



July 5, 2012

By Certified Mail: 7012-1010-0000-6031-3612

The Honorable Kenneth Salazar
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240.

The Honorable Rebecca M. Blank
Acting Secretary
U.S. Department of Commerce
1401 Constitution Ave., N.W.
Washington, DC 20230

RE: Petition for Rulemaking to Define the Term “Destruction or Adverse Modification” of Critical Habitat and to Improve the Regulations Governing the Designation Process for Critical Habitat.

Dear Secretary Salazar and Acting Secretary Blank,

The Society for Conservation Biology¹ (SCB) hereby petitions the Secretary of the Department of the Interior (DOI), through the U.S. Fish and Wildlife Service (FWS), and the Secretary of the Department of Commerce (DOC), through the National Oceanic and Atmospheric Administration (NOAA) (collectively the “Services”), under the Administrative Procedure Act,² and the DOI’s regulations at 43 C.F.R. Part 14, to revise 50 C.F.R. §§ 402 and 424 to improve the Services’ implementation of the Endangered Species Act with respect to the designation of critical habitat and consultation activities for such critical habitat. Implementing these changes to the Services’ regulations will allow the Secretaries to better fulfill the stated purposes of the Act: “to provide a means whereby ecosystems upon which endangered species and threatened species depend may be conserved,” and “to provide a program for the conservation of such endangered species and threatened species.”³

¹ SCB is an international professional organization whose mission is to advance the science and practice of conserving the Earth’s biological diversity, support dissemination of conservation science, and increase application of science to management and policy. The Society’s 5,000 members include resource managers, educators, students, government and private conservation workers in over 140 countries.

² The Administrative Procedure Act provides that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e).

³ 16 U.S.C. § 1531(b).



INTRODUCTION

The Endangered Species Act (ESA) is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation”⁴ and has been successful in preventing hundreds of species from going extinct since its enactment in 1973. However, the goal of the ESA is not merely to prevent the extinction of species, but also to “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered and threatened species,” as well as to implement the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and several other international treaties.⁵ It is important to recognize that Congress defined the terms “conserve” and “conservation” to mean “all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary.”⁶ Thus “conservation” means more than just the survival of endangered species, but instead includes the much more ambitious goal—the recovery of endangered species.

Since the passage of the ESA in 1973, our scientific understanding of biodiversity, ecosystem functions, and the threats posed by human activities to biodiversity has been increasingly documented by numerous scientific assessments. We are now aware of threats to biodiversity that were not even considered at the time of the passage of the ESA, including the impacts of invasive species, the challenges of climate change, and other complex land-use impacts to biodiversity. Although powerful, this 39-year old statute has not been significantly revised since 1988, and the regulations that implement the ESA have stood mostly unchanged since 1986. Therefore, there is an urgent need for the ESA’s implementing regulations to address these new challenges in order to fulfill the ESA’s mandates, especially the mandates contained in Section 4 and Section 7 of the ESA, which requires the Services to utilize the best scientific and commercial data available when taking action to protect threatened and endangered species.⁷

Loss of habitat is the primary threat to the vast majority of imperiled species, a fact that the Congress expressly noted when it passed the Endangered Species Act in 1973.⁸ Accordingly, the recovery of threatened and endangered species depends on sufficient habitat being protected and restored to ensure a species’ long term viability. In 1978, Congress amended Section 4 of the ESA, requiring the Services to designate critical habitat for threatened and endangered species.⁹ Critical habitat serves several vital roles in the implementation of the ESA. Most importantly, it requires the Services to consider what habitat is essential for the conservation of the species, including its recovery. In addition, upon the designation of critical habitat, the

⁴ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

⁵ 16 U.S.C. § 1531(b).

⁶ 16 U.S.C. § 1532(3).

⁷ 16 U.S.C. §§ 1533(b)(1)(A) & 1536(a)(2).

⁸ 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(8):607-615.

⁹ Pub. L. 95-632 (Nov. 10, 1978). *See also*, 16 U.S.C. § 1533(a)(3)(A).



Services are required to provide a description and evaluation of activities which may adversely modify such habitat,¹⁰ thereby providing guidance for landowners and land-management agencies on ways they can avoid the take of endangered or threatened species, the adverse modification of critical habitat, and other impacts to endangered or threatened species prohibited by the ESA. Furthermore, the designation process provides information for Section 10 incidental take permits and habitat conservation plans, as well as additional information to Federal land management agencies on land acquisition decisions that could benefit endangered species. Finally, the potential that an agency action may affect critical habitat triggers the consultation process under Section 7 of the ESA, which requires all agencies of the federal government to consult with the Services on any discretionary action they might take to ensure that their activities 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 which is determined...to be critical.”¹¹

Unfortunately, the Services’ current regulations and their past practices have underestimated the importance of critical habitat for species survival and recovery. Partially as a result, critical habitat has not been designated for a majority of the listed threatened and endangered species. And, where such habitat is designated, the areas designated have generally not been large enough to ensure the recovery of listed species. The regulations covering the designation of critical habitat have not been changed since 1984, and the regulations covering consultations with respect to critical habitat under Section 7 have not been updated since 1986. Accordingly, the regulations must be revised to properly account for both the survival of listed species and the recovery of those species. SCB recommends the following three regulatory changes to address these deficiencies.

I. Under 50 C.F.R. § 402.02, the Term “Destruction or Adverse Modification” Must Be Reformed to Address Species Recovery

A. 50 C.F.R. § 402.02¹² Should be Revised to Read as Follows:

Destruction means a direct or indirect alteration that permanently decreases the extent of critical habitat available for the survival or recovery of a listed species. There shall be a rebuttable presumption that a Reasonable and Prudent Alternative shall not be available for an action that permanently decreases the extent of critical habitat of a species, unless for every acre destroyed by such action, more than two acres of additional comparable habitat outside of the critical habitat already designated for such species are permanently protected through mitigation.

Adverse modification means a direct or indirect alteration that diminishes the value of critical habitat for the survival or recovery of a listed species. Such alterations include, but are not

¹⁰ 16 U.S.C. § 1533(b)(8).

¹¹ 16 U.S.C. § 1536(a)(2).

¹² The current regulation at 50 C.F.R. § 402.02 states: *Destruction or adverse modification* means 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.



limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. There shall be a rebuttable presumption that an alteration does not diminish the value of critical habitat if the effects upon the species are *de minimis*, both physically and biologically, and in no case those effects persist for more than one generation of that species or five years, whichever is shorter.

B. Explanation of Proposed Revision

The regulatory definition that SCB proposes contains several important changes. First, the proposed regulation provides for separate definitions of “destruction” and “adverse modification.” Second, the proposed regulation would expressly require the consideration of recovery in the designation of critical habitat. Finally, the regulation would remove the term “appreciably” from the old regulation and replace it with a clearly defined *de minimis* exception for alterations to critical habitat.

1. Providing a Unique Definition for Destruction of Critical Habitat and a Unique Definition for Adverse Modification of Critical Habitat.

The primary advantage of providing a unique regulatory definition for both of the terms in the phrase “destruction or adverse modification” of critical habitat is that it helps to make much less ambiguous when the Services must issue a Reasonable and Prudent Alternative (RPA) for a proposed action. To be clear, these regulations are not attempting to alter any of the thresholds for when the Services must complete a Biological Opinion on a proposed action. We believe that the “may affect” standard found at 50 C.F.R. § 402.14(a) is the appropriate inquiry regarding when a formal consultation is triggered under the ESA. Instead, one of the primary purposes for this particular change is to make clear at what point during the formal consultation process the Services must prepare an RPA, as well as what such an RPA must contain, to address the destruction of critical habitat or the adverse modification of critical habitat.

For example, in *Butte Environmental Council v. U.S. Army Corps*,¹³ the FWS completed a formal biological opinion on a proposed project to build a 678-acre industrial park in Redding California. During the consultation process, the FWS determined that the project would destroy 234.5 acres of critical habitat for the vernal pool fairy shrimp and would destroy 242.2 acres of critical habitat for the slender Orcutt grass. The developer of the project proposed to offset these effects by creating or restoring 0.56 acres of aquatic habitat, and preserving another 18.64 acres, at other on- and off-site locations. Despite acknowledging that “the proposed project would contribute to a local and range-wide trend of habitat loss and degradation” for these two species, the FWS concluded that the proposed project “would not result in the adverse modification or destruction of critical habitat” for those species.¹⁴ The FWS reached this conclusion because, as the Consultation Handbook¹⁵ explains, “Adverse effects on...segments of critical habitat

¹³ 620 F.3d 936 (9th Cir. 2010)

¹⁴ *Id.*

¹⁵ U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., 1998. *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* at 4-34.



generally do not result in...adverse modification determinations unless that loss, when added to the environmental baseline, is likely to...appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species.” Since the loss of these 230 acres for the vernal shrimp and Orcutt grass represented only a small percentage of the species’ critical habitat, it did not represent adverse modification under the FWS’s analysis.

While the Ninth Circuit upheld the FWS’s decision in *the Butte Env’tl. Council case*, the ruling was based on deference to the existing regulatory framework and consultation handbook language. However, the Court stated “we express no opinion on whether the ‘adverse modification’ inquiry under section 7 of the ESA *properly focuses on the effects of an action on a particular unit of critical habitat or on total critical habitat nationwide.*”¹⁶ Thus, changes to the regulatory framework would not be incompatible with the *Butte Env’tl. Council* decision.

We believe that the Services’ “adverse modification” inquiry is not properly focused for several reasons. As will be discussed below in greater detail, the “appreciably diminish” inquiry is not consistent with the intent of the ESA. And in addition to this, the FWS’s inquiry was also in error because the FWS, based on the current regulatory definition of destruction or adverse modification, as well as the ESA Consultation Handbook, merged the inquiry for these two unique terms into a single inquiry focusing on adverse modification. If Congress had wanted the Services to only consider potential “adverse modification” to critical habitat in context of a species’ total available designated critical habitat, it could certainly have done so. But the language contained in Section 7(a)(2) of ESA is clear that destruction *or* adverse modification of critical habitat requires must *both* be considered by the Services in a consultation.

The ESA contains two distinct concepts, “destruction” and “adverse modification.” Section 7(b)(3)(A) states that an RPA should be issued “[if] jeopardy or adverse modification is found” and appears to omit the possibility of issuing an RPA for destruction of critical habitat.¹⁷ However, the legislative history of the ESA suggests that Congress was not precise in defining when an RPA could be issued in the case of the outright destruction of critical habitat, and that Congress approved of the FWS’s approach in its 1978 regulations¹⁸ which allowed an RPA to cover situations where the destruction of critical habitat occurred.¹⁹ Nonetheless, we believe that the plain meaning of these two terms would suggest a more stringent standard for actions that destroy critical habitat given the potential consequences for the recovery of a species when critical habitat is permanently destroyed. Therefore, the Services should have the discretion to consider providing a permit based upon an RPA for an action agency only if such RPA requires rigorous mitigation greater than 2:1 to compensate for lost critical habitat. In situations where critical habitat is modified, but not permanently destroyed, there may be more flexibility in

¹⁶ 620 F.3d at 948 n.1 (9th Cir. 2010) (emphasis added).

¹⁷ 16 U.S.C. § 1536(b)(3)(A)

¹⁸ *Joint Regulations, Part 402: Interagency Cooperation—Endangered Species Act of 1973*, 43 Fed. Reg. 870 (Jan. 4, 1978).

¹⁹ In the Conference Report on the 1978 Amendments to the ESA, the Congress stated that the revised Section 7 “essentially restates section 7 of existing law” because “regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.” H. Conf. R. No 95-1804, 95th Cong. 2nd Session. Oct 14, 1978



determining whether an RPA is required and/or the extent of the mitigation required within that RPA.

Mitigation ratios have been a long-standing policy requirement in wetland mitigation activities under the Clean Water Act. For example, a 1990 Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Army Corps) established basic mitigation principles to ensure that there would be “no net loss” of wetlands in the United States.²⁰ Regarding compensatory mitigation, the joint MOA states the following:

Mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan.... In the absence of more definitive information on the functions and values of specific wetland sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low.²¹

Higher mitigation ratios are often required under various mitigation regimes depending on the quality, importance, or difficulty inherent in the project. A typical category is mitigation for sites and wetland types that are difficult to restore. This is used in the EPA-Corps MOU.²² Higher mitigation ratios are often also required where there is a long time-lag expected between the permitted activity and the achievement of the desired endpoint for the compensation site. Higher mitigation ratios are often also required where the impacts are going to occur in pristine wetland rather than in severely degraded ones. **As an example, the California Fish and Game requires 5:1 mitigation for impacts to riparian habitats for endangered species, 3:1 mitigation for rare/unique habitats, 2:1 mitigation for medium value habitat, and 1:1 mitigation for disturbed wetland habitats.**²³ **Because the overarching policy goal for wetlands is no net loss, there are only a few exceptions where wetland mitigation is permitted at a level less than 1:1.**²⁴

The FWS has appeared to endorse the idea of mitigation ratios in some specific contexts, but not yet done so in a transparent and consistent manner as a matter of national policy for endangered species. For example, in a programmatic consultation regarding Section 404

²⁰ *The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines*, February 6th 1990. Available at: <http://water.epa.gov/lawsregs/guidance/wetlands/mitigate.cfm>

²¹ *Id.*

²² National Academy of Sciences. *Compensating for Wetland Losses Under the Clean Water Act*. Committee on Mitigating Wetland Losses, Board on Environmental Studies and Toxicology, Water Science and Technology Board, National Research Council (2001).

²³ California Department of Fish and Game-South Coast Region: *Guidelines for Wetland Mitigation*.

²⁴ *The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines*, February 6th 1990. Available at: <http://water.epa.gov/lawsregs/guidance/wetlands/mitigate.cfm>



wetlands permits for threatened and endangered vernal pool crustaceans, the FWS required that for “every acre of habitat directly or indirectly affected, at least two vernal pool credits will be dedicated within a Service-approved ecosystem preservation bank, or, based on Service evaluation of site-specific conservation values, three acres of vernal pool habitat may be preserved on the project site or on another nonbank site as approved by the Service.”²⁵ In other words, depending on the location of the conservation crediting activity for vernal pool habitat, a mitigation ratio of either 2:1 or 3:1 was required.²⁶ In situations where the loss of endangered species habitat does not implicate the loss of wetlands, mitigation ratios do not appear to be required consistently. This lack of consistency causes resentment, frustration and potentially legislative or judicial reversals of agency actions²⁷. Our proposed revision would help to correct this lack of consistency and prevent the Services from failing to mitigate harmful activities in the future.

It is also important to explain why a minimum ratio of 2:1 should be required where a proposed action will destroy critical habitat. First, a safety margin must exist for all mitigation actions because scientific literature demonstrates that mitigation is rarely 100% successful. The National Academy of Sciences conducted an extensive review of nine wetland mitigation programs in 2001 and found that “the mitigation ratio requirements were never fully met, but the ratio for the mitigation implemented was higher than 1:1 in three of the nine studies.”²⁸ Because of general difficulty in fully implementing a mitigation program, the NAS concluded that “a 1.5:1 ratio of mitigation:loss of acreage would be needed to equal the area lost (if all other permit conditions are met, including functional equivalency).” In other words, a 1.5:1 ration is needed just to ensure that in fact 1:1 mitigation actually occurs (assuming all permit conditions are met).

Furthermore, recent research also demonstrates that wetland functionality in mitigation projects is often less than would occur in non-disturbed wetland locations. Meaning that functional equivalency rarely occurs in mitigation wetlands. In a meta-analysis of over 600 wetland mitigation projects around the world, biological structure and biogeochemical functioning was on average 26% and 23% lower, respectively, compared to undisturbed wetland locations.²⁹ On a whole, this analysis concluded that restoration performance is often limited meaning that even after several decades, mitigation fails often fails to recovery original levels of wetland ecosystem functions, even after many decades. For these two reasons, lack of full mitigation and loss of functionality, SCB recommends at least a 2:1 mitigation ratio as an

²⁵ US Fish and Wildlife Service. Programmatic Formal Endangered Species Act Consultation on Issuance of 404 Permits for Projects with Relatively Small Effects on Listed Vernal Pool Crustaceans Within the Jurisdiction of the Sacramento Field Office, California (1996)

²⁶ *Id.*

²⁷ For example, the House Natural Resources Committee held a hearing on June 19, 2012 at which an administrator in the California public school system, John A. Stokes, testified concerning several years of what he perceived to be changing requirements with regard to the management and mitigation for San Diego Fairy Shrimp habitat in pooling water on land the school district had planned to use for a new elementary school. See, <http://naturalresources.house.gov/UploadedFiles/StokesTestimony06-19-12.pdf>

²⁸ National Academy of Sciences. *Compensating for Wetland Losses Under the Clean Water Act*. Committee on Mitigating Wetland Losses, Board on Environmental Studies and Toxicology, Water Science and Technology Board, National Research Council (2001).

²⁹ Moreno-Mateos et al. *Structural and Functional Loss in Restored Wetland Ecosystems*, PLoSone 10:1, Jan. 2012



appropriately precautionary approach to offset the destruction of critical habitat. Until the FWS can demonstrate that mitigation fully restores lost critical habitat acreage with equivalent ecosystem functionality, a greater than 1:1 ratio is needed in order to provide threatened and endangered species with the benefit of doubt that Congress intended.³⁰

Finally, a 2:1 mitigation ratio is required to further the overarching policy goal of the ESA, namely the recovery of threatened and endangered species. As has been widely noted, Congress enacted the ESA “to provide a program for the conservation of such endangered species and threatened species.”³¹ The ESA defines “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary.”³² Thus, the objective of the ESA is to enable listed species “not merely to survive, but to recover from their endangered or threatened status.”³³ Loss of habitat continues to be the primary threat to the vast majority of endangered species, a fact that the Congress expressly noted when it passed the Endangered Species Act in 1973.³⁴ Accordingly, the recovery of threatened and endangered species depends on sufficient habitat being protected and restored to ensure a species’ long term viability. Therefore, recovery for many threatened and endangered species requires more than just “no net loss” as is the case in context of wetlands, but requires additional protected habitat to ensure recovery. A 2:1 mitigation ratio is the most straightforward policy tool to accomplish this larger goal.

2. Expressly Considering Recovery in Consultations.

The words “destruction” or “destroyed” connote the permanent ceasing of existence. When critical habitat is destroyed, it longer provides any value, biologically or physically to a threatened or endangered species’ survival or to its recovery. Thus, under the proposed definition, critical habitat is destroyed when there is a permanent reduction in the extent of existing critical habitat. The word “permanently” is used in the definitional phrase to represent a reasonably long period of time in the context of the resulting effects upon a particular species, and not to be limited to catastrophic events such as meteors crashing into the Earth. For example, the Supreme Court found that the closing of the Tellico Dam would “destroy the critical habitat” of the snail darter given the relative permanence of the construction of a large dam on the landscape.³⁵ In the *Butte Envtl. Council* case, the FWS acknowledged, and the Ninth Circuit agreed that 242 acres of critical habitat for the vernal pool fairy shrimp “would be destroyed” as a result of building of a shopping complex. In both cases, one could argue that over the course of millennia, these impacts may disappear, however for all practical purposes for

³⁰ House Conference Report 96-697, 1979 U.S.C.C.A.N. 2576 (emphasis added).

³¹ 16 U.S.C. § 1531(b).

³² 16 U.S.C. § 1532(3).

³³ *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir., 2004); *N.M. Cattle Growers Ass’n v. U.S. Fish and Wildlife Service*, 248 F.3d 1277, 1283 (10th Cir.2001); *Sierra Club v. U.S. Fish and Wildlife Service.*, 245 F.3d 434, 441-42 (5th Cir.2001).

³⁴ 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(8):607-615.

³⁵ *Tennessee Valley Authority v. Hill*, 437 US 153, 171 (1978)



these species, these human impacts represented a permanent loss in the extent of critical habitat for those species. Because the recovery of listed species can easily be delayed or precluded by the outright destruction of critical habitat, it is important for there to be a high standard of mitigation for the Services to sign off on such actions through the issuance of an RPA.

Such was not the case in the *Butte Env'tl. Council* decision, in which FWS found that no adverse modification would occur despite the destruction of 242 acres of critical habitat. Equally troubling, FWS was willing to find no adverse modification, and thus did not even require an RPA, despite limited compensatory mitigation in the form of restoring 15 acres of habitat as an offset. At best, this represented a loss of over 225 acres of critical habitat. It is difficult to see how such an action would not, at a minimum, slow the pace of recovery for these two species, especially when the FWS had already identified habitat fragmentation as the leading threat to the species. Therefore, a revised regulation must clearly state that where critical habitat is destroyed, the Services must require mitigation to fully offset its destruction in an RPA, regardless if the permanent loss is one acre, 10,000 acres, or 100,000 acres. Under the proposed approach, more than two acres of habitat would need to be protected (either through a permanent conservation easement, fee title purchase by FWS, or similar legal mechanism following existing agency guidance regarding mitigation) to offset each acre of critical habitat that is destroyed by an agency action. Such habitat would need to support comparable biological and physical features that ensure to a comparable extent the conservation of the listed species, and would need to be outside the existing critical habitat designation.

If full mitigation is not required, then the prospect of recovery will be diminished. It is important to recognize that SCB's proposed regulation does not preclude development. It merely requires that at the conclusion of a proposed project, there is *more* available and currently functional habitat in existence than at the start of such project. By clarifying the definition of "destruction" of critical habitat, the proposed regulation better ensures that recovery is not precluded or indefinitely forestalled. And, as explained below in Section II below, by creating a mechanism to regularly revise critical habitat designations for listed species in situations where offsetting mitigation occurs any additional habitat that has been protected through mitigation could regularly be added to the critical habitat designated for the species.

Similarly, under the revised regulations, the proposed definition of "adverse modification" ensures that a threatened or endangered species' prospects for recovery are considered as an independent basis for an adverse modification finding. Under the current regulations, the term "destruction or adverse modification" is defined to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." In the past, the Services interpreted this definition to mean that a proposed federal action would need to diminish habitat for *both* the survival *and* recovery of a listed species in order for the Services to arrive at an adverse modification determination. In other words, a proposed action would adversely modify critical habitat if, and only if, the value of the critical habitat for the *survival* of an endangered or threatened species was appreciably diminished. Impacts that *only* affected a species' recovery were insufficient to trigger an adverse modification finding. This narrow interpretation by the Services effectively read the goal of recovery entirely out of the adverse modification inquiry. Because this definition did not



account for recovery, three Circuit Courts of Appeals determined that this definition was not permissible under the ESA.³⁶ In reaching this decision, the Courts noted that critical habitat is defined as areas in which physical or biological features are found that are “essential to the conservation of the species.”³⁷ And, since “conservation” is defined in the ESA to include recovery, the Services must consider recovery as an independent inquiry when deciding if a federal action could adversely modify critical habitat. As the Ninth Circuit explained, “[t]he agency’s controlling regulation on critical habitat thus offends the ESA because the ESA was enacted not merely to forestall the extinction of species (i.e., promote a species survival), but to allow a species to recover to the point where it may be delisted.”³⁸

Each of these proposed definitions requires the Services to address recovery. By creating a straightforward definition for the destruction of critical habitat, the pace and prospects of recovery will not be diminished. As will be described below, by clarifying when an RPA must be developed for “adverse modification” the Services will be better able to identify those de minimis activities whose effects do not require an RPA. By making explicit the requirement that the Services address recovery in critical habitat designation and consultations, the Services will be able to better facilitate the recovery of endangered and threatened species under the Act and comply with the relevant case law on this issue.

3. Defining De Minimis Adverse Modification

Finally, the proposed regulatory definition removes the word “appreciably” from the definition of “adverse modification” and replaces it with a scientifically based de minimis standard for determining when an RPA is not required for an action that adversely modifies critical habitat. SCB recognizes that some impacts to critical habitat may be of such a small magnitude that an RPA may be unnecessary. Therefore, what the regulations propose is a clear de minimis exception coupled with a rebuttable presumption that expressly holds that when impacts to critical habitat are limited physically and biologically, and in no case persist for more than one generation for the species, whose critical habitat is being impacted, then an RPA would not be necessary. Any adverse modification that is greater in scope than the de minimis exception requires the development of an RPA to mitigate its impacts. This approach has several advantages to an undefined “appreciably” standard.

First, the de minimis exception has a clear temporal limit, a duration or length of either one generation of the species, which the IUCN defines as “the average age of the parents of the current cohort” or five years, whichever is shorter.³⁹ Setting the de minimis limit based on the species’ own life history ensures that the Services will consider adverse modifications at the

³⁶ See *N.M. Cattle Growers Ass’n v. U. S. Fish and Wildlife Serv.*, 248 F.3d 1277, 1283 (10th Cir. 2001); *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069 (9th Cir. 2004)

³⁷ 16 U.S.C. § 1532(5)(A)(1) (emphasis added).

³⁸ *Gifford Pinchot Task Force*, 378 F.3d at 1069.

³⁹ IUCN (International Union for Conservation of Nature). 2001. IUCN Red List categories and criteria. Version 3.1. IUCN, Gland, Switzerland.



proper temporal scale. An adverse impact to critical habitat that persists for only a year will likely have a very different effect on a species that lives for twenty years compared to a species that completes its life cycle in a few months. Indeed, for a species that completes its life cycle in a few months, an impacting lasting an entire year harms multiple generations of the species, jeopardizing its long-term prospects for survival or recovery. However, there is also substantial evidence that slow-reproducing species, those with long generational lengths, can be more at risk than those species with short generational lengths. For example, a very recent study concluded that “age at maturity can serve as a universal predictor of extinction risk in fishes and mammals when r_{max} is unknown. These findings are thus supportive of the application of extinction-risk and population-status criteria that are based on generation time and that are independent of taxonomic affinity.”⁴⁰ Therefore, as a precautionary approach, in recognition of the conservation complexities for slowly reproducing species, SCB proposes that no de minimis exception can be granted for an alteration whose adverse effects last more than five years. A five year limit also corresponds with the period of time at which the Services must conduct status reviews for each threatened and endangered species.⁴¹ That review is designed specifically for adjustments in conservation measures so the Service can determine whether to reinitiate consultation concerning a modification that had been expected to be either short-lived, or otherwise de minimis, and is found not to be.

Second, the de minimis exception states that the impacts must be de minimis *both* physically *and* biologically. The de minimis exception is designed to mirror the statutory definition of critical habitat, which focuses on the “physical or biological features [] essential to the conservation of the species.”⁴² Only if an adverse modification does not diminish the value of any of the physical or biological features, which were the basis of the critical habitat designation, for longer than one generation of the species’ life history, then the Services have the ability to make a finding that the impact does not represent adverse modification or require an RPA. For example, if an impact diminishes the value of a physical feature of a species’ critical habitat for less than one generation, but the impact diminishes a biological feature for longer than one generation or five years, such an impact would not be eligible for the de minimis exception. The action would represent adverse modification and an RPA would be required to address it.

Some effects are of a short-term, but nonetheless have significant impacts on the value of critical habitat for the survival or recovery for a species. By establishing a rebuttable presumption, the de minimis exception would not preclude a finding that a short-term impact represents adverse modification of critical habitat. Overcoming the rebuttable presumption should only require a showing that, based on the best available science, the impacts from a proposed project would diminish the value of critical habitat for such species. Framing the adverse modification in this way provides the right degree of precaution in a new regulatory framework for critical habitat.

⁴⁰ Hutchings et al. 2012. *Life-history correlates of extinction risk and recovery potential*. *Ecological Applications*, 22(4):1061–1067

⁴¹ 16 U.S.C. § 1533(c)(2).

⁴² 16 U.S.C. § 1532(5)(A)(i)



This more stringent approach for analyzing adverse modification is reasonable because the designation of critical habitat involves several screening processes designed to ensure that not all of the geographic range of a listed species is protected as critical habitat. The Services must first take into account “the economic impact, the impact on national security, and any other relevant impact” of designating critical habitat.⁴³ The Services may exclude any area from critical habitat if “the benefits of such exclusion outweigh the benefits of specifying such areas” unless the failure to designate will critical habitat will result in the extinction of the species concerned.⁴⁴ Since critical habitat is a subset of the occupied and unoccupied habitat of a threatened or endangered species, and since critical habitat is *essential* to the recovery of a listed species, the Services should not discount adverse modifications of that critical habitat. Where adverse modifications are found, the Services must recommend an RPA, which would sufficiently alter or mitigate possible impacts to avoid adverse modification from occurring.⁴⁵

An example of how such a de minimis exception has already worked in practice (if not in name), can be found in the *Rock Creek Alliance v. FWS* case.⁴⁶ There, the FWS determined that a proposed silver mine would not adversely modify the critical habitat of the bull trout. The FWS determined that the approximately 2.8 out of 135 miles of stream within a critical habitat unit would be modified. The FWS analyzed the potential impacts of the mine on water temperature, substrate composition, migratory corridors, channel stability, and vegetation cover. FWS ultimately concluded that the critical habitat was “expected to remain functional, albeit at a lower [functional] level,” and the most significant impacts would be temporary, lasting five to seven years.⁴⁷ The Court determined that the FWS’s decision was sound because it “was not based solely on the scale of the impact, but also on the duration and the level by which the habitat’s functionality would be diminished.”⁴⁸

The use of a de minimis exception would be consistent with *Rock Creek Alliance*. Bull trout live approximately 10-12 years, and all of the impacts were expected to last less than that amount of time (five to seven years). The Services properly considered the physical and biological elements of critical habitat and concluded that they would not impact the species’ survival or recovery. It should also be noted that FWS also concluded that “the *rate of recovery* of the core area population may slow slightly... but if current efforts to *recover* [bull trout] continue to be successful and overshadow the potential loss, the *recovery rate* of the core area may not be affected.”⁴⁹ In situations like this one, where neither survival nor recovery will be impacted by a de minimis adverse modification, an RPA is not necessary. However, had the Services concluded, based on the best available science, that the impacts would in fact slow the rate of recovery, such a finding would have been sufficient to overcome the rebuttable presumption, and an RPA would have been required. Accordingly, the proposed regulatory

⁴³ 16 U.S.C. § 1533(b)(2).

⁴⁴ *Id.*

⁴⁵ 16 U.S.C. § 1536(b)(3)(A)

⁴⁶ 663 F.3d 439 (9th Cir. 2011).

⁴⁷ *Id.* at 442.

⁴⁸ *Id.* at 443

⁴⁹ *Id.*



change recognizes that narrow cases exist where an RPA is not required, but requires that the Services be explicit in their analysis when making such a determination.

II. Under 50 C.F.R. § 424.12, Recovery of Listed Species Must be Considered During the Designation of Critical Habitat in Both Occupied and Unoccupied Habitats.

A. 50 C.F.R. § 424.12(b)⁵⁰ should be revised to read as follows:

In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

- (1) Space for individual and population growth, and for normal behavior;
- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal;
- (5) Habitats that are protected from disturbance, likely to support the species as habitats are altered by climate change, or are representative of the historic geographical and ecological distributions of a species; and
- (6) The recovery of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements required by the species shall be represented in the habitat designated and described in the proposed and final regulations designating critical habitat. Primary constituent elements, wherever applicable to a given listed species include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, connectivity (such as migration and dispersal corridors), seasonal wetland or dryland, water quality or quantity, host species or plant pollinators, geological formation, vegetation type, tide, and specific soil types.

⁵⁰ The current regulation at 50 C.F.R. § 424.12(b) states: b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following: (1) Space for individual and population growth, and for normal behavior; (2) Food, water, air, light, minerals, or other nutritional or physiological requirements; (3) Cover or shelter; (4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally; (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.



B. 50 C.F.R. § 424.12(e)⁵¹ should be revised to read as follows:

The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by the species when such areas are essential to the survival or recovery of the species.

C. 50 C.F.R. § 424.12(g)⁵² should be revised to read as follows:

The Secretary shall review and where appropriate revise the critical habitat of a given species:

- (1) Within 18 months of the completion of a recovery plan for a given species;
- (2) Within 18 months of the up-listing of a species from threatened status to endangered status;
- (3) At the end of every other five year status-review if such species' conservation status has not improved significantly since the beginning of such ten year period; and
- (4) As any other new data become available that indicate that additional or different critical habitat is needed to ensure the recovery of a given species.

For subsections (1)-(3) of this section, where the Secretary determines that no additional critical habitat is required for the conservation of the species, he shall publish such a finding and the basis for it in the Federal Register explaining such determination. Where the Secretary determines that critical habitat should be revised, he shall publish a final rulemaking within 12 months of a positive finding.

D. Explanation of Proposed Revisions

The above recommended changes would codify that recovery is the central goal of the ESA by expressly requiring the Services to consider recovery during the designation and revisions to critical habitat for listed species. As has been explained by the Ninth Circuit, "Congress, by its own language, viewed conservation and survival as distinct, though complementary, goals, and the requirement to preserve critical habitat is designed to promote both conservation and survival."⁵³ Therefore, designating only enough critical habitat to ensure a species survival at current level is insufficient if recovery is impeded by the failure to designate sufficient levels. Each of the three recommendations above addresses areas where the regulations fail to properly consider recovery during the critical habitat designation process.

First, 50 C.F.R. § 424.12(b) is revised to expressly require the Services to consider recovery as a special management consideration when analyzing the physical and biological features that are essential to the conservation of a listed species. Such a change is necessary because, in the past, the Services only very rarely designated critical habitat for recovery purposes. For example, when considering whether to designate critical habitat for the Gulf sturgeon (*Acipenser oxyrinchus desotoi*), a threatened species, the Services declined to designate

⁵¹ The current regulation at 50 C.F.R. § 424.12(e) states: The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.

⁵² The current regulation at 50 C.F.R. § 424.12(g) states: Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

⁵³ *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d at 1070.



any critical habitat. They reasoned that because, “threatened species such as the Gulf sturgeon are, by definition, not currently at risk of extinction, but are rather anticipated to become so in the foreseeable future, unoccupied critical habitat would not be immediately required for their survival.”⁵⁴ According to the Services, while the designation of critical habitat was necessary for the species’ recovery, it was not necessary for the survival of the sturgeon, and as a result they elected not to designate such habitat. This decision was rejected by Fifth Circuit, which explained that the Services must consider recovery independent of survival with respect to critical habitat.⁵⁵ The Court went on to explain that under the Services’ reasoning, all threatened species would no longer qualify for receiving critical habitat designations, a result that “is difficult to reconcile... with the ESA, which states that critical habitat ‘shall’ be designated for threatened, as well as endangered, species. The agency’s interpretation would read these provisions out of the statute.”⁵⁶ Expressly including the recovery of the species as part of the critical habitat analysis, the Services will be able to better meet the mandates of the ESA.

50 C.F.R. § 424.12(b) is also revised to require the Services to consider how climate change might alter habitats in the future, and to anticipate those changes when designating critical habitat. Human-induced climate change is already playing a significant role in habitat loss and the spread of invasive species.⁵⁷ Scientific research indicates that up to 24% of all species globally will be threatened with extinction if current warming trends continue unabated.⁵⁸ The Services have begun to consider climate change in listing decisions under the ESA. In some instances, the Services are considering climate change during the process of designating critical habitat.⁵⁹ And, the FWS has developed a comprehensive strategic plan for responding to climate change.⁶⁰ However, given the widespread anticipated impact of climate change on biodiversity, it is critical that it be considered expressly in each critical habitat designation, as well as revisions to critical habitat in the future.⁶¹ Expressly including habitats that may support threatened and endangered species in the future as habitats are altered due to climate change will ensure that climate change is fully addressed, and not arbitrarily excluded, by the Services in the applying critical habitat provisions of the Act.

50 C.F.R. § 424.12(b) is revised to ensure that connectivity is properly considered and provided for when critical habitat is designated. Efforts to recover endangered species increasingly involve measures to ensure population connectivity among core habitat areas.

⁵⁴ 60 Fed. Reg. 43,721 (Aug. 23, 1995).

⁵⁵ *Sierra Club*, 245 F.3d at 441.

⁵⁶ *Id.* at 445.

⁵⁷ Parmesan, C. 2006. *Ecological and Evolutionary Responses to Recent Climate Change*. Annual Review of Ecology, Evolution, and Systematics 37:637–69.

⁵⁸ Malcom, et al. 2006. *Global Warming and Extinctions of Endemic Species from Biodiversity Hotspots*. Conservation Biology. 20(2):538-548; Thomas et al., 2004. *Extinction risk from climate change*. Nature. 427:145-148.

⁵⁹ Designation of Critical Habitat for the Polar Bear (*Ursus maritimus*) in the United States, 75 Fed. Reg. 76,086 (Dec. 7, 2010).

⁶⁰ USFWS 2011. *Rising to the Urgent Challenge: Strategic Plan for Responding to Accelerating Climate Change*. Available at: www.fws.gov/home/climatechange/pdf/ClimatePlanOverview.pdf.

⁶¹ See Berry (editor). 2009. *Biodiversity in the Balance: Mitigation and Adaptation Conflicts and Synergies*. Oxford University Press.



Providing for natural connectivity within and among populations furthers the ESA's larger goal to "to preserve the ability of natural populations to survive in the wild."⁶² Species whose genetic health remains dependent on human-assisted translocations are considered "intensively managed," which represents a more precarious conservation status than self-sustaining species and conservation dependent species (an otherwise self-sustaining species for which continued efforts are required to limit human-caused mortality).⁶³ In fact, nearly all studies of corridors suggest that they provide benefits to or are used by animals in real landscapes.⁶⁴ In some instances, the Services have considered connectivity requirements for threatened and endangered species. For example, when designating critical habitat for Canada lynx, the FWS stated that "retaining connectivity with larger lynx populations in Canada is important to ensuring long-term persistence of lynx populations in the United States."⁶⁵ While the FWS ultimately declined to designate low-elevation areas that would have connected high-elevation habitat for the Canada lynx, this demonstrates that the Services can consider such factors where appropriate. Furthermore, as the several distinct aspects of connectivity and the cost-effectiveness of making the right choices in conserving and restoring connectivity become better understood, in order to determine which habitat is truly critical and cost-effective, the Services should consider each such aspect of connectivity, as well as the general concept. In order to ensure that connectivity is considered in a consistent manner, the regulation is revised to include corridors that protect essential functions such as dispersal and migration as essential critical habitat.

Second, 50 C.F.R. § 424.12(e) is revised to reflect the statutory definition of critical habitat in unoccupied areas. The current definition allows the Services to designate unoccupied critical habitat only when a critical habitat limited to its present range "would be inadequate to ensure the conservation of the species." The term "inadequate" is normative and has no scientific justification as a threshold for designating critical habitat in unoccupied areas. There is a different analytical standard for designating occupied critical habitat from unoccupied critical habitat. But, the ESA's requirement to consider designating critical habitat outside of the currently occupied geographic range should not be read out of the statute by an undefined "inadequacy" standard. As stated in *Cape Hatteras Access Pres. Alliance v. U.S. DOI*, "occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the *area itself* must be essential."⁶⁶ The proper inquiry is a determination that an area is essential to the conservation of a listed species, not a finding of inadequacy based on unquantifiable and undefined criteria. The proposed regulations are designed to properly reflect this inquiry.

Additionally, 50 C.F.R. § 424.12(g) is revised by providing several additional triggering events that will require the Services to consider whether existing critical habitat for listed species should be revised. Under the ESA, the Services "may, from time-to-time thereafter as

⁶² *Trout Unlimited v. Lohn*, 559 F.3d 946, 957 (9th Cir. 2009).

⁶³ Redford et. al. 2011. *What does it mean to successfully conserve a (vertebrate) species?* *Bioscience* 61:39-48

⁶⁴ Paul Beier and Reed F. Noss (1998) *Do Habitat Corridors Provide Connectivity?* *Conservation Biology* 12: 1241-1252.

⁶⁵ 74 Fed. Reg. 8,616. Feb 25, 2009.

⁶⁶ 344 F.Supp.2d 108, 119 (D.D.C.2004) (emphasis added).



appropriate, revise such designation” of critical habitat for a species.⁶⁷ The Services rarely, if ever, revise the critical habitat of listed species in the absence of a legal challenge from a stakeholder group. Such a situation does not represent a rational, science-based approach to prioritizing revisions of critical habitat based on conservation needs. Under the proposed regulation, the Services would be required to consider revising critical habitat if a species conservation status is changed from threatened to endangered, upon the publication of a final recovery plan for a listed species, and once every ten years to coincide with the 5-year status reviews required under the Section 4(c) of the ESA. From both a biological and efficiency perspective, these are the most appropriate times for the Services to consider revising critical habitat designations. In situations where a species is formally uplisted from threatened to endangered, it is clear that such species is in need of additional conservation measures to prevent its extinction. One of the most logical steps that the Services could take when an uplisting is needed would be to designate additional critical habitat for the species.

The proposed regulation also requires the Services to consider revising their critical habitat designations if a species’ conservation trend has not significantly improved over a ten year period. Given that the length of time that recovery is projected to take often extends for multiple decades, it is not realistic for the Services to consider revising critical habitat at frequent intervals. However, if a species’ conservation status has not improved over a ten year period, this may indicate that additional critical habitat is required. Finally, revised critical habitat requirements can be informed by the completion of a recovery plan. Often, not enough is known at the time of listing to make a fully informed decision regarding the designation of critical habitat. This is the main reason that Congress provided the Services with an additional year, post-listing to designate critical habitat. The completion of a recovery plan may help to inform where additional critical habitat is required. For each of these three scenarios, the Services are given a reasonable amount of time (18 months) to make an informed decision regarding whether critical habitat should be revised, and an additional 12 months after that to complete a rulemaking process for such revisions.

Finally, this proposal also notes that *different* critical habitat may be required to ensure the conservation of a listed species than that which the Services originally proposed as critical habitat. SCB believes that it is entirely appropriate to remove critical habitat designations where the best available science indicates that the original designation was in error. Scientific research that may not have been available at the time of listing could well indicate that some habitats are not critical to the survival or recovery of a species. The proposed regulatory changes would allow the Services to address these situations where appropriate and ensure that there are no additional regulatory burdens in locations where critical habitat should not have been designated.

⁶⁷ 16 U.S.C. § 1533(a)(3)(A)(ii).



III. Under 50 C.F.R. § 424.14, Petitions to Designate and Revise Critical Habitat Must be Responded to, and Acted Upon, within a Reasonable and Limited Period of Time.

A. 50 C.F.R. § 424.14(c)(3)⁶⁸ Should be Revised to Read as Follows:

(i) Within 12 months after receiving a petition found under paragraph (c)(1) of this section to present substantial information indicating that revision of a critical habitat may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(ii) Where, at the end of the 12 month period under paragraph (c)(3)(i), and based on the information considered in paragraph (c)(2) of this subsection, the Secretary finds that a revision to critical habitat is warranted, he shall publish a proposed rulemaking to revise such critical habitat no later than 24 months after the publication of the finding required under (c)(3)(i), and shall publish a final rulemaking no later than an additional 12 months after the publication of the proposed rule.

B. 50 C.F.R. § 424.14(d)⁶⁹ Should be Revised to Read as Follows:

Petitions to designate critical habitat.

- (1) Upon receiving a petition to designate critical habitat to provide for the conservation of a species, the Secretary shall promptly conduct a review in accordance with the Administrative Procedure Act (5 U.S.C. 553) and applicable Departmental regulations.
- (2) To the maximum extent practicable, within 180 days of receiving a petition to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the designation may be warranted. The Secretary shall promptly publish such finding in the Federal Register and so notify the petitioner.
- (3) In making the finding required by paragraph (b)(1) of this section, the Secretary shall consider whether a petition contains—
 - (i) Information indicating that areas petitioned as critical habitat contain physical and biological features essential to, and that may require special management to provide for, the conservation of the species involved; or
 - (ii) Information indicating that areas petitioned do not contain resources essential to, or do not require special management to provide for, the conservation of the species involved.

⁶⁸ The current regulation at 50 C.F.R. § 424.14(c)(3) states: Within 12 months after receiving a petition found under paragraph (c)(1) of this section to present substantial information indicating that revision of a critical habitat may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

⁶⁹ The current regulation at 50 C.F.R. § 424.14(c)(d) states: *Petitions to designate critical habitat or adopt special rules.* Upon receiving a petition to designate critical habitat or to adopt a special rule to provide for the conservation of a species, the Secretary shall promptly conduct a review in accordance with the Administrative Procedure Act (5 U.S.C. 553) and applicable Departmental regulations, and take appropriate action.



- (4) (i) Within 18 months after receiving a petition found under paragraph (d)(1) of this section to present substantial information indicating that the designation of a critical habitat may be warranted, the Secretary shall determine how he intends to proceed with the requested designation, and shall promptly publish notice of such intention in the Federal Register.
- (ii) Where, at the end of the 18 month period under paragraph (d)(4)(i), and based on the information considered in paragraph (c)(3) of this subsection, the Secretary finds that a designation of critical habitat is warranted, he shall publish a proposed rulemaking to designate such critical habitat no later than 24 months after the publication of the finding required under (c)(3)(i), and shall publish a final rulemaking no later than an additional 12 months after the publication date of the proposed rule.

C. 50 C.F.R. § 424.14(e) Should be Inserted as Follows:

Petitions to adopt special rules. Upon receiving a petition to adopt a special rule to provide for the conservation of a species, the Secretary shall promptly conduct a review in accordance with the Administrative Procedure Act (5 U.S.C. 553) and applicable Departmental regulations, and take appropriate action.

D. Explanation of Proposed Revisions

The ESA requires the Services to, concurrently with the listing of a species, designate “to the maximum extent prudent and determinable” critical habitat for such species.⁷⁰ This duty is further described in Section 4(b) of the ESA by explaining that the Services are required to designate critical habitat at the time a species is listed unless critical habitat is not determinable. In this case, the Services “must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.”⁷¹ While it is clear that Congress gave the Services significant leeway to defer designating critical habitat for up to a year after the publication of a final rule listing a species as threatened or endangered (in order to obtain sufficient information to properly designate habitat),⁷² the Congress was equally clear that that critical habitat designations should occur for the vast and overwhelming majority of listed species. However, for a number of reasons, including lack of sufficient funding and a questionable interpretation of the phrase “prudent and determinable,” the Services have been unable to properly meet the mandate of Section 4 to designate critical habitat. As of April 2011, critical habitat has only been designated for 604 of the 1,372 (44%) species listed in the United States.⁷³ As has been noted by the 5th Circuit, Congress intended that the exception to not designate critical habitat would be used sparingly, but unfortunately, “the Services have inverted this intent, rendering critical habitat designation the exception and not the rule.”⁷⁴

⁷⁰ 16 U.S.C. § 1533(a)(3)(A)(i)

⁷¹ 16 U.S.C. § 1533(b)(6)(C)(ii).

⁷² 16 U.S.C. § 1533(b)(6)(C)(ii).

⁷³ USFWS 2011, Critical Habitat Fact Sheet. http://www.fws.gov/endangered/esa-library/pdf/critical_habitat.pdf

⁷⁴ *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441 (5th Cir.2001) See also H.R. Rep. No. 95-1625, at 16, reprinted in 1978 U.S.C.C.A.N. 9453, 9466 (“It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species).



Because it was likely not foreseen by Congress that the Services would fail in so many cases to designate critical habitat for listed species at the time of listing, the ESA does not contain deadlines for the Services to respond and act upon petitions to designate critical habitat for listed species. Instead, for petitions to revise critical habitat, the Secretary must make a finding within 90 days indicating whether the petition presents substantial information indicating that a review may be warranted; and within 12 months the Services must determine how they intend to proceed with the requested revision to critical habitat.⁷⁵ There are no statutory deadlines that require the Services to publish a draft rule or a final rule revising designated critical habitat within a set period of time in response to a citizen petition. Nevertheless, the ESA still requires the Services to determine how “to proceed” with a revision to critical habitat, meaning that the Services must still make progress on such a revision. Failing to act on a revision to critical habitat would not meet the definition of “to proceed.” The ESA provides no statutory direction regarding petitions to designate critical habitat, instead these fall under the general petition process of the Administrative Procedure Act (APA).⁷⁶ While the APA does not provide a strict timeline for responding to citizen petitions, it does prohibit “agency action unlawfully withheld or unreasonably delayed.”⁷⁷

The suggested changes to the regulations addressing petitions to list and revise critical habitat provide a reasonable accommodation between the ESA’s overall goal of designating critical habitat as a means of achieving recovery and the lack of strict statutory deadlines for responding to such petitions. For petitions to revise critical habitat, the proposed regulations give the Services 24 months to publish a proposed critical habitat revision upon the expiration of the 12 month review period outlined in Section 4(b)(3)(D)(ii) of the ESA, and an additional 12 months beyond that to publish a final rule. From the filing of the petition to the final revision of critical habitat, the Services would have approximately three years and ninety days, a reasonable amount of time to accomplish such a task.

For petitions to designate critical habitat, the Services would have even longer amount of time to reach the final rulemaking stage. Under this proposed regulation, the Services would have to respond to an initial petition to designate critical habitat within 180 days of receipt of such petition, 18 months to determine how they intend to proceed with the requested designation, 24 additional months to publish the proposed critical habitat, and 12 more months to publish a final rule. From the filing of the petition to the final revision of critical habitat, the Services would have approximately five years to accomplish this task, a reasonable amount of time in line with the APA’s general case law regarding agency action unreasonably delayed.

An additional subsection is added to the end of 50 C.F.R. § 424.14 to address petitions for special rules under Section 4(d). Given the paucity or even total lack of petitions for rulemakings under Section 4(d) of the ESA, a more detailed regulatory timetable does not appear warranted at this time. However, should the Services choose to establish a more detailed

⁷⁵ 16 U.S.C. § 1533(b)(3)(D)(i)-(ii).

⁷⁶ 5 U.S.C § 551 *et seq.*

⁷⁷ 5 U.S.C. § 706(1).



framework for citizen petitions under the ESA that fall under the APA, we believe that the newly proposed subsection (d) would provide a model for doing so.

CONCLUSION

Recovery, the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided by the ESA are no longer necessary, is one of the central goals of the Act. Critical habitat designations are one of the most important tools for ensuring the survival of listed species. But, in order for this tool to become effective in the recovery of listed species, the above listed changes to the regulations implementing the ESA are urgently needed. We appreciate your consideration of this petition, and would appreciate, and request a response within ninety days of receipt of this petition.

Respectfully submitted on behalf of the Society and its North America Section and ourselves as individuals,

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