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TESTIMONY BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES REGARDING RECENT CHANGES TO ENDANGERED SPECIES CRITICAL HABITAT DESIGNATION AND IMPLEMENTAITON

APRIL 19, 2016

Good morning, Mr. Chairman, Mr. Ranking Member, and members of the Committee. My name is Loyal Mehrhoff, and I am the Endangered Species Recovery Director at the Center for Biological Diversity. On behalf of the Center and its more than one million members and supporters, I want thank you for giving me the opportunity today to testify on the benefits that critical habitat provides under the Endangered Species Act, and the Services' recently finalized rules relating to critical habitat.

Prior to joining the Center in 2015, I spent five years as the field supervisor of the U.S. Fish and Wildlife Service's Pacific Islands Office in Hawaii, and before that I spent three years as the director of the U.S. Geological Survey's Pacific Island Ecosystems Research Center. I was integrally involved in the listing and critical habitat designation process for dozens of endangered species in Hawaii, and I know from personal experience in Hawaii that critical habitat provides significant benefits to endangered species and is often the key to their recovery. Research has shown that species with designated critical habitat are twice as likely to be on the road to recovery as species that do not have designated critical habitat.[1]

The Benefits of Critical Habitat

First, it is important to recognize that the Endangered Species Act is one of the most successful conservation laws ever passed by any nation on Earth, and has prevented the extinction of 99 percent of the species under its protections. Today, a majority of the species protected by the Act are either stable or improving. Scientists estimate that without the Act's protection, at least 227 species in the United States would have gone extinct.[2]

With respect to threats to endangered species, habitat destruction remains the leading cause of species imperilment and extinction both here in the United States and around the world.[3] Congress recognized this stark reality when it passed the Endangered Species Act in 1973:

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[1] Taylor and Suckling et. al, 2005. The effectiveness of the Endangered Species Act: a quantitative analysis. Bioscience 55(4) at 362.

[2] *See* Suckling, K. et. al., 2012. On time, on target: how the Endangered Species Act is saving America's wildlife. Center for Biological Diversity, http://www.esasuccess.org/report_2012.html.

[3] *See*, e.g., Pimm, S.L. et al., 2014. The biodiversity of species and their rates of extinction, distribution, and protection. Science 344: DOI: 10.1126/science.1246752; Wilcove, D. S., et al. 1998. Quantifying Threats to Imperiled Species in the United States: Assessing the relative importance of habitat destruction, alien species, pollution, overexploitation, and disease, BioScience 48:607-615.

> Man can threaten the existence of species of plants and animals in any of a number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range. The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat.[4]

In the 1978 Amendments to the Endangered Species Act, Congress defined critical habitat to include both occupied and unoccupied areas that are essential to the conservation of threatened and endangered species. And by defining "conservation" as using all available tools and measures to improve a species' condition "to the point that the protective measures of the Act are no longer required," Congress made clear that the purpose of critical habitat is to further the recovery of listed species to achieve the fundamental goals of the Endangered Species Act: to prevent extinction and to move species toward recovery.

As the Fish and Wildlife Service correctly explained in their recently finalized rules, critical habitat serves multiple functions in implementing the Act.[5] Most simply, by telling the public and land managers where endangered species live or roam, we can better target conservation efforts to benefit those species. By drawing lines on a map, critical habitat facilitates conservation activities by other federal agencies, which are required to use their authorities to develop programs that benefit endangered species under Section 7(a)(1) of the Act. Critical habitat also focuses conservation efforts of states and local governments, nongovernmental organizations, and individuals. Critical habitat also helps to develop efficient and effective habitat conservation plans, and can guide the development of recovery plans and planning efforts.

Finally, by identifying mitigation and other reasonable conservation measures during the Section 7(a)(2) consultation process critical habitat provides significant regulatory protection by ensuring that federal agencies do not adversely modify or destroy critical habitat. It is important to note that the consultation process almost never stops federal projects.[6] Instead, the consultation process steers development away from the most sensitive areas and ensures that the remaining significant impacts are properly mitigated. Critical habitat designations do not affect private development on private lands if there is no federal nexus or federal permit required. Nor does it, as if often claimed, establish de-facto wilderness areas or limit public access to public lands. Critical habitat designations are therefore quite compatible with economic development if when mitigation and reasonable conservation measures are utilized.

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[4] H.Rep.No. 93-412, 93d Cong., 1st Sess. (July 27, 1973).
[5] 79 Fed. Reg. 27066, 27067
[6] Malcom and Li, 2015. Data contradict common perceptions about a controversial provision of the U.S. Endangered Species Act. PNAS 112(52) at 15844–15849, www.pnas.org/cgi/doi/10.1073/pnas.1516938112 (Out of an analyzed 6,829 formal consultations between 2008 and 2015, only one biological opinion of the Service reached a jeopardy opinion. In that instance, the project was still allowed to proceed by adopting reasonable prudent alternatives (RPAs) to mitigate adverse effects on the species, pursuant to Section 7(b)(3)(A) of the Act.)

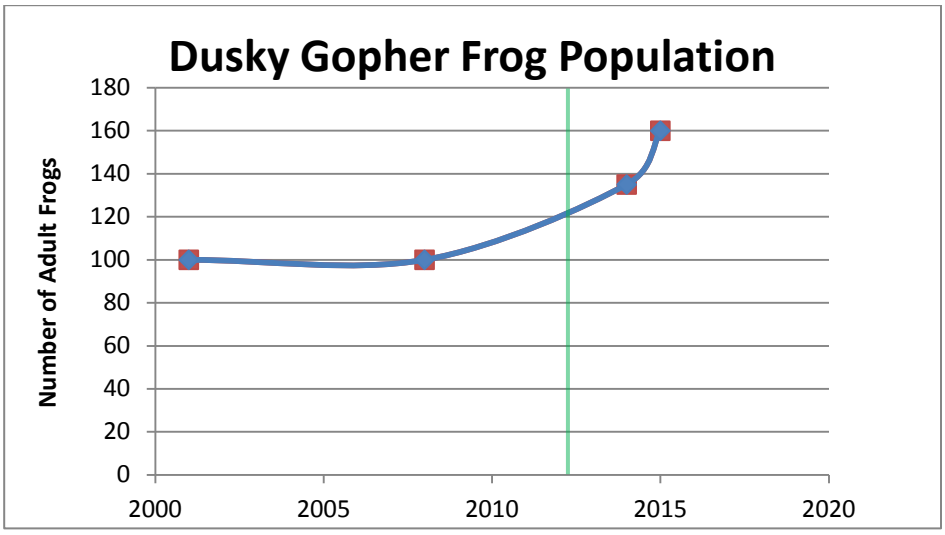
Despite the clear requirement in the Act that listing and critical habitat designation occur concurrently to the greatest extent practicable, more than half of endangered species have not received critical habitat designations.[7] Freshwater fish and mussels in the Southeast, for example, are some of the most rapidly declining endangered species, and most of these did not received critical habitat when they were listed. The failure to designate critical habitat ultimately makes recovery for these species slower and more costly than what likely would have occurred had critical habitat been designated.

When critical habitat is designated, endangered species often benefit significantly. The following examples demonstrate this reality:

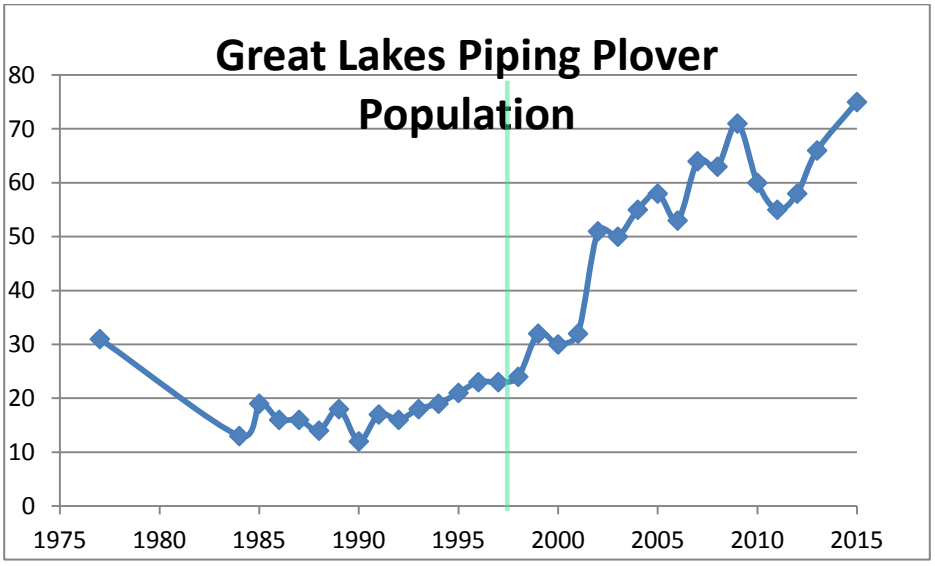
Palila: The Palila is a small songbird found in the high elevation forests of Hawaii's Big Island. This bird was first protected in 1967 and received critical habitat in 1977.[8] The Palila's habitat had been consistently degraded as a result of non-native ungulates on the slopes of Mauna Kea. It took more than 30 years before appropriate management of Palila habitat was fully implemented. During that time the Palila numbers rose and fell. Current management – which emphasizes habitat restoration – is designed to accelerate Palila recovery. When a realignment of Saddle Road through critical habitat was undertaken, the required consultation ensured that mitigation for impacts occurred and that Palila was protected from increased fire risk resulting from this road work. Today, some of the most important areas of critical habitat have been fenced off to protect the forests from over-browsing by non-native species. Without these lines on the map, adequate management for Palila habitat would have been much more challenging.

Dusky Gopher Frog: The dusky gopher frog was listed in 2001, but critical habitat was not designated until 2012.[9] Although it was once common from Louisiana to Alabama, the frog is now only found in four locations in southern Mississippi. With a population of just a few hundred individuals, it is one of the most endangered frogs in the United States. During its early years of protection under the Endangered Species Act, the frog's populations continued to drop. After critical habitat was designated, additional actions were taken to save the species. In 2013, an agreement with the Center, other non-profit groups, and private landowners resulted in 170 acres of critical habitat being purchased and protected from development. This land, which will be owned by the Land Trust for the Mississippi Coastal Plain, will be shielded from development. Together with a recovery plan finalized in 2015, this frog has a fighting chance of survival.

[7] Taylor and Suckling et. al, 2005 at 360-367.
[8] 32 Fed. Reg 4001; 42 Fed. Reg. 40685-40690.
[9] 77 FR 35117-35161 (June 12, 2012), available at http://ecos.fws.gov/tess_public/profile/speciesProfile.action?spcode=B079.

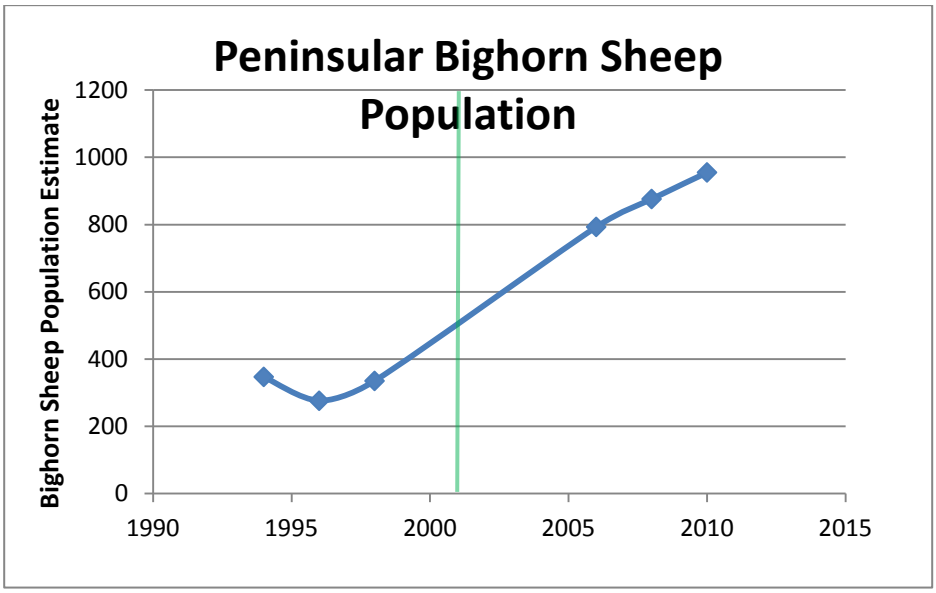


Atlantic and Great Lakes Piping Plover: Piping plovers were protected under the Endangered Species Act in 1985,[10] but did not receive designated critical habitat until 2001. Following its listing, intensive management to stabilize its populations was undertaken to address direct threats to the plover, such as predator management programs for raccoons, crows and ravens. These early efforts led to small increases in plover populations in the Great Lakes and Northeast. However it was not until after 2001 when critical habitat was designated, that populations truly rebounded. Critical habitat made it easier for land managers to identify areas where common-sense restrictions on beach use — such as limits on off-highway vehicles — should be deployed to protect nesting birds. The Northeast population has now exceeded its recovery plan goal of 625 nesting pairs for more than 10 years and continues to grow.



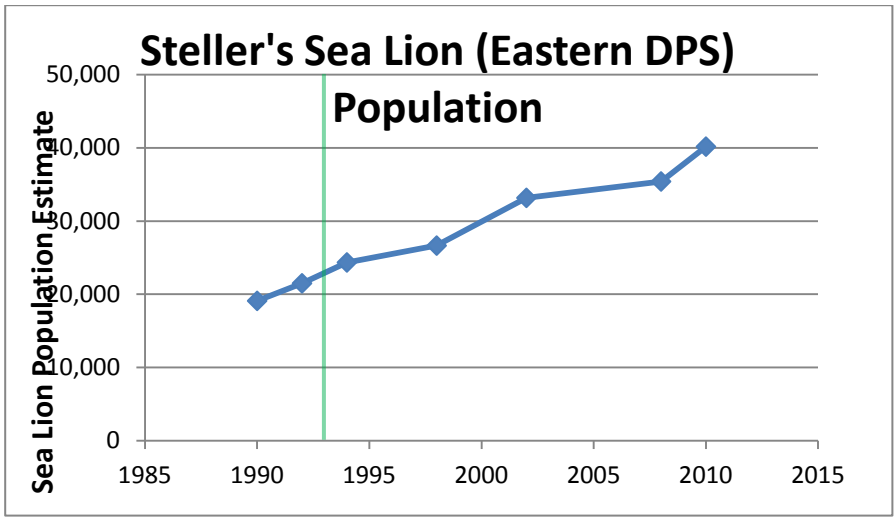
[10] 50 Fed. Reg. 50726-50734 (Dec. 11, 1985).

Peninsular bighorn sheep: Although the U.S. Fish and Wildlife Service first listed it as an endangered species in 1998, little was done initially to protect its habitat.[11] Bighorn sheep numbers along the Southern California Peninsular Mountain range had already declined by 77 percent due to livestock overgrazing, road development and urban sprawl. By the year 2000, there were just 334 individuals left, leaving more golf courses in the Palm Springs area than bighorn sheep. In 2001 the Service designated 845,000 acres of critical habitat.[12] The population subsequently grew from the low point of 334 animals in 2001 to approximately 955 animals in 2010 in the Palm Springs area.



Steller's sea lion (Eastern DPS): The Steller's sea lion was protected under an emergency listing in 1990.[13] Shortly after listing, critical habitat was designated in 1993 along the coasts of Alaska, Oregon and California, and groundfish trawling was banned within the sea lion's critical habitat. The population thereafter increased from roughly 21,000 animals in 1989 to 63,488 in 2009. In 2014, the eastern Distinct Population Segment of the Steller's sea lion was declared recovered and delisted.[14]

[11] 63 Fed. Reg. 13134-13150 (March 18, 1998), available at https://ecos.fws.gov/docs/federal_register/fr3225.pdf.
[12] 66 Fed. Reg. 8650-8677 (Feb. 1, 2001), available at https://ecos.fws.gov/docs/federal_register/fr3703.pdf.
[13] 55 Fed. Reg. 13488 (April 10, 1990), available at http://ecos.fws.gov/docs/federal_register/fr1683.pdf.
[14] 79 Fed. Reg. 42687-42696 (July 23, 2014), available at http://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-16756.pdf.



The Services Final Rules on "Adverse Modification" of Critical Habitat, Changes to the 424 Regulations, and Final Policy on 4(b)(2) Exclusions.

The Center submitted extensive comments on each of these three changes to the rules implementing critical habitat under the Act. I summarize our concerns and analysis below for each final rule.

The Services finalized definition for the phrase "destruction or adverse modification" is legally invalid as it fails to give independent meaning to beyond what is prohibited under the Services' jeopardy standard. Section 7 of the Act prohibits federal agencies from taking actions that jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat. Where Congress uses the word "or" it is generally accepted that phrases on either side of the "or" have independent meaning.[15] In the final rule, the prohibition on "destruction or adverse modification" is effectively the same as the prohibition on jeopardy because the prohibition applies only to any action that "affects the value of the critical habitat as a whole for the conservation of a listed species."[16] The reality is that where such activities reach this high threshold, a species will almost always be jeopardized as well. Furthermore, by not defining "destruction" separate from "adverse modification" the Services also failed to give independent meaning to each type of impact to critical habitat. As a practical consequence, this regulation will not result in changes in existing practice during consultations. In the final rule, the Services state: "We do not expect this final rule to alter the section 7(a)(2) consultation process from our current practice, and previously completed biological opinions do not need to be reevaluated in light of this rule."[17] This is unfortunate if it is proven to be true. A recent study from Defenders of Wildlife showed that of more than 80,000 biological opinions completed over the past eight years, only

[15] *Howell-Robinson v. Albert*, 384 B.R. 19, 21 (D.D.C. 2008) (A statute's words are to be interpreted according to their ordinary sense and with the meaning commonly attributed to them).
[16] 80 Fed. Reg. 7214, 7218 (Feb. 11, 2016), available at https://federalregister.gov/a/2016-02675.
[17] 80 Fed. Reg. 7214, 7216.

one resulted in a jeopardy finding, and none resulted in a finding of "destruction or adverse modification" of critical habitat.

The Services finalized rule making changes to the regulations at 50 C.F.R. § 424 will generally only have minor impacts on the process the Services use to designate critical habitat.[18] The most notable change is that the Services will no longer identify the "primary constituent elements" ("PCEs") of critical habitat, but rather will identify the "physical or biological features" of critical habitat when it designates "occupied" critical habitat. This change better tracks the statutory language of the Act, and is easier to understand than PCEs, which had no basis at all in the Act, and were generally confusing to the public. This change will likely have no effect, either positive or negative, on the size of a species' critical habitat designation. Other changes to the 424 regulations are mainly ministerial in nature.

The Services finalized policy regarding critical habitat exclusions under Section 4(b)(2)[19] of the Act may represent an improvement over existing practice in evaluating possible exclusions from a final critical habitat designation. However, only time will tell if the Services use the policy as it was intended, or instead simply continue their existing practices. It is important to note that the current practice for evaluating exclusions varies considerably between the U.S. Fish and Wildlife Service and National Marine Fisheries Service. The Fisheries Service's approach to exclusions is transparent and understandable because the agency evaluates each potential exclusion separately based on the conservation value of the particular area. In contrast, the Fish and Wildlife Service approach is not transparent, and is instead based on vague generalizations about the "value" of conservation partnerships. Having eight criteria to evaluate non-binding, not-federally-approved conservation plans could be an important step forward in making the exclusion process fairer and more protective of endangered species. It is important that the Services identify and map habitat excluded under 4(b)(2) on the same maps showing designated critical habitat. These areas are excluded due to value of conservation plans, as such they are expected to play a positive role in the recovery of the species. Identifying them on maps in the federal register will help ensure that their important role is not forgotten by future planners, managers and conservationists.

Although not a subject of today's hearing, the Service also finalized a rule in August of 2013 on the timing of economic analyses of critical habitat.[20] The rule accomplished three separate things. First, it officially split listing rules and critical habitat designations into two separate rulemaking proposals. Second, it required the Services to provide their economic analysis at the time the proposed designation is released to the public. Third, it requires the Services to use an "incremental" economic analysis when assessing critical habitat economic impacts. The Center opposed the Services' decision to segregate the critical habitat proposal from the listing proposal, as it drastically increases the cost of completing each document and therefore reduces the number of species the Services can protect in a given year. The Center notes that the Fish and Wildlife Service generally is unable to complete their economic analyses of

[18] 81 Fed. Reg. 7413-7440 (Feb. 11, 2016), available at https://federalregister.gov/a/2016-02680.
[19] 81 Fed. Reg. 7226-7248 (Jan. 11, 2016), available at https://federalregister.gov/a/2016-02677.
[20] 178 Fed. Reg. 53058 (Aug. 28, 2013).

critical habitat at the same time that they release the proposed critical habitat designation, and therefore must reopen the public comment period regularly. This also adds unnecessary cost to the listing program. Finally, the Center agrees that an incremental economic analysis is the most appropriate methodology for conducting economic analyses, as it follows the government-wide approach required by the Office of Management and Budget as detailed in OMB Circular A-4, which was finalized in 2003 during the George W. Bush administration.[21]

Conclusion

Critical habitat is a key and proven tool in recovering species under the Endangered Species Act. Weakening or undermining its effectiveness only slows down recovery, and means that species will be on the list of endangered species longer, something that all parties agree is not a desired outcome. We offer our assistance to the Committee in finding ways to make critical habitat designations more effective, and to get our most imperiled species the protections they need as quickly as possible so that they can be quickly recovered to healthy and sustainable levels.

Thank you.

[21] Office of Management and Budget, Circular A-4 (Sept. 17, 2003), available at https://www.whitehouse.gov/omb/circulars_a004_a-4/.