

Committee on Natural Resources

Rob Bishop, Chairman
Hearing Memorandum

April 15, 2016

To: All Natural Resources Committee Members

From: Majority Committee Staff - Michael Freeman, x69750

Hearing: Oversight hearing titled “*Recent Changes in Critical Habitat Designation and Implementation*”

The Committee on Natural Resources will hold an oversight hearing to hear testimony on *Recent Policy Changes in Critical Habitat Designation and Implementation* on **April 19, 2016 at 10:00 a.m. in 1324 Longworth**. The hearing will focus on recent final rules and policy from the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration’s (NOAA) Fisheries Service.

Policy Overview

- The U.S. Fish and Wildlife Service and NOAA Fisheries (collectively referred as the “Services”) recently amended regulations and policy regarding critical habitat under the Endangered Species Act (“ESA”).
- Despite strong opposition, earlier this year, the Services finalized several new definitions codified at 50 CFR § 424.02, significantly, new definitions for the term “*geographical area occupied by the species*” and the term “*physical or biological features.*”¹ The Services also finalized a revised regulatory definition of “*destruction or adverse modification*” as codified at 50 CFR § 424.02.²
- The Services also issued a new policy regarding the use of exclusions, notably exclusions on federal land and water under Section 4(b)(2) of the ESA.³
- These regulatory changes by executive branch agencies usurp Congress’ legislative and constitutional authority and providing sweeping new authority not intended by Congress.
- The regulatory changes could significantly and adversely impact economic and energy related activities in areas newly proposed or already designated as critical habitat, even in areas where species haven’t existed in years—or ever. The regulations will likely encourage increased ESA litigation and closed-door ESA settlements between the Services and litigious groups.

¹ *Implementing Changes to the Regulations for Designation Critical Habitat*, 81 Fed. Reg. 7414 (February 11, 2016) (Critical Habitat Rule)

² *Definition of Destruction or Adverse Modification of Critical Habitat*, 81 Fed. Reg. 7214 (February 11, 2016) (Adverse Modification Rule)

³ *Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act*, 81 Fed. Reg. 7226 (February 11, 2016) (Exclusion Policy)

Witnesses Invited

Mr. Dan Ashe, Director
U.S. Fish and Wildlife Service
U.S. Department of the Interior
Washington, D.C.

Ms. Karen Budd-Falen, Attorney
Budd-Falen Law Offices
Cheyenne, Wyoming

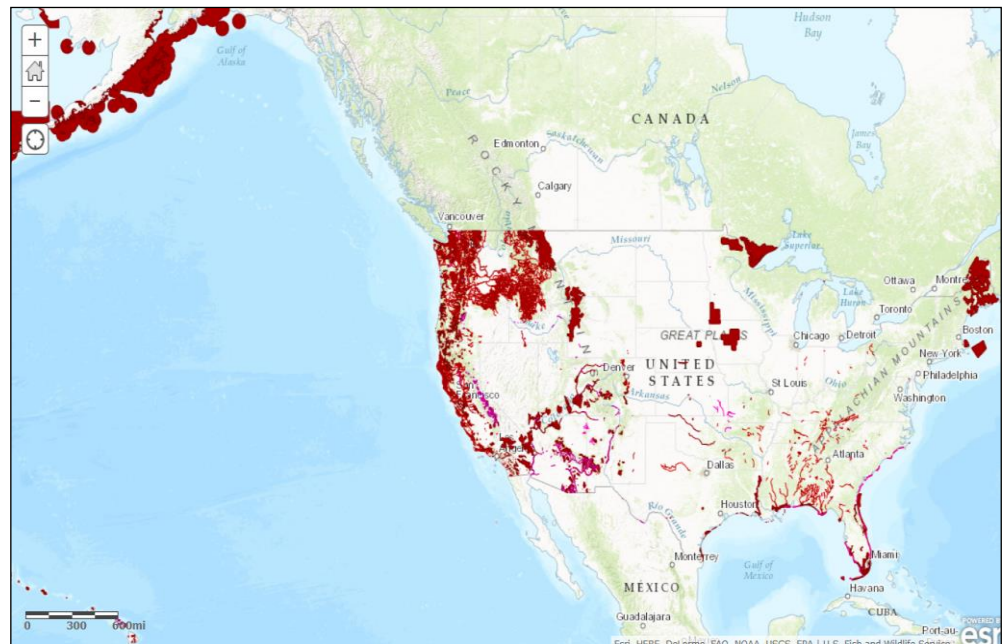
Mr. David Bernhardt
Brownstein, Hyatt, Farber & Schreck
(former Solicitor for the U.S. Department of the Interior, 2006-2008)
Washington, D.C.

Ms. Robbie LeValley
County Administrator
Delta County, Colorado
(former President, Colorado Cattlemen's Association)

Mr. Loyal Mehrhoff
Endangered Species Recovery Director
Center for Biological Diversity
Washington, D.C.

Background

The designation of critical habitat is an integral part of the ESA, and the consequences of critical habitat are far reaching and significant. Section 7(a)(2) of the ESA requires each federal agency to consult with the Secretary to ensure that its actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or *result in the destruction or adverse modification of habitat*”



Map of areas currently designated as critical habitat (791 of 1,592 Endangered Species Act-listed species in the U.S.) *Source: U.S. Fish and Wildlife Service*

that is determined to be critical.⁴

In recent years, the Administration has proposed or finalized hundreds of new critical habitat designations, impacting millions of acres and thousands of river miles as critical habitat.⁵ Critical habitat designations have created uncertainty for a host of activities on federal, state, local and privately-owned property and waters across the nation. Any private action that requires a federal permit or other federal action is therefore contingent on this statutory provision. Consultation can be an expensive and lengthy process, with unpredictable delays that have the potential to discourage investment and prevent economic activity from taking place. Therefore, the process of designating critical habitat and the question of what constitutes “destruction or adverse modification” of critical habitat are issues of significant concern to many.

I. Changes to Regulations for Designating ESA Critical Habitat

“Geographical Area Occupied by the Species” and “Physical or Biological Features”

The Services’ February 2016 rule implementing changes to the regulations for designating critical habitat finalized numerous new and amended definitions, as well as revised criteria for designating critical habitat.⁶ While all of these changes are important, the Services’ new definitions of “geographical area occupied by the species” and “physical or biological features” have particular significance. In general, the changes finalized in the rule will provide the Services with expanded authority to designate larger and larger areas of critical habitat, with potentially greater impact on lives of those who live and work near critical habitat.

The term “geographical area occupied by the species,” previously undefined, is contained in the ESA statutory definition of critical habitat, as follows:

- (i) [T]he specific areas within the *geographical area occupied by the species*, at the time it is listed in accordance with the [provisions governing listing of endangered and threatened species], 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) [The] specific areas outside the *geographical area occupied by the species* at the time it was listed in accordance with the [provisions governing listing of endangered and threatened species], upon a determination by the Secretary that such areas are essential for the conservation of the species.⁷

⁴ 16 U.S.C. §1536(a)(2) (emphasis added).

⁵ <http://ecos.fws.gov/ecp/report/table/critical-habitat.html>

⁶ Critical Habitat Rule, 81 Fed. Reg. 7414.

⁷ 16 U.S.C. § 1532(5)(A)(i)-(ii)

The Services now define this term much more expansively to mean the “geographical area which may generally be delineated around the species occurrences, as determined by the Secretary (*i.e.*, range). Such areas may include those areas used throughout all or part of the species life cycle, even if not used on a regular basis (*e.g.*, migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).”⁸ The distinction between periodic use and use by vagrant individuals is not clarified in the rule, and there are serious questions as to whether such a standard can be applied consistently.

The Services also note that this definition is further modified by the phrase “at the time it is listed”, and contend that this limitation on the designation of critical habitat can make it “difficult to discern what was occupied at the time of listing.”⁹ The Services new regulation also notes that “while some of the changes in a species’ known distribution reflect changes in the actual distribution of a species, some only reflect changes in the quality of information concerning distribution.”¹⁰ The premise here is that changes in actual distribution of the species since listing should *not* be considered in the critical habitat designation, but that changes in the information regarding the distribution of the species at the time it was listed *could* be considered in critical habitat designations. Whether this is consistent with the language of the ESA remains an open question.

In addition, the Services have defined the term “physical or biological features” as “the features that support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be described in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.”¹¹

In support of this new definition, the Services point to a court case which noted that it was not addressing “whether dynamic land capable of supporting plover habitat can itself be one of the ‘physical or biological features’ essential to conservation.”¹² The Services seem to confuse the reluctance of the court to address this question as an invitation for the Services to legislate on the matter.

The Services claim that “physical or biological features” could include the *potential* to become a physical or biological feature at some point in the future. In the final rule, the Services offer an example of a species that may require “early successional riparian vegetation in the Southwest.”¹³ If such vegetation exists only 5 to 15 years after a local flooding event, the Services argue that not only is the vegetation a “feature” but also the flooding events themselves. This appears to allow the Services to designate areas that may at some undetermined point become critical habitat. This could provide almost limitless discretion to the agencies.

⁸ Critical Habitat Rule, 81 Fed. Reg. 7414, 7429.

⁹ Critical Habitat Rule, 81 Fed. Reg. 7414, 7430.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Cape Hatteras Access Preservation v. DOI*, 344 F. Supp. 2d 108 (D.D.C.)

¹³ Critical Habitat Rule, 81 Fed. Reg. 7414, 7430.

Together, the changes to the concepts of “geographical area occupied by the species” and “physical or biological features” expand the discretion of the Services to designate critical habitat. The changes inject uncertainty into an already uncertain process, and may exacerbate the frustrations caused by excessive and frivolous litigation. The ESA is already a fertile ground for litigation.¹⁴ By granting themselves new authorities, the Services are incentivizing lawsuits by frequent ESA litigant groups which hope to force the Services to use those new authorities to the maximum extent possible. The Committee hopes this hearing will help to provide some answers to the many unanswered questions raised by these policy changes.

II. Changes to the Definition of Destruction or Adverse Modification of Critical Habitat

At the same time the Services’ new regulations expand the definition of critical habitat, they change the standard which triggers the consultation requirement in Section 7 of the ESA. Specifically, the Services have changed the definition of “destruction or adverse modification.” This definition has evolved through several iterations. For the purposes of this discussion, we will begin with the definition issued by the Services thirty years ago in 1986:

“... a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.”¹⁵ (“1986 Definition”)

In 1998, the Services clarified this definition by explaining that “appreciably diminish” meant “to considerably reduce the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species.”¹⁶

In 2001, the Fifth Circuit reviewed the 1986 Definition and found that the definition was flawed in that it required the Services to consider the value of the critical habitat to both *survival* and *recovery*.¹⁷ Noting that the statute only requires the Services to consider the “conservation” value of the critical habitat, the court held that the Services exceeded their discretion by requiring the consideration of the impact to *survival*. The Ninth Circuit reached the same conclusion in 2004,¹⁸ and in response, the Services discontinued the use of the 1986 Definition in 2005 by issuing new guidance.¹⁹ This 2005 Guidance applied the definition of conservation as found in the Act in order to comply with the court cases.

¹⁴ In 2012, the Committee on Natural Resources received information from the Department of Justice revealing 573 open ESA-related lawsuits against the federal government.

¹⁵ 52 FR 19926

¹⁶ ESA Handbook, available at:

¹⁷ *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001) (“[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits”) (emphasis in original).

¹⁸ *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004).

¹⁹ Guidance Memos – see ref at 7215

The Services finalized a wholly different definition on February 11, 2016:

“... a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter that physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.”²⁰

After receiving comments on the meaning of the term “appreciably diminish” in the context of adverse modification of critical habitat, the Services use the guidance in the ESA Handbook published in 1998, which equated the term to “considerably reduce.”²¹ The Services then take a further step and conclude that “considerable” in this context means “worthy of consideration.”²² In other words, it is a “way of stating that we can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of critical habitat.”²³ This is a departure from the commonly understood definition of the word “considerable” and is a source of concern for many.

III. Changes to the Policy on Exclusions from Critical Habitat under ESA Section 4(b)(2)

Section 4(b)(2) of the ESA authorizes the Secretaries to “exclude any area from critical habitat if the Secretary determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of species concerned.”²⁴

In the policy guidance, the Services state that they will, among other things, consider private and state conservation efforts as part of the exclusion process, give extra consideration to excluding land for national-security and homeland-security reasons, and, as a general rule, will *not* consider other Federal land for exclusion.²⁵ The Services also state that they will consider only the “probable incremental economic impacts” of the designation in their required economic analysis.²⁶

In support of the new policy on exclusions on federal land, the Services argue that “while the benefits of excluding non-Federal lands include development of new conservation partnerships, those benefits do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under section 7 of the [ESA].”²⁷ In other words, the Services are arguing that there is no functional difference between the exclusionary authority in section 4(b)(2) and the section 7 consultation process.

²⁰ Adverse Modification Rule, 81 Fed. Reg. 7214, 7216.

²¹ ESA Handbook

²² Adverse Modification Rule, 81 Fed. Reg. 7214, 7218.

²³ *Id.*

²⁴ 16 U.S.C. § 1533(b)(2).

²⁵ Exclusion Policy, 81 Fed. Reg. 7226, 7228-7232. (emphasis added).

²⁶ Exclusion Policy, 81 Fed. Reg. 7226, 7232.

²⁷ *Id.* at 7231

Furthermore, the Services “generally will not consider avoidance of the administrative or transactional costs associated with the section 7 consultation process to be a “benefit” of excluding a particular area.”²⁸ By not considering the administrative or transactional costs, the Services may reduce the benefits in any given cost-benefit analysis, generally making it less likely that the Secretary will use the exclusionary authority.

²⁸ *Id.*