



The Expanding Role of Critical Habitat Under the ESA

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Definition of Critical Habitat (ESA §3(5)(A))

- (i) Specific areas that contain the “physical and biological features” which are “essential to the conservation of the species” and “require special management consideration or protection”; and
- (ii) “Specific areas outside the geographical area occupied by the species at the time it is listed that are determined to be essential for the conservation of the species.”

Consideration of Economic Impacts (ESA §4(b)(2))

- Economic and other impacts on land uses must be considered in designating particular areas as critical habitat.
- Areas may be excluded when “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.”
 - Exclusion may not cause the species’ extinction.

Why is critical habitat important?

Critical habitat imposes restrictions on activities through ESA Section 7(a)(2).

- Federal actions may not proceed if they would destroy or adversely modify critical habitat.
- Federal actions affecting critical habitat trigger the consultation requirements of Section 7(a)(2).

Why is critical habitat important?

- Federal actions include all discretionary activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.
 - They include the granting of licenses, permits, leases, rights-of-way, permits and other authorizations by federal agencies.

1978 ESA Amendments

- Critical habitat was defined for the first time.
- Provisions governing the timing and process for designation were added.
- Section 4(b)(2) was added to ensure consideration of economic costs and other non-biological factors.

1978 ESA Amendments

“I believe the majority of the House is in agreement on that, that the Office of the Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of this species.” (statement of Rep. Bowen)

1978 ESA Amendments

“Many zealous bureaucrats have discarded human needs from their considerations with regard to endangered species. The amendments . . . recognize that there are important human considerations to be dealt with and people are an important factor in this equation.” (statement of Rep. Burgener)

1978 ESA Amendments

“[A]s much as 10 million acres of Forest Service land is involved in the critical habitat being proposed for the grizzly bear in three Western States. Much of the land involved in this proposed designation is not habitat that is necessary for the continued survival of the bear. It instead is being designated so that the present population within the true critical habitat can expand.” S. Rep. No. 95-874, at 10 (1978)

1978 ESA Amendments

“The designation of critical habitat amounts to nothing less than a form of restrictive zoning from Washington, D.C.”
(statement of Rep. Murphy)

1978 ESA Amendments

“Thus, even though more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention.” *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 623 (W.D. Wash. 1991)

Critical Habitat Trends

- Treating critical habitat as “recovery” habitat for future population expansion.
- Larger and larger areas designated as critical habitat.
- Declaring that areas designated as critical habitat are occupied without credible evidence of occupancy.
- Land is almost never excluded based on economic impacts.

Southwestern Willow Flycatcher



Southwestern Willow Flycatcher

Changes in southwestern willow flycatcher critical habitat

<u>Year</u>	<u>Stream Miles</u>	<u>Area</u>
1997	599 mi.	--
2005	737 mi.	120,824 ac.
2012	1,227 mi.*	208,973 ac.*

**Proposed = 2,090 mi., 534,807 ac.*

Designation of Recovery Habitat

Service Identifies Important Habitat for Recovery of Southwestern Willow Flycatcher

“As part of its ongoing efforts to conserve our nation’s most imperiled species, the U.S. Fish and Wildlife Service (Service) has identified riparian lands that are important for the recovery of the southwestern willow flycatcher....”

2014 Rulemaking

On May 12, 2014, the Services published three regulatory proposals concerning critical habitat:

- New definition of “destruction or adverse modification” (79 FR 27060).
- Changes to regulations governing the criteria for critical habitat (79 FR 27066).
- Draft policy concerning exclusions from critical habitat under Section 4(b)(2) (79 FR 27052).

“Adverse Modification”

“Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of physical or biological features that support the life-history needs of the species for recovery.”

“Conservation Value”

“[W]e determined that “conservation value” embodies the *intended recovery role of critical habitat* and, therefore, is relevant in a determination as to whether an action is likely to destroy or adversely modify that habitat.

“Conservation value,” as used in the definition, then, *is the contribution the critical habitat provides, or has the ability to provide, to the recovery of the species.”*

Changes to CH Regulations

- Describes critical habitat as “areas that are or will be essential to the species’ recovery.”
- Defines “geographic area occupied by the species” to include areas that are not regularly used by a species; analogous to the range of the species.
- “Occupied” includes areas that are periodically used by a species member “during some portion of its life history.”

Changes to CH Regulations

- Suitable vegetation need not exist if it might develop in the future.
- Features may include dynamic or ephemeral habitat characteristics.
- Habitat that is not ephemeral but has been degraded “must have one or more of the physical or biological features at the time of designation.”

Improving ESA Implementation

- http://www.fws.gov/endangered/improving_esa/reg_reform.html
- http://www.fws.gov/endangered/improving_esa/DCH.html
- http://www.fws.gov/endangered/improving_esa/AM.html
- http://www.fws.gov/endangered/improving_esa/CHE.html