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ARTICLE

CRITICAL HABITAT AT THE
CROSSROADS:

RESPONDING TO THE G.W. BUSH
ADMINISTRATION'S ATTACKS ON
CRITICAL HABITAT DESIGNATION
UNDER THE ESA

MICHAEL SENATORE, JOHN KOSTYACK & ANDREW WETZLER*

I. INTRODUCTION

If you are an environmentalist, it is always difficult to know where to focus your energies. There are a myriad of threats to our natural world and there are numerous laws and programs to address them. Assigning priorities is particularly challenging at this moment in early 2003, when the executive and legislative branches of the federal government have combined to launch a blizzard of initiatives to weaken environmental laws and programs.

In this article, we argue that the George W. Bush Administration's ("Administration") attacks on the critical habitat protections in the Endangered Species Act ("ESA") warrant priority attention from the environmental movement. Many species across the United States and, indeed, around the world, continue to slip towards extinction. As Congress recognized when it passed the ESA, the decline of most species can be

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directly traced to the destruction of their habitat.¹ Protection and restoration of ecosystems that support endangered species is thus fundamental to species conservation.

The ESA contains a number of provisions that directly and indirectly protect the habitats upon which species depend for their survival.² Of those provisions, the ESA's requirements to designate and protect a listed species "critical habitat" is one of the most important. Section 4 of the ESA requires that, with a few exceptions, critical habitat be designated for every species listed as either endangered or threatened.³ Once a species' critical habitat is established, Section 7 of the ESA prohibits federal agencies from carrying out, funding or permitting any action that is likely to result in "destruction or adverse modification" of that critical habitat.⁴ Thus, Section 7 gives federal agencies a clear mandate to protect the habitat essential for species recovery. While, the Act's prohibition on the "take" of any listed species does theoretically provide protection for species' habitat,⁵ the critical habitat provisions of ESA far and away provide the most concrete mandate in the ESA for federal agencies to advance the Act's recovery goal through habitat protection.

Unfortunately, the Administration is now systematically dismantling existing critical habitat designations — designations that were only achieved after a long-fought campaign by the environmental movement. The Administration's principal tactic is to enter behind-the-scenes settlements with industry litigants that are challenging critical habitat designations. In the typical settlement, the Administration and industry litigants agree to remand the critical habitat designations so that an expansive economic impact analysis can be carried out, and they agree that no critical habitat will be protected during the period of the remand. Thus, the Administration has consistently supported the removal of current habitat protections for imperiled species. As discussed below, these tac-

¹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

² *See generally* The Endangered Species Act §§ 2-18, 16 U.S.C. §§1531-1544 (2000).

³ The Endangered Species Act § 4, 16 U.S.C. §§1533(a)(3)(A) (2000). When designating critical habitat, the ESA's implementing regulations also require the U.S. Fish and Wildlife Service or National Marine Fisheries Service ("Services") to produce maps delineating all designated critical habitat. Drawing lines on a map gives clear guidance to the public about which lands and waters are particularly valuable to listed species. This helps educate people about the natural world they inhabit, and, more importantly, helps to ensure that key habitats are not destroyed out of sheer ignorance. 50 C.F.R. §424.12(c) (2003). The regulations recognize, however, that there are some circumstances (such as with species that are highly valued by poachers) where producing critical habitat maps would not be wise. 50 C.F.R. §424.12(a)(1)(i) (2003).

⁴ 16 U.S.C. § 1537 (2000).

⁵ *See* 16 U.S.C. § 1538(a)(B-C) (2000) *and* *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 696-698 (1995).

tics contradict both the letter and the spirit of the ESA and they deny imperiled species much needed protection.

The attacks by the current Administration are not the first difficulties environmentalists have faced implementing the ESA's critical habitat provisions. Reflecting the political controversy that often accompanies critical habitat designations, past Administrations have consistently resisted complying with the Act's habitat designation requirements.⁶ The latest attacks, however, are by far the most worrisome. The attacks are coming just as the environmental community was beginning to reap the fruits of a successful legal campaign to enforce the critical habitat duties, and just as the amount of critical habitat designations was beginning to increase substantially.

The chipping away at critical habitat protections is particularly troublesome because it is accompanied by a completely unfettered new approach to economic impact analysis. To date, the Administration has issued no regulation or policy guidance explaining its methodology for analyzing the economic impacts of designating critical habitat. Early signals from the Administration suggest that the analysis will be heavily politicized, with the United States Fish and Wildlife and National Marine Fisheries Services ("Services") emphasizing the costs of species protection while de-emphasizing the benefits. Such an analysis could provide the foundation for weakening not just critical habitat protection, but the full array of protections provided to imperiled species by the ESA, including the listing of species—an area where economic impacts are supposed to play no role.⁷

To prevent this from happening, environmentalists must understand how the ESA's critical habitat protection program got into such deep trouble, and they must devise and advocate for policy solutions that place the program on more solid footing. This article attempts to meet both of these goals.

II. EARLY AGENCY RESISTANCE TO CRITICAL HABITAT

Congress enacted the ESA in 1973 with the goal of conserving endangered and threatened species and the ecosystems upon which they depend.⁸ Habitat would be protected both through acquisition and regu-

⁶ See Oliver L. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 *COLO. L. REV.* 277, 302 (1993) (pointing out that the former administrations designated critical habitat for only sixteen percent of the listed species as of 1993).

⁷ 16 U.S.C. § 1533(b)(1)(A) (2000).

⁸ See 16 U.S.C. § 1534 (1973); see also Cong. Rec. on September 18, 1973, statement of Rep. Biaggi reprinted in Committee Print, at 202 ("[T]he bill eliminates the

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latory measures.⁹ Among the most significant regulatory measures was Section 7 of the Act, in which Congress directed each federal agency to “[i]nsure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.”¹⁰ Unfortunately, Congress neglected to define either “critical habitat” or the substantive “jeopardize the continued existence of” and “destruction or adverse modification” standards.¹¹

A. EARLY REGULATORY DIRECTION: THE 1976 GUIDELINES AND 1978 AMENDMENTS

In 1976, the Secretary of the Interior (“Secretary”) issued guidelines that defined these key terms.¹² The Secretary’s guidelines defined critical habitat as “any air, land, or water area including any elements thereof which the Secretary . . . has determined is essential to the survival of wild populations of a listed species or to its recovery.”¹³ Destruction or adverse modification of critical habitat was defined as an action that “would have a deleterious effect upon any of the constituent elements of critical habitat which are necessary to the survival or recovery of such species, and such effect is likely to result in a decline in the numbers of the species.”¹⁴

In 1978, the Secretary replaced the guidelines with regulations.¹⁵ The regulations defined critical habitat as “any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.”¹⁶ Furthermore, they specified that critical habitat included “any air, land, or water area (exclusive of those existing man-made structures or settlements which are necessary to the survival and recovery of a listed species) and constituent elements thereof, the

dollar ceilings on acquisition . . . of critical habitat areas . . . [which] represents an important philosophy in environmental legislation – namely, that if we are serious about preserving our environment we are going to have to spend some real money”) (on file with authors).

⁹ *Id.*

¹⁰ See 16 U.S.C. § 1536(a)(2) (2000).

¹¹ See M. BEAN & M. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW*, 252 (3d ed. 1997).

¹² *Id.* citing Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act, issued by the Director of the U.S. Fish and Wildlife Service on April 22, 1976.

¹³ *Id.*

¹⁴ *Id.* at 253.

¹⁵ 43 Fed. Reg. 874 (1978).

¹⁶ *Id.*

loss of which would *appreciably decrease the likelihood of the survival and recovery of a listed species* or a distinct segment of its population.”¹⁷

The 1978 regulations thus marked two important policy shifts that would plague the critical habitat program for years to come. First, by defining critical habitat as those constituent elements necessary for a species’ “survival *and* recovery,” the 1978 regulations departed from the 1976 guidelines that defined critical habitat as those elements essential to “the survival . . . of a listed species *or* to its recovery.”¹⁸ The new definition strongly implied that in the Service’s view, at least, habitat important for a species’ recovery, but not essential to its short term survival, were not part of “critical habitat.”¹⁹

Similarly, the regulations defined both the duty to avoid jeopardy and the duty to avoid adverse modification of critical habitat as an obligation not to reduce the chances of a species’ “survival *and* recovery.”²⁰ By defining these duties so similarly, the Secretary left unclear what actions would trigger one duty but not the other. We refer to this ambiguity elsewhere in this article as the “redundancy myth,” because it has allowed the Secretary to argue, despite the absence of any supporting statutory language or legislative history, that the ESA’s jeopardy and critical habitat protections are redundant.

B. CONGRESSIONAL REACTION: THE 1978 AMENDMENTS

On the heels of the 1978 regulations, Congress amended the ESA, including the provisions dealing with critical habitat.²¹ Although it did not explicitly address the 1978 regulations, Congress took a different view of the Act. The plain language of the amendments indicates that habitat important to a species recovery, but not to its mere survival,

¹⁷ *Id.* (emphasis added).

¹⁸ Director of the U.S. Fish and Wildlife Service, *Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act*, April 22, 1976 (on file with authors).

¹⁹ “Recovery” and “survival” are not recognized as having any specific meaning in the scientific literature. However, the Services have informally defined “recovery” as “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.” FISH & WILDLIFE, § 7 HANDBOOK (on file with authors). “Survival,” in contrast, has been defined as “the condition in which a species continues to exist into the future while retaining the potential for recovery.” *Id.*

²⁰ See 43 Fed. Reg. 870 (2000) (defining jeopardy as to “reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild”).

²¹ See generally R. LITTELL, *ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION*, ch. 2 (1992) (for a discussion of the ESA’s amendments starting with the 1966 enactment and continuing through to the 1988 amendments).

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should be included within critical habitat. It also made clear that the jeopardy and critical habitat protections are *not* redundant.²² Congress, for the first time, defined critical habitat as:

. . . the specific areas within the geographical area occupied by the species, at the time it is listed . . . 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 specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.²³

By clarifying that critical habitat was “essential for the *conservation* of the species,” Congress implicitly answered (in the affirmative) the question of whether habitat important for recovery, but not for mere survival, was covered by the definition.²⁴ The term “conservation” is defined as “to use and 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 pursuant to this Act are no longer necessary.”²⁵ In other words, critical habitat is that which is essential for the recovery and delisting of the species.

Unfortunately, the 1978 amendments also added ambiguous and confusing language to the ESA that gave the executive branch several rationales to evade the critical habitat provisions. There are three worth noting. First, Congress — without explanation — defined *occupied* critical habitat as habitat requiring “special management considerations or protections.” It remains unclear whether this provision imposed an additional *restriction* on the designation of critical habitat — as the Services now believes — or, if fact, *broadened* the categories of occupied critical habitat subject to designation, as many environmentalists believe.²⁶

Second, the 1978 amendments to the ESA required that critical habitat be designated “to the maximum extent prudent” at the time a spe-

²² *Id.*

²³ 16 U.S.C. § 1531 (5)(A) (i) (2000). This definition included two additional limiting provisions: 1) the designation of critical habitat for species already listed at the time of the 1978 amendments was made discretionary – effectively allowing the Secretary to avoid the designation of critical habitat for the nearly 650 species already listed; and 2) “except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by” a species. 16 U.S.C. § 1531 (5)(B-C) (2000); see S. 2899 § 2(1), *reprinted in* Committee Print, at 1170-71 (on file with authors).

²⁴ *Id.*

²⁵ *Id.* at 1532(3).

²⁶ See generally *Center for Biological Diversity v. Norton*, 240 F.Supp.2d 1090 (D. Ariz. Jan. 13, 2003).

cies is listed.²⁷ Although this provision imposes a rigorous deadline on the Services, the inclusion of the word "prudent" created a loophole.²⁸ Exploiting that loophole, the Services repeatedly refused to designate critical habitat when listing species, finding instead that the designations were not then "prudent."²⁹

Finally, Congress required the Secretaries to "consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat."³⁰ Moreover, the Secretary was authorized to "exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species."³¹ While largely ignored for nearly twenty years following their enactment, these provisions have recently been the focus of numerous successful lawsuits brought by industry groups challenging the economic analyses accompanying critical habitat designations. As discussed below, the Administration has acquiesced to these challenges and signaled its desire to make economic analysis a major focus of its ESA program.

C. REGULATORY RESPONSE: THE 1986 REGULATIONS

The first update of the critical habitat regulations after the 1978 statutory amendments came in 1986, when the Services promulgated regulations significantly limiting the role of critical habitat in protecting species.³² Ignoring the central role that Congress had assigned to critical

²⁷ 16 U.S.C. § 1533(a)(3) (2000). Congress also inserted a provision allowing the Service to postpone critical habitat designations by no more than a year in the event that the species critical habitat was not then "determinable." *Id.*

²⁸ As discussed below, this rationale was eventually rejected by the courts. *See, e.g.,* *Natural Resources Defense Council v. United States Dept. of the Interior*, 113 F.3d 1121, 1123 (9th Cir. 1997). As the Ninth Circuit recognized, the legislative history shows that this was meant to be a limited exception exercised only when the designation of critical habitat would not be in the "best interest" of the species. *Id.*

²⁹ *See* H.R. Rep. No. 1625 at 16, reprinted in Committee Print, at 740. *See also* H.R. Rep. No. 1625 at 17, reprinted in Committee Print, at 741 ("It is only in rare circumstances where the specification of critical habitat concurrently with the listing is not beneficial to the species"), H.R. Conf. Rep. No. 1804, 95th Cong. 2d Sess. 27 (1978), reprinted in Committee Print, at 1218. *See also* H.R. Rep. No. 1625 at 17, reprinted in Committee Print, at 741 (For example, it would not be "prudent" to designate critical habitat if a collector could use that information to better locate and collect individuals of that species).

³⁰ 16 U.S.C. § 1533(b)(2) (2000).

³¹ *Id.*

³² *See* 51 Fed. Reg. 19926 (1986); *see also supra* note 6 at 299; E. Perry Hicks, *Note: Designation Without Conservation: the Conflict Between the Endangered Species Act and its Implementing Regulations*, 19 VA. ENVTL. L.J. 491, 492 (2000).

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habitat in the recovery of listed species, the regulations effectively removed habitat needed for recovery from the scope of critical habitat protection.

Under the 1986 regulations, before an action can be viewed as destroying or adversely modifying critical habitat, it must “appreciably diminish the value of critical habitat for *both* the survival and recovery of a listed species.”³³ By inserting the word “both” into the definition of adverse modification, the Services thus found that any federal action that harms habitat needed for recovery, but not needed for survival, would not be prohibited by the ESA’s critical habitat provisions.³⁴

III. THE ENVIRONMENTALISTS’ ENFORCEMENT CAMPAIGN

For roughly six years after the promulgation of the 1986 regulations, the Services treated critical habitat as an obscure, and easily ignored, component of the ESA.³⁵ Indeed, between 1986 and the end of President George H.W. Bush’s Administration, the Services designated critical habitat for a mere fourteen species.³⁶ The Services listed over 250 species during that same time period.³⁷

As the Bush Senior Administration yielded to the Clinton Administration, however, there were hopeful signs that critical habitat designation might yet take the central place in the efforts to conserve endangered species that the framers of ESA intended.³⁸ The Clinton Administration was plainly more sympathetic to the environmental movement than the Bush Senior Administration had been, and the President’s early appointments — such as the tapping of League of Conservation Voters president Bruce Babbitt to be Secretary of the Interior — certainly portended a fundamental shift in attitude towards land conservation.³⁹ There were also other hopeful signs. Early on in the Clinton Administration, the Service designated critical habitat for the Northern spotted owl.⁴⁰ Al-

³³ 50 C.F.R. § 402.02 (2003) (emphasis added).

³⁴ The 1986 regulations was thus another expression of the Services view of the jeopardy and critical habitat provisions as essentially redundant.

³⁵ WILLIAM H. RODGERS JR., *ENVIRONMENTAL LAW* § 9.9 NEPA Compliments – Habitat Designation (2d ed. 1994).

³⁶ See *supra* note 6.

³⁷ A chart showing each critical habitat designation issued by the Fish and Wildlife Service from 1986 until the present, and summarizing that data by Presidential Term is on file with the authors.

³⁸ A. Kimberly Rockwell, *The Fifth Amendment Implications of Including Habitat Modification in the Definition of Harm to Endangered Species*, 11 J. LAND USE & ENVTL L. 573, 602-603 (1996).

³⁹ *Id.*

⁴⁰ 50 C.F.R. Part 17, 57 Fed. Reg. 1796-1801 (1992).

though the designation was prompted by a lawsuit⁴¹ (and smaller than originally proposed), the designation's emphasis on the central role the critical habitat plays in species recovery seemed to signal that the Service was finally moving in the direction long advocated by environmentalists.⁴²

Unfortunately, whatever hopes environmentalists had placed in the new Administration's willingness or ability to promote critical habitat were short lived. In the first two years of the Clinton Administration, a combination of regulated industries, "wise use" groups, and "property rights" think tanks mounted a campaign to weaken the ESA.⁴³ The timber industry, for example, mounted a broad-based legal challenge to the habitat protections in the ESA's "take" regulations.⁴⁴ Meanwhile, vocal opponents of the ESA went to the floor of Congress to attack the DOI's biological survey, claiming that it was engaged in a search for endangered species on private property as part of a massive federal land grab. In 1994, many of these opponents secured key positions of power, as the "Gingrich revolution" gave anti-regulatory Republicans control of the House of Representatives. It was in this context that the Clinton Administration launched a series of initiatives to promote habitat conservation plans and other collaborative and "user-friendly" conservation tools.⁴⁵

Controversial and high profile critical habitat designations, however, did not fit in with this new cooperative emphasis, and like the Bush Senior Administration before it, the Clinton Administration slowly but surely began to try to sweep critical habitat under the rug. For the vast majority of new species listed, the U.S. Fish and Wildlife Service ("Service" or "FWS") simply avoided critical habitat designations ostensibly because designation was not "prudent" or critical habitat was not then "determinable." While the latter determination theoretically obligated

⁴¹ See generally *Northern Spotted Owl v. Lujan*, 758 F.Supp. 621 (W.D. Wash. 1991).

⁴² See *supra* note 40 ("critical habitat serves to preserve options for a species' eventual recovery...[It] helps focus conservation activities by identifying areas that contain essential habitat features (primary constituent elements) regardless of whether or not they are currently occupied by the listed species, thus alerting the public to the importance of an area in the conservation of a listed species"). *Id.* The considerable controversy that surrounded the designation, however, foretold of the battles to come. See Rudy Abramson, U.S. Designates Owl Habitat but Acreage Is Cut, *THE L.A. TIMES*, p. A1 (Nov. 19, 1992) (quoting a representative of the American Forest Resource Alliance referred to the designation as "a legal lynching of an entire region by an out-of-control federal agency").

⁴³ See *supra* note 38.

⁴⁴ See generally *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

⁴⁵ See "No Surprises" Rule, 63 Fed. Reg. 8859 (Feb. 23, 1998).

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the Services to issue a proposed critical habitat designation within a year, the Services often ignored this deadline.

Faced with the Services' failure to designate critical habitat and buoyed by their success in the *Northern Spotted Owl*⁴⁶ case, environmentalists went to court. Early success in enforcing the ESA's deadlines quickly attracted the attention of the new Republican majority in the House, which was eager to scale back the ESA.⁴⁷ Aided by conservative Democrats from western states, in early 1995 Congress enacted Public Law 104-6, which placed a moratorium on final listing determinations and critical habitat designations.⁴⁸ Although funding for the Service's listing and critical habitat activities was restored in 1996, the hostility that Republican majority and many Democrats had for the designation of critical habitat was unmistakable.⁴⁹ Moreover, the view of critical habitat in the DOI was not much more charitable. The DOI repeatedly characterized the critical habitat provisions as redundant with the jeopardy protection and thus of little or no value.

Indeed, between 1995 and 1999 — well after Congress lifted the moratorium — the Service did not designate critical habitat for a single species without being ordered to do so by a court.⁵⁰ The courts did not receive the Service's intransigence well. Virtually all of the courts found the government's excuses for failing to designate critical habitat illegal. Indeed, there were soon dozens of judgments against the Service, overturning its own decisions not to designate critical habitat for a wide variety of species.⁵¹

The Service's response was not, however, to abandon its refusal to designate critical habitat for listed species. Instead, the Service responded by revising — and greatly expanding — internal guidelines it had enacted in the early 1980s to set priorities among species for their

⁴⁶ 758 F. Supp. 627-28.

⁴⁷ See, e.g., Margaret Kriz, *Newt's Dog and Pony Show*, *National Journal*, p. 1004 (April 22, 1995) and Ron Seely, *The Endangered Species Laws Face Extinction: Republican Congress Aims to Cut Environmental Costs*, *Wisconsin State Journal*, p. 1A (Dec. 11, 1995) (for examples of the 104th Congress' attacks on the ESA).

⁴⁸ Public Law No. 104-6, 109 Stat. 73, 86 (April 10, 1995); see generally *Environmental Defense Center v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995).

⁴⁹ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

⁵⁰ See, e.g., *Natural Resources Defense Council v. United States Dept. of the Interior*, 113 F.3d 1121, 1123 (9th Cir. 1997).

⁵¹ See, e.g., *Southwest Center for Biological Diversity v. Babbitt*, CIV-96-2317-PHX (D. Ariz. March 19, 1997); *Southwest Center for Biological Diversity v. Babbitt*, Case No. 96-1170-IEG (S.D. Cal. Feb. 24, 1996); and *Defenders of Wildlife v. Rogers*, CIV 96-2045 (D. Ariz. May 16 1997).

listing, delisting, reclassification, and the issuance of recovery plans.⁵² While the 1983 Priority Guidelines set priorities for *species*, it did not prioritize the various listing-related *activities* undertaken by the Service with respect to those species.⁵³ Its new rule, known as the Service's "Listing Priority Guidance" or "LPG," expanded these guidelines by setting priorities *between* the Service's statutorily mandated listing activities.⁵⁴ The Service assigned the lowest priority to the designation of critical habitat.⁵⁵

Relying upon its new policy, the Service began to argue that it had the discretion not to designate critical habitat in deference to other, higher priority, obligations, such as listing new species. The Service's LPG did not fare very well in court, however. Indeed, throughout the remainder of the 1990s courts consistently rejected the Service's reliance upon the LPG. For example, in *Forest Guardians v. Babbitt*, the Tenth Circuit held that the Service "violated [its] non-discretionary duty by failing to designate the critical habitat for the Rio Grande silvery minnow by the statutory deadline."⁵⁶ The court ordered the Service "to comply with [its] statutory duty to publish a final regulation . . . without regard to [its] preferred priorities."⁵⁷

In June 1999, the Service changed tactics again, publishing a revised "Final Listing Priority Guidance for fiscal year 2000."⁵⁸ In its revised LPG, the Service removed critical habitat designation from the listing priority guidance entirely, stating that critical habitat designations would now be conducted, and funded, separately.⁵⁹ This latest revision

⁵² See Endangered and Threatened Species Listing and Recovery Priority Guidelines for Fiscal Years 1998 and 1999, 48 Fed. Reg. 43098 (Sept. 21, 1983).

⁵³ *Id.*

⁵⁴ See, e.g., Final Listing Priority guidance for Fiscal Year 1997, 61 Fed. Reg. 64475 (Dec. 5, 1996). See also Final Listing Priority Guidance for Fiscal Years 1998 and 1999, 63 Fed. Reg. 25502 (May 8, 1998).

⁵⁵ See 61 Fed. Reg. at 64474. See also 63 Fed. Reg. at 25510.

⁵⁶ *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1193 (10th Cir. 1999).

⁵⁷ See also *Conservation Council for Hawaii v. Babbitt*, 24 F.Supp.2d 1074, 1078 (D. Hawaii 1998) (ordering the Service to designate critical habitat for 245 species of plants); *Southwest Center for Biological Diversity v. Babbitt*, Case No. 98-1009-IEG (POR) (S.D. Cal. Dec. 23, 1998) (Supp. ER at 25) (holding that "[i]n light of the clear deadlines laid out in the regulatory scheme, the Court has no choice but to grant plaintiffs' request for an injunction requirement defendants' compliance with the ESA."); and *Southwest Center for Biological Diversity v. Babbitt*, Case No. 96-2317-PHX-RGS (D. Ariz. March 19, 1997) (Supp. ER at 44) (holding that "Congress set forth in the ESA specific time periods for making certain decisions and those time periods must be followed").

⁵⁸ 64 Fed. Reg. 57114 (Oct. 22, 1999).

⁵⁹ *Id.* at 57118. This change in tactics was probably in reaction to two Circuit Court opinions. First, in *Environmental Defense Center*, the Ninth Circuit noted that the 1995 moratorium made it impossible for the Service to designate critical habitat for the California red-legged frog. 73 F.3d at 872. Picking up on this theme, in *Forest*

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to the Service's LPG was soon followed by Congressional action. A rider attached to the DOI's 2001 Appropriations Bill, sought by the Secretary of the Interior, placed a cap on funding for listing species and designating critical habitat.⁶⁰ With a cap on its funding and an increasing load of critical habitat designations,⁶¹ the Service could now argue that its limited funding made it impossible to accelerate the pace at which it was designating critical habitat.

Additionally, the Services adopted two entirely new tactics. First, it began excluding large parcels of land from critical habitat designation, arguing that they did not meet the definition of critical habitat. Under the Service's theory, occupied habitat that is already protected by other agreements — such as habitat conservation plans, natural resource management plans, or as parks or other restricted-use areas — did not meet the definition of "critical habitat" because those lands did not require any "special management considerations or protections."⁶²

Second, the Services began to change the way it mapped critical habitat. For example, when the FWS designated critical habitat for the coastal California gnatcatcher the FWS relied on very broad maps while, at the same time, being very clear that many of the areas it mapped did not actually constitute critical habitat.⁶³ Moreover, the Service never identified, or even estimated, the total acreage of those areas that actually constituted critical habitat.⁶⁴ This approach effectively evaded the Ser-

Guardians the Tenth Circuit noted that if the Secretary of Interior could demonstrate, due to a lack of funds, the actual "impossibility" of designating critical habitat for a particular species, that defense might have merit. 174 F.3d at 1192. Presumably the, by funding critical habitat designations out of an entirely segregated (and quite modest) pot of money, the Service was setting itself up to argue actual impossibility once those funds were depleted or otherwise spoken for.

⁶⁰ Secretary Babbitt had requested such a rider each year for the four previous budget cycles. *See generally*, Weiner, Heather, Memorandum, "ESA RIDER on Interior Funding Bill," EarthJustice Legal Defense Fund (May 30, 2000) (on file with the authors).

⁶¹ By 2000 the Service had been ordered to designate critical habitat for dozens of species across the country and, in a single case, for over a hundred plant species in Hawaii. *See Conservation Council for Hawaii*, 24 F.Supp.2d 1074, 1078-80.

⁶² *See, e.g.*, "Final Determination of Critical Habitat for the Coastal California Gnatcatcher," 65 Fed. Reg. 63680, 63688 (Oct. 24, 2000) (excluding Habitat Conservation Plan lands and military lands with Integrated Natural Resource Management Plans from critical habitat designation.). *See also generally* Center for Biological Diversity 240 F.Supp.2d 1090 (overturning exclusion of Mexican Spotted Owl habitat under the same theory).

⁶³ Proposed Determination of Critical Habitat for the Coastal California Gnatcatcher," 65 Fed. Reg. 5946, 5950 (Feb. 7, 2000) (noting "[w]e did not map critical habitat in sufficient detail to exclude all developed areas ... and other lands unlikely to contain primary constituent elements essential for gnatcatcher conservation").

⁶⁴ *Id.*

vice's obligation to make determinations about what specific parcels of land are, and are not, included within a critical habitat designation.⁶⁵

Despite these new tactics, however, by the end of the Clinton Administration the environmentalists' enforcement campaign had unquestionably begun to pay dividends. The Service finally had made progress—albeit generally under court order—in designating critical habitat. In President Clinton's second term of office (roughly from the time that funding for critical habitat designation was restored), the Service designated critical habitat for twenty-eight species. More importantly, in its 2000 Listing Priority Guidance, the Service announced that it had reduced much of the backlog of critical habitat designations that resulted from the 1995 moratorium.⁶⁶ In part, the progress the Clinton Administration made was apparently the result of its judgment that it could no longer continue to resist critical habitat designations in the face of so many legal defeats and simply had no choice but to begin designating critical habitat. Following the 2000 listing priority guidance, the proliferation of critical habitat designations around the country was about to take on new importance, and new controversy, as a major court ruling finally seemed to give teeth to the ESA's critical habitat provisions.

IV. SIERRA CLUB V. U.S. FISH AND WILDLIFE SERVICE: EXPLODING THE MYTH OF REDUNDANCY

As noted earlier, by defining “jeopardy” and “adverse modification” in nearly identical terms in its 1978 and 1986 regulations, the Services had structured a regulatory environment in which the jeopardy and adverse modification prongs were redundant — and thus valueless. In short, through these regulations, and subsequent legal and policy debates that relied on them, the Services had effectively written the critical habitat provision of the ESA out of the Act.⁶⁷

⁶⁵ See also Proposed Critical Habitat for Nine Evolutionarily Significant Units of Steelhead in Washington, Oregon, Idaho and California, 64 Fed. Reg. 5740, 5744 (Feb. 5, 1999). In June of 1999, the Service issued a “Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation.” *Id.* In its notice, the Service discussed the possibility of retreating from very precise “map-based” delineations of critical habitat to a “more general habitat location delineations and broad descriptions of habitat types,” including descriptions based on “habitat types, elevation, and riparian areas.” 64 Fed. Reg. at 31,873 (June 14, 1999).

⁶⁶ 64 Fed. Reg. at 57,115 (Sept. 21, 1999) (noting that the Service's listing activities have “returned to a more balanced listing program and have reduced the serious backlogs that remained from the 1995-96 moratorium and funding rescission”).

⁶⁷ See Katherine Simmons Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811, 840 (1990) (“Despite this seemingly clear creation of a two-pronged mandate in the statute to prevent jeopardy to species and adverse modification of critical habitat, the regulations appear to collapse the two

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In *Sierra Club v. U.S. Fish and Wildlife Service*, plaintiffs attacked the Service's failure to designate critical habitat for the gulf sturgeon and, in doing so, challenged this redundancy myth.⁶⁸ The Service had initially refused to designate critical habitat for the sturgeon, finding that such designation would provide little additional benefits to the species, and thus would not be prudent.⁶⁹

The Service's conclusion was, of course, premised upon its own regulations defining the jeopardy and adverse modification prongs. According to the court,

the Service[] reasoned that virtually any federal action that would adversely modify or destroy the Gulf sturgeon's critical habitat would also jeopardize the species' existence and trigger jeopardy consultation. Relying on the definitions of the destruction/adverse modification and jeopardy standards in 50 C.F.R. § 402.02, the Service[] concluded that designation of critical habitat would provide no additional benefit to the sturgeon beyond the protections currently available through jeopardy consultation.⁷⁰

The Fifth Circuit overturned the Service's finding, holding that the regulation on which the Service relied was illegal. Specifically, the Fifth Circuit held that, instead of defining "adverse modification" an activity that threaten *both* a species survival *and* recovery of a listed species, "adverse modification" must be defined instead to encompass activities that threaten a species' recovery alone.⁷¹ Thus, the Court held:

The ESA defines "critical habitat" as areas which are "essential to the conservation" of listed species. Conservation is a much broader concept than mere survival. The ESA's definition of "conservation" speaks to the recovery of a threatened or endangered species. . . . Requiring consultation only where an action affects the value of critical

prongs into a single 'no jeopardy' standard"). See *supra* note 6 at 299 ("With this sleight of hand, Interior has equated the modification of critical habitat with jeopardy. No separate protection is provided for critical habitat"). See also E. Perry Hicks, Note, *Designating Without Conservation: The Conflict Between the Endangered Species Act and its Implementing Regulations*, 19 VA. ENVTL. L. J. 491, 494 (2000) ("Although the ESA establishes these two substantively distinct prongs, the 1986 DOI regulations conflate them into one standard").

⁶⁸ *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001).

⁶⁹ *Id.* at 437-48.

⁷⁰ *Id.* at 439.

⁷¹ *Id.* at 441-42.

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habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.⁷²

In addition to finding that the Service's definition of adverse modification violates the plain meaning of the statute, the Fifth Circuit also recognized that it is inconsistent with the Act's legislative history.⁷³

The court noted that Congress amended the ESA in 1978, in part to define the term "critical habitat."⁷⁴ Before the 1978 amendments, the Service defined critical habitat through regulation as "any air, land or water area . . . the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population . . ."⁷⁵ The Service's regulations thus implicitly foreclosed a finding of adverse modification where an action would reduce the likelihood of a species recovery, but not its short-term survival.⁷⁶

According to the court, when Congress amended the ESA, it rejected this approach, instead centering its definition of critical habitat on a species' conservation, not its short-term survival.⁷⁷ "The Service's definition of the destruction/adverse modification standard in terms of survival and recovery" is "an attempt to revive an interpretation [of the ESA] that was rejected by Congress."⁷⁸ Accordingly, and "[g]iven the extent to which 50 C.F.R. § 402.02 permeates the 1998 [Gulf sturgeon critical habitat] decision," the Court struck down the Service's conclusion that it was not prudent to designate critical habitat for the sturgeon.⁷⁹

The implications of *Sierra Club* are profound. Under the court's reading of the statute, the designation of critical habitat imposes a significantly more stringent conservation standard than merely listing a species and applying the jeopardy standard. Not only had environmental plaintiffs now secured significant critical habitat designations across the country, but it now looked as if those designations might have real consequences in the way wildlife was managed.

V. GEORGE W. BUSH ADMINISTRATION ATTACKS

The convergence of two events, however, would ultimately undo many of the critical habitat designations that environmental plaintiffs had

⁷² *Id.* (emphasis in the original).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 50 C.F.R. § 402.02 (1978); *Sierra Club*, 245 F.3d at 442.

⁷⁶ See H.R. Rep. No. 95-1625, at 7-8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9458 (1978).

⁷⁷ *Sierra Club*, 245 F.3d at 443.

⁷⁸ *Id.*

⁷⁹ *Id.*

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fought so hard to secure, and set the stage for the current round of policy debates and litigation. The first event was the election of George W. Bush and his appointment of officials at the U.S. DOI⁸⁰ with a record of both hostility to the ESA and close alignment with the interests of real estate development, mining, logging, and other industries.⁸¹ The second event was the issuance of *New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*.⁸² This ruling would provide the Bush Administration with an opportunity to undo much of the progress environmentalists had made on critical habitat and to begin to reshape critical habitat into a tool for undermining species conservation.

As discussed above, before the Service may designate critical habitat for a species, it must first take into account the "the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."⁸³ This is the only language in the statute explicitly calling for the Service to take economic effects into account in deciding the scope of a species protection measure.⁸⁴

Unfortunately, nothing in the Act provides the Service with guidance about what economic impacts it should consider, and how they should affect the scope of a critical habitat designation.⁸⁵ The Service, therefore, developed its own methodology known as the "baseline approach."⁸⁶

Under this methodology any economic impact attributable to the listing of the species (and the protections that apply automatically upon listing, such as the jeopardy and take prohibitions) is expressly excluded

⁸⁰ See White House President George Bush; Bush Administration by Name, available at www.whitehouse.gov/news/nominations (last visited April 27, 2003) (discussing presidential appointments).

⁸¹ See Federal Courts Overturn Habitat Protections, Per Bush Request, available at www.nrdc.org/bushrecord/wildlife_species.asp#1307 (last visited April 27, 2003). See also Politics & Issues Bush's Record Endangered Species Act Under Firs From President Bush, available at <http://www.sierraclub.org/politics/bush/species.asp> (last visited April 27, 2003) (for general comments regarding President George W. Bush and his political record on the environment, the Endangered Species Act, and his favoritism of industry).

⁸² *New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). [hereinafter "New Mexico Cattle Growers"].

⁸³ 16 U.S.C. § 1533(b)(2) (2002).

⁸⁴ *Supra* note 2.

⁸⁵ *Id.*

⁸⁶ *New Mexico Cattle Growers*, 248 F.3d at 1280. The baseline approach utilized by the U.S. Fish and Wildlife Service is premised on the idea that the listing of the species (which will occur prior to or simultaneously with the [critical habitat designation]) will have economic impacts that are not to be considered. *Id.* The primary statutory rationale for this position comes from 16 U.S.C § 1533(b)(1)(A). Listing determinations be made "solely on the basis of the best scientific and commercial data available." *Id.*

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from consideration.⁸⁷ Take this example: The Service wants to designate 10 acres in XYZ County as critical habitat for a distinct population of brown bears, recently listed as threatened. Economic analysis suggests that there will be a \$100 cost associated with that designation. The same analysis, however, also concludes that \$75 of that \$100 cost will also result from the regulations associated with listing the brown bear. Under the baseline approach, the Service calculates the cost of designating critical habitat for the brown bear as \$25 (\$100 less the \$75 "baseline").

The use of the baseline approach was not without controversy. Developers and other industry groups maintained that the Act requires the Service to calculate *all* of the economic costs of designating critical habitat, regardless of whether those costs might also be caused by other provisions of the Act. Environmentalists supported the baseline approach; however, they faulted the Service's avoidance of economic analysis altogether based on the false assertion that critical habitat and jeopardy standards are redundant.

In *New Mexico Cattle Growers*, industry plaintiffs challenged the designation of critical habitat for the southwest willow flycatcher.⁸⁸ Specifically, they targeted the Service's economic analysis, which concluded that there would be *no* costs associated with the designation.⁸⁹ The Service arrived at this conclusion by combining the baseline method and the Services' "long held policy position that [critical habitat designations] are unhelpful, duplicative, and unnecessary."⁹⁰ Indeed, by the Services' reckoning, there could rarely be *any* economic impacts attributable solely to the designation of critical habitat "because all actions that result in adverse modification of critical habitat will also result in a jeopardy decision."⁹¹

The Service defended the baseline approach principally by arguing that without it, the Service would be forced to inject economic considerations into the listing process⁹², which the ESA prohibits.⁹³ The Tenth

⁸⁷ *Id.* at 1280, 1283 ("The baseline approach adopted by the FWS utilizes a "but for" method for determining what economic impacts flow from the [critical habitat designations]. Thus, unless an economic impact would not result but for the [critical habitat designations], that impact is attributable to a different cause (typically listing) and is not an "economic impact . . . of specifying any particular area as critical habitat").

⁸⁸ *Id.* at 1280.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1283.

⁹¹ *Id.* at 1283-84 (quoting DIVISION OF ECONOMICS, U.S. FISH AND WILDLIFE SERVICE, ECONOMIC ANALYSIS OF CRITICAL HABITAT DESIGNATION FOR THE SOUTHWESTERN FLYCATCHER, S3 (1997)).

⁹² *Id.* at 1285.

⁹³ See 16 U.S.C. § 1533(b)(1)(A) (2000) (requiring listing determinations to be made "solely on the basis of the best scientific and commercial data available").

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Circuit rejected this argument, holding that “Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes.”⁹⁴

The impact of the *New Mexico Cattle Growers* decision extends well beyond the willow flycatcher and the Tenth Circuit. Because virtually every critical habitat designation has relied upon the baseline method, nearly all of the designations secured by environmentalists in recent years were now open to legal challenge, and, as discussed below, various industry groups have been quick to exploit this opportunity. More importantly, the Bush Administration has eagerly embraced the Tenth Circuit’s decision, while assiduously ignoring the holding in *Sierra Club*.⁹⁵ Without soliciting public comment or waiting for the judgment of any other Circuit Court, it has quietly adopted *New Mexico Cattle Growers* as Administration policy, setting the stage for numerous other successful critical habitat challenges.⁹⁶

National Association of Home Builders v. Norton was the first case where this new policy manifested itself.⁹⁷ Industry plaintiffs challenged the designation of critical habitat for the cactus ferruginous pygmy-owl arguing, among other things, that the Service had failed to adequately

⁹⁴ *New Mexico Cattle Growers*, 248 F.3d at 1285. The Tenth Circuit made clear, however, that its rejection of the baseline approach was largely motivated by the fact that employing this method in tandem with the Service’s definitions of jeopardy and adverse modification “renders any purported economic analysis done utilizing the baseline approach virtually meaningless.” *Id.* As the Tenth Circuit explained: “[T]he root of the problem lies in the FWS’s long held policy position that [critical habitat designations] are unhelpful, duplicative, and unnecessary *Id.* In turn, the policy position of the FWS finds its root in the regulations promulgated by the FWS in 1986 defining the meaning of both the ‘jeopardy standard’ (applied in the context of listing) and the ‘adverse modification standard’ (applied in the context of designated critical habitat) *Id.* “[T]he standards are defined as virtually identical, or, if not identical, one (adverse modification) is subsumed by the other (jeopardy) While these regulatory definitions are not before us today, they have been the cause of much confusion in that they inform the FWS’s interpretation of the ESA’s economic impact language.” *Id.* at 1283.

⁹⁵ *Sierra Club*, 245 F.3d 434 (5th Cir. 2001).

⁹⁶ Under the practice of intercircuit nonacquiescence, if an agency position is rejected in one circuit, “it should have a reasonable opportunity to persuade other circuits to reach a contrary conclusion.” *Johnson v. U.S. Railroad Retirement Board*, 969 F.2d 1082, 1093 (D.C. Cir. 1992). Thus, the Bush Administration could have taken the position that it would only follow *New Mexico Cattle Growers* in the Tenth Circuit, and disagreed with its application in the pygmy-owl case which was filed in the Ninth Circuit, rather than adopt it wholeheartedly as Administration policy to be followed nationwide.

⁹⁷ *Nat’l Ass’n of Home Builders v. Norton*, NO. Civ.A.-00-0903-PHX-SRB, 2001 LEXIS 24817, (D. Ariz. Sept. 19, 2001).

consider the economic impacts of its designation.⁹⁸ The case proceeded through briefing on cross motions for summary judgment with the government defending its designation as expected.⁹⁹ Then, with the ink barely dry on *New Mexico Cattle Growers*, the Service filed a motion for partial voluntary remand of the critical habitat designation, arguing that it no longer believed the designation was lawful.¹⁰⁰ Citing *New Mexico Cattle Growers*, it argued that “[i]n light of this recent decision, the Service . . . is prepared to remand the pygmy-owl critical habitat designation, reconsider its existing economic analysis for the pygmy-owl critical habitat, and to use the new economic analysis in the balancing process required by ESA section 4(b)(2).”¹⁰¹ The court granted the government’s motion.¹⁰²

Following the willow flycatcher and pygmy-owl decisions, additional lawsuits were filed challenging critical habitat designations on similar grounds for many other species.¹⁰³ The Administration’s response in virtually all of these lawsuits has been the same.¹⁰⁴ The Administration has agreed to voluntarily reconsider the challenged designations and has asked the court to set the existing designation aside pending

⁹⁸ Plaintiffs also raised a number of additional issues concerning the adequacy of the critical habitat designation which were not resolved by the court and which have been raised repeatedly by industry plaintiffs in other cases. These issues and their potential impact on the future of critical habitat’s role in the conservation of listed species are discussed below. *Id.*

⁹⁹ *Id.* at 1.

¹⁰⁰ *Id.* The Service asked the court to remand the critical habitat designation for the cactus ferruginous pygmy-owl in order to recalculate the economic impact analysis in efforts to comply with the ESA. *Id.*

¹⁰¹ See Defendants’ Motion for Partial Voluntary Remand of Critical Habitat Designation, National Association of Home Builders, et al., v. Norton, et al., CV No. 00-0903-PHX-SRB.

¹⁰² Nat’l Ass’n of Home Builders v. Norton, 2001 U.S. Dist. LEXIS 24817 (D. Ariz. Sept. 19, 2001).

¹⁰³ See Nat’l Ass’n of Home Builders v. Evans, NO. CIV. A. 00-2799 (CKK), 2002 LEXIS 25521, (D.D.C. April 24, 2002) (adopting consent decree proposed by plaintiffs and the government remanding and setting aside critical habitat for several species of Pacific salmon and steelhead). See *N.R.D.C. v. U.S. Department of the Interior*, No. 99-5246 (C.D. Cal. June 11, 2002) (granting in part government’s motion for voluntary remand to reconsider California coastal gnatcatcher critical habitat designation but denying request to vacate existing rule pending remand). See *Home Builders Ass’n of N. Cal. v. U.S. Fish and Wildlife Service*, No. 01-5722 (E.D. Cal. July 2, 2002) (denying government’s motion for voluntary remand regarding designation of critical habitat for the Alameda whipsnake). See *Home Builders Ass’n of N. Cal. v. Norton*, No. 01-1291 (D.D.C. November 6, 2002) (adopting consent decree proposed by plaintiffs and government vacating and remanding critical habitat for the red-legged frog). See also *Bldg. Indus. Legal Defense Found. v. Norton*, 231 F. Supp.2d 100 (D.D.C. 2002) (granting government’s motion to voluntarily remand and set aside critical habitat for the Riverside fairy shrimp and Arroyo southwestern toad).

¹⁰⁴ *Id.*

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promulgation of a new rule.¹⁰⁵ Between the Service's position and the Administration's position, efforts by environmental intervenors to overturn the settlement agreements, or provisions removing critical habitat protections while reconsideration of challenged designation occurs, have been largely unsuccessful.¹⁰⁶

VI. WHERE DO WE GO FROM HERE?

This article has described the many hurdles that have been placed in front of effective critical habitat protection over the years. Many of these have been swept aside as citizens have gone to the courts and courts have upheld the letter and spirit of the ESA. But the latest hurdle — the Bush Administration's nearly wholesale undoing of critical habitat designations at the behest of economic interests — is perhaps the most daunting challenge of them all.

The Administration's adoption of the *New Mexico Cattle Growers* ruling means that virtually all of the critical habitat designations across the country may need to be redone, draining precious resources away from species that have never had a designation in the first place. In addition, the Administration's unwillingness to keep critical habitat protections in place during the remand periods means that habitat needed for species recovery will lose vital protection for years at a time. Moreover, in light of the Administration's demonstrated hostility to the ESA, this methodology will likely be used to overstate the costs and downplay the benefits of critical habitat designation and other key protections for imperiled species.

We set forth below our proposals for legislative or regulatory change needed to avert a crisis with the critical habitat program and to place the program on a more solid footing for the long term.

¹⁰⁵ *Id.*

¹⁰⁶ This seems not only to be a function of the legal environment created by the *New Mexico Cattle Growers* case, but also a result of largely secret negotiations between industry plaintiffs and compliant defendants. For example, in *Home Builders Ass'n of N. Cal.*, the Fish & Wildlife Service refused to let environmental groups participate in settlement talks between the parties, despite the fact that they had been granted intervenor status. *Personal communication* with Michael Sherwood, Senior Attorney, Earth Justice Legal Defense Fund (Feb. 18, 2003) (on file with authors).

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A. REDEFINE “ADVERSE MODIFICATION” TO AFFIRM THAT THE CRITICAL HABITAT TOOL IS DESIGNED TO PROTECT HABITAT NEEDED FOR SPECIES RECOVERY.

Two years ago, the court in *Sierra Club v. U.S. Fish and Wildlife Service* held that critical habitat serves the goal of species recovery, and comes into play even when species survival is not immediately affected.¹⁰⁷ For this reason, the court struck down the 1986 regulation defining “adverse modification” of critical habitat, which limited the application of critical habitat to actions affecting both recovery and survival.¹⁰⁸

As of this writing, the Administration still has not responded to this court ruling. In fact, despite its extensive behind-the-scenes policy making on species-specific critical habitat determinations, it has never enunciated and sought public comment on its overall approach to critical habitat. To date, its species-specific actions have moved in a direction opposite from what the court in *Sierra Club* suggested was necessary. Rather than using critical habitat in a manner that furthers species recovery, it has rolled back critical habitat protections.

Regulatory action is needed now to redefine “adverse modification” of critical habitat consistent with the Fifth Circuit’s decision in *Sierra Club*. If the Administration believes that critical habitat means something other than habitat essential to a species recovery, then it is obliged to state what that meaning is, and explain how the ESA would achieve its recovery goal in the absence of the critical habitat tool.

B. DEVELOP AN ECONOMIC ANALYSIS METHODOLOGY THAT IS COST-EFFECTIVE AND INCORPORATES ECOLOGICAL ECONOMICS.

Now that the Administration is embarking on new economic analyses of previous critical habitat designations, and will soon be undertaking similar analyses for species that are due to receive their first designations, it must ensure that its approach is consistent and makes sense.

Section 4(b)(2) of the ESA, which calls for economic analyses, provides little guidance.¹⁰⁹ It does make clear, however, that these analyses are designed for the sole purpose of deciding the scope of a critical habitat designation.¹¹⁰ In other words, the costs and benefits of designation

¹⁰⁷ *Sierra Club*, 245 F.3d at 434.

¹⁰⁸ *Id.* at 447.

¹⁰⁹ 16 U.S.C. § 1533(b)(2) (2000).

¹¹⁰ *Id.* The Act also makes clear that habitats may not be excluded from a critical habitat designation based on an economic impact analysis if doing so would cause the extinction of a species. This threshold is so low that it is difficult to foresee how it

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must inform the decision of how much habitat to protect through the designation process. The costs and benefits of other aspects of ESA implementation are, however, not relevant to this decision. Thus, it would be extremely wasteful to analyze these impacts. For the sake of cost effectiveness, a return to the “baseline” approach to analyzing impacts is warranted.

Some might argue that limiting the analysis to the marginal costs of critical habitat designation, rather than covering all costs and benefits of ESA implementation, would violate *New Mexico Cattle Growers* and thus would be illegal in the Tenth Circuit. The Tenth Circuit issued *New Mexico Cattle Growers*, however, at a time when the “adverse modification” definition treated critical habitat as redundant with jeopardy.¹¹¹ So long as critical habitat and jeopardy are treated the same, critical habitat designation would necessarily have no economic impact beyond listing. According to the court in *New Mexico Cattle Growers*, any approach that consistently leads to a finding of no impact is contrary to Congressional intent in enacting Section 4(b)(2).¹¹²

If the Administration were to fix its “adverse modification” definition, then the Service would not find that designating critical habitat has no economic impact. The baseline approach would lead consistently to findings of both positive and negative impacts, and the basis for the prohibition against this approach in *New Mexico Cattle Growers* would disappear.

Our proposal to reinstate the baseline approach, however, only partially answers the question of how to perform economic analyses of critical habitat designations. This question can be answered fully only after a full public airing of alternatives. The Administration should begin this process by issuing an advanced notice of proposed rulemaking (“ANPR”) concerning procedural and substantive standards for implementing Section 4(b)(2).¹¹³ Although an ANPR is not required for such a rule making, it would allow the public to weigh-in with the agency before its views becomes calcified.

In an ANPR, and the proposed and final regulation that follows, the Administration should pay close attention to two issues. First, any methodology must be cost-effective and time-sensitive, so that overall ESA implementation is not undermined by the costs and delays of the 4(b)(2) process.¹¹⁴ Second, any methodology must give a fair accounting to the

would come into play beyond the most the serious abuse of the economic impact analysis provisions. *Id.*

¹¹¹ *New Mexico Cattle Growers*, 248 F.3d at 1285.

¹¹² *Id.*

¹¹³ 16 U.S.C. § 1533(b)(2) (2000).

¹¹⁴ *Id.*

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ecological benefits of designating critical habitat and the costs of not protecting species and ecosystems. Too often, economic studies have failed to take into account the ecological limits of economic activity. Input from experts in the rapidly growing field of ecological economics should be solicited to ensure that a truly balanced methodology for economic analysis is developed.

C. DEVELOP A SCIENTIFICALLY RIGOROUS AND COST-EFFECTIVE METHODOLOGY FOR DRAWING CRITICAL HABITAT MAPS

A consistent methodology for drawing critical habitat maps is also needed. No commonly accepted methodology has been developed to date. In some circumstances, the Services have taken short cuts such as drawing lines around entire regions, encircling both habitat areas and developed areas.¹¹⁵ In other cases, the Services have sidestepped their map-drawing responsibilities altogether; they have simply described the constituent elements of the species' critical habitat without saying where those elements can be found.¹¹⁶

These practices have prevented critical habitat from fulfilling its unique role of educating the public about habitat needs and providing a clear protection mandate to federal agencies. The Service should solicit public and scientific input on alternative approaches to map drawing, with the ultimate goal of achieving a uniform methodology that is both cost-effective and scientifically rigorous.

To ensure that map drawing is based on carefully-developed science, Congress must change the deadlines for critical habitat designations. Under current law, which requires designation at the time of listing or at most one year thereafter, the Services have little time to gather the best scientific thinking on a species recovery needs. In this general time period, the Services are consumed with the challenges of making the listing determination. Initial designations should be postponed to coincide with development of the recovery plan, so that the recovery team's thinking helps to inform the decision on the scope of critical habitat. (Similarly, the decision on critical habitat can help inform the recovery plan.) Because the ESA does not currently impose deadlines for completion of recovery plans, Congress should impose deadlines of three years from the date of listing for both critical habitat designations and

¹¹⁵ See U.S. Fish and Wildlife Service Critical Habitat: What Is It? *available at* www.endangered.fws.gov (revised May 2000). See also, 64 Fed. Reg. 31,873 (Jun. 14, 1999).

¹¹⁶ See *supra* note 49. See also *supra* note 50.

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recovery plans.¹¹⁷ Congress should also streamline the process of updating critical habitat designations so that the designations always reflect best available science.

D. CLARIFY THE DEFINITION OF "SPECIAL MANAGEMENT" CONSIDERATIONS

As discussed above, the ESA's definition of critical habitat defines occupied habitat as "the specific areas within the geographical area occupied by the 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."¹¹⁸ Seizing on this undefined language, the Services recently began excluding lands from critical habitat designations that were arguably protected by other regulatory mechanisms. Environmentalists have long argued that this is a fundamental misunderstanding of the statute; the fact that a particular area is protected through a habitat conservation plan or as a park argues for its status as critical habitat.¹¹⁹ Put another way, while the Services view the "special management" prong as *restrictive*, environmentalists view it as *additive*. Recently, courts have begun to rule on this question. In *Center for Biological Diversity v. Norton*, a court in the District of Arizona struck down the FWS' interpretation, of the "special management considerations or protection" definition.¹²⁰ The court explained that this interpretation — which limits the number of allowable protections to a listed species' habitat — is not only "unsupported by the English language, but runs contrary to one of the enunciated policies of the ESA."¹²¹ The Services should instead issue new regulations defining "special management consideration or protection." The new definition should recognize that the existence of special management considera-

¹¹⁷ This was the approach taken in S.1100, a bill introduced by Sen. John Chafee (R-RI). 1999. S. 1100, 106th Cong. (1999). The bill was approved by Committee and won the support of both conservationists, industry groups and the Clinton Administration, but was ultimately killed by then-Sen. Majority Leader Trent Lott (R-MI). *Id.* The bill also established a reasonable and enforceable schedule for clearing-up the critical habitat backlog. *Id.*

¹¹⁸ 16 U.S.C. § 1532 (5)(A) (2000).

¹¹⁹ Although listed species may already be receiving "special management considerations or protection" on certain parcels of land, they clearly would receive important additional benefits from a critical habitat designation on those parcels. For example, such a designation would educate land managers and others about the importance of maintaining and enforcing those management considerations or protections. It would also provide a "safety net" of protection in the event those management considerations or protections are removed.

¹²⁰ *Center for Biological Diversity*, 240 F.Supp.2d at 1090-94.

¹²¹ *Id.* at 1099-1100.

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tions was never meant to operate as an independent basis for excluding habitat from designation. To the contrary, the existence of such protections instructs the Services to pay special attention to presume such areas are, in fact, critical habitat.

E. ADDRESS THE CHRONIC BUDGETARY SHORTFALLS.

The Service's budget for ESA implementation has never been adequate. The chronic budget shortfall for listing and critical habitat determinations as become worse in recent years as the scope of the Service's responsibilities has grown exponentially, as increasing numbers of species join the threatened and endangered lists and the Services are forced to reevaluate completed economic analyses.

To make the critical habitat program succeed, the Administration must request, and Congress must appropriate, the funds needed to remedy this growing budgetary gap. Considering that the future of this nation's biodiversity is at stake, this should be an easy adjustment to make.

VII. CONCLUSION

The critical habitat program, never wildly popular with the agencies charged with implementing it, is undergoing a serious attack from the current Bush Administration. Working in tandem with industry allies, the Administration is crafting behind-the-scenes settlements that remove critical habitat protections and set in motion a sweeping new approach to economic analyses. If this effort succeeds, the entire ESA — not just critical habitat — could be seriously damaged.

We have recommended a series of reforms that conservationists can rally around — reforms that reorient the critical habitat program towards the ultimate goal of the ESA: species recovery. We are not very hopeful that the current Administration will embrace them. These are, however, ideas that not only environmentalists, but also many members of Congress, can rally around. Indeed, both Republicans and Democrats embraced several of our suggestions in the past. Our recommendations are therefore offered as an alternative, mainstream, agenda for reform of the ESA.