.noaa.gov/1salmon/salmesa/crithab/CHsite.htm>. Information on other NMFS species is available in the critical habitat rules published in the federal register.

## Findings

Examination of this empirical evidence leads to the following conclusions.

### **1. Industry Challenges Account for Approximately 80% of the Critical Habitat Cases That Are Still Active**

Though some may find this surprising, the fact is that industry rather than environmental groups are responsible for most of the active critical habitat litigation underway today. I use the term “active” differently than FWS uses it in its database. FWS lumps all cases, even those that have been settled or reached final judgment under the heading of “active” cases.<sup>17</sup> This creates a misleading impression of the number of cases that are still in active litigation and. Therefore I excluded cases that have been settled or adjudicated to provide a more accurate picture of the current impact of critical habitat litigation on agency resources.

There are 542 cases in the FWS database that have been settled or adjudicated. Of these, critical habitat has been designated in 399 cases, and designations are underway in another 83 cases. For the balance of the cases designations have either been rescinded or excluded. This data indicates that the bulk of the critical habitat workload has already been done and the resource demands will continue to decline as the remaining designations are completed.

I also count as “challenges” the total number of critical habitat designations that are involved in the active cases. For example, if a case involves five different critical habitat designations, that counts as five “challenges.” This provides a more realistic assessment of the impact that a case has on agency workloads. Using these parameters, there are 54 active challenges in the FWS database. By my count, 45 (83%) were filed by industry groups and 5 (17%) by environmental groups.<sup>18</sup>

### **2. Of the Approximately 833 Listed Species That Currently Lack Critical Habitat, Less Than 50 are Susceptible to Suit Under the ESA Given Statute of Limitations and Other Legal Bars.**

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<sup>17</sup>*Id.*

<sup>18</sup> Cases were assigned to these two categories based on the type of relief sought. Those seeking to compel designations were listed as environmental cases; those seeking to rescind designations were listed as industry cases.

There are currently 1,312 listed species.<sup>19</sup> Of these, 479 (37%) have critical habitat and 833 (83%) do not. By my calculation, approximately 799 of the 833 species without critical habitat are not subject to suit under the ESA for a variety of reasons. About 62 are either under court-ordered schedules already, or are the subject of active litigation. Approximately 695 are either pre-1978 species, which are not subject to the ESA's citizen suit provision, or they are beyond the six year statute of limitations discussed above. In another 26 cases, the exclusion of critical habitat appears to be justified based on statutory criteria. That leaves about 50 cases that could be the subject of litigation. By my count, only 35 of these have a significant likelihood of success.

### **3. Recovery Plans Either Preceded or Were Completed Within Six Months of Critical Habitat Designations in Approximately 90% of the Cases.**

There are 1,172 species with critical habitat or recovery plans.<sup>20</sup> "For 1,065 (91%) of these species, critical habitat did not precede the recovery plan or was created less than six months prior to the recovery plan." . The balance of 107 species had recovery plans developed some time after the designation. This data shows that, contrary to a central criticism of the current ESA process, critical habitat designations are not out of synch with recovery planning. To the contrary, critical habitat designations must be accelerated to catch up with the recovery planning process for most listed species.

### **4. At Current Rates of Listing Few New Species Will be Listed Over the Next Several Years.**

There are hundreds of "candidate" species that FWS has determined to be eligible for listing under the ESA.<sup>21</sup> This could create the potential for more litigation if FWS continues its pattern of refusing to designate critical habitat at the listing stage. However, given the current rate of listings by the Bush Administration, which is the lowest in the history of the ESA, there is little likelihood that there will be a sudden surge in listings that would trigger litigation over

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<sup>19</sup> See <http://www.fws.gov/endangered/wildlife.html#Species> (last visited August 22, 2005)

<sup>20</sup> See [http://ecos.fws.gov/tess\\_public/TESSBoxscore](http://ecos.fws.gov/tess_public/TESSBoxscore) (Last visited August 22, 2005)

<sup>21</sup> USFWS, "Review of Native Species That Are Candidates or Proposed for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions; Proposed Rule. United States Fish and Wildlife Service, May 11, 2005, 70 FR 24870, available at: <http://www.fws.gov/endangered/candidates/2005.CNOR%2011May05%20FR.pdf> (last visited August 22, 2005)

critical habitat.<sup>22</sup>

### Conclusion

The data does not support the rhetoric fueling the debate in Congress over critical habitat. The “flood” of critical habitat litigation filed by environmental groups in the decade of the 90's to beat the statute of limitations clock has receded to a trickle. Industry lawsuits seeking to undo critical habitat designations now account for over 80% of the active cases. Nor is there likely to be any resurgence in “environmentalist” litigation now that the six year statute of limitations has run on most of the species that are still without critical habitat. Finally, the charge that critical habitat designations are too far out in front of the recovery planning process is simply wrong. The data shows that, in 90% of the cases, recovery plans either preceded or were done within six months of the designations.

The courts have ruled uniformly that critical habitat designation provides important protections that no other provision of the ESA provides. Courts in various parts of the country have held that federal agencies must avoid activities that would impair recovery by destroying or adversely modifying critical habitat. Bills that seek to weaken the critical habitat provisions of the existing law will only succeed in making recovery less likely for the vast majority of listed species that have become endangered due to loss of habitat.

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<sup>22</sup> Greenwald and Suckling, “Progress or Extinction: A Systematic Review of the U.S. Fish and Wildlife Service’s Endangered Species Act Listing Program 1974-2004 (2005); available at: <http://www.sw-center.org/swcbd/Programs/policy/esa/ESAreport6-05.pdf>