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**Recovery of an Endangered Provision: Untangling  
and Reviving Critical Habitat Under the  
Engangered Species Act**

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# Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat under the Endangered Species Act

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Recovery is “the regaining of or possibility of regaining something lost or taken away;” or “restoration or return to any former and better state or condition.”<sup>1</sup> This is what we need for the thousands of species we have battered and exiled to the brink of extinction. Recovery is the heart and soul of the Endangered Species Act<sup>2</sup> (ESA) and the reason for its enactment. If we look closely at the goals and structure of the Act, we will find recovery’s primary support in the provisions dealing with critical habitat designation and protection – provisions that the implementing agencies and many commentators have attempted to completely write out of the statute. Their interpretation is wrong, and while this reality is gradually gaining recognition, little is being done to move closer to what Congress intended. There has been little to no improvement in the problems plaguing both designation of critical habitat and protection of that which has been designated. It is time we took a closer look at critical habitat in order to revive it, as it is an endangered provision.

## I. Introduction

The primary goal Congress expressed in the “Purposes” subsection of the ESA was “to provide a means whereby the ecosystems upon which threatened and endangered species depend may be conserved.”<sup>3</sup> This is a reference to habitat conservation, which is a key element of the Act. Conservation biologists had already determined that habitat loss is the single most important factor in species extinction, and that habitat protection is essential to recovery. This understanding and concern was the foundation upon which

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<sup>1</sup> Dictionary.com Unabridged. Random House, Inc. <http://dictionary.reference.com/browse/recovery> (accessed: March 16, 2010).

<sup>2</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000).

<sup>3</sup> Id. § 1531(b).

Congress built the ESA.<sup>4</sup> The terms “conservation” and “recovery” are used synonymously in the ESA,<sup>5</sup> so protecting habitat with an eye toward recovery for at-risk species was clearly a key part of what Congress had set out to accomplish. To that end, Congress tasked the implementing agencies with designating critical habitat for each species listed as endangered or threatened under the Act,<sup>6</sup> and then provided special protections for that habitat.<sup>7</sup> Unfortunately, nearly four decades later, critical habitat has yet to become the recovery tool it was meant to be.

There has been a great deal of confusion among courts, agencies, developers, and environmental organizations regarding the legal, environmental, and economic impacts of designating critical habitat for species listed as threatened or endangered under the ESA. Indeed, critical habitat has been called “the front line” of the ESA battleground.<sup>8</sup> At the heart of this difficulty has been a need to understand the degree to which the protections for critical habitat can be distinguished from those for listed species generally. Critical habitat is primarily protected in the context of federal agencies consulting with the Fish & Wildlife Service or the National Marine Fisheries Service to determine whether a

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<sup>4</sup> See 119 cong. Rec. 30,528 (1973) (Rep. Lehman: “The new law recognizes that the greatest threat to endangered animals has been man’s destruction of their habitat.” See also 119 cong. Rec. 25,676 (1973) (Sen. Stevens: “One of the major causes of the decline in wildlife populations is the destruction of their habitat.”); 119 cong. Rec. 30,162 (1973) (Rep. Sullivan: “For the most part, the principal threat to animals stems from the destruction of their habitat.”).

<sup>5</sup> See 16 U.S.C. § 1532(3) (“The terms “conserve,” “conserving,” and “conservation” mean 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.”).

<sup>6</sup> Id. § 1533(a)(3) (“The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable— (A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat”).

<sup>7</sup> Id. § 1536(a)(2) (requiring federal agencies to insure that their actions do not adversely modify critical habitat).

<sup>8</sup> Scott Norris, *Only 30: A Portrait of the Endangered Species Act as a Young Law*, 54 BIOSCIENCE 288, 291 (2004). See also John G. Sidle, *Critical Habitat Designation: Is It Prudent?*, 11 ENVIRONMENTAL MANAGEMENT 429, 429 (1987) (“Critical habitat designation for federally listed endangered and threatened species in the United States is one of the most controversial and misunderstood provisions of the Endangered Species Act.”).

proposed federal action either jeopardizes a listed species or adversely modifies its designated critical habitat.<sup>9</sup> For most of ESA history these agencies deemed the jeopardy standard and the adverse modification standard to be identical (the “functional equivalence policy,” which is discussed in more detail in Part III), such that critical habitat added no further protection beyond listing. This understanding is reflected in the regulations defining jeopardy and adverse modification, which codify it.<sup>10</sup> This perceived redundancy led them to designate critical habitat quite rarely and protect that which had been designated quite poorly.

Recent case-law, however, has made adjustments to both of these standards, separately from one another, and now the landscape is far more complex.<sup>11</sup> On the critical habitat side, this has come up in the context of a challenge to the Fish & Wildlife Service's method of analyzing the economic impact of a particular critical habitat designation (a factor required by the ESA), which depends heavily on the relationship between these two protective standards. If critical habitat indeed added no further protections to those already enjoyed by listed species, what economic impact could designation really have? The jeopardy standard tends to be challenged in cases dealing with its direct application during the consultation process, as does the critical habitat standard, which is also raised in the context of failure to designate. Because the two standards have been addressed separately and in a variety of contexts, there is little court guidance on the relationship between the two.

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<sup>9</sup> Section 7 of the ESA requires all federal agencies to “insure 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 [critical] habitat of such species ... .” 16 U.S.C. § 1536(a)(2).

<sup>10</sup> See *infra* Part II.B.

<sup>11</sup> See *infra* Part IV.

Understanding this relationship is essential to understanding critical habitat itself, as its value exists entirely in relation to the protection from jeopardy that listed species already enjoy. Commentators have argued repeatedly, and the implementing agencies have agreed, that critical habitat adds no value beyond listing,<sup>12</sup> ignoring the simple fact that Congress expressly provided for the designation and protection of critical habitat, presumably for a reason. It must serve a purpose, as it defies norms of statutory interpretation to suggest that Congress would require an agency to engage in a process that was to have no impact at all. However, we will never be able to understand this relationship, and thus the value of critical habitat itself, until we clearly define *both* standards of protection and think through Congress' holistic plan.

The foundation of this article is to demonstrate, via statutory interpretation and scientific support, that critical habitat absolutely must add value beyond listing and that this value is in the form of a greater focus on recovery of the species. Ultimately, this article is a call to action. In particular, I ask that the agencies recognize this reality, not merely in the wake of lost litigation but in a clearly defined and permanent manner, as this is the only effective form of recognition. I propose that the regulations setting the consultation standards be redrafted to reflect this distinction and that the method for designating critical habitat be modified to reflect the new standards. Finally, and perhaps most important, we absolutely must get caught up with designation of critical habitat for the species already listed as threatened or endangered.

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<sup>12</sup> See, e.g., Nicholas C. Fantl, *Not So Critical Designations: The Superfluous Nature of Critical Habitat Designations under the Endangered Species Act*, 57 Ark L. Rev. 143 (2004); Robert J. Scarpello, *Statutory Redundancy: Why Congress Should Overhaul the Endangered Species Act to Exclude Critical Habitat Designation*, 30 B.C. Env'tl. Aff. L. Rev. 399 (2003) (arguing that we should do away with critical habitat because it offers no additional protections over listing but wastes time with litigation anyway); Shawn E. Smith, *How "Critical" is a Critical Habitat?: The United States Fish and Wildlife Service's Duty Under the Endangered Species Act*, 8 Dick. J. Env'tl. L. & Pol'y 343 (1999).

## II. The Fundamentals of Critical Habitat

In order to discuss the issues most central to this article, it is necessary first to provide the relevant statutory and regulatory framework. The Endangered Species Act (ESA) provides a process for listing threatened and endangered species.<sup>13</sup> The decision whether to list a species is to be based on several factors, one of which is “the present or threatened destruction, modification, or curtailment of its habitat or range.”<sup>14</sup> Thus, habitat concerns do play into the listing decision itself, but as will be discussed further below, this does not conflate listing with habitat designation.

Once listed, species receive protection in several forms. The form most people are aware of is the prohibition against “taking” individual members of a listed species,<sup>15</sup> which is an important route to protection from private parties. However, it does far less to promote recovery than the form of protection applicable to this article, which is the requirement that all federal agencies “insure 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 [designated critical] habitat of such species.”<sup>16</sup> In order to avoid jeopardy or adverse modification, the action agency is required to consult with the appropriate ESA-implementing agency (either the Fish & Wildlife Service or the National Marine Fisheries Service, depending on the species, hereinafter jointly referred to as “the Services”) any

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<sup>13</sup> 16 U.S.C. § 1533(a)(1).

<sup>14</sup> Id. § 1533(a)(1)(A).

<sup>15</sup> See Id. § 1538(a)(1).

<sup>16</sup> Id. § 1536(2).

time an action might affect a listed species.<sup>17</sup> The consulting agency then issues its opinion as to whether the action will jeopardize the species or adversely modify its designated critical habitat.<sup>18</sup> This opinion is not binding, but it is guidance that will be given weight in court should the action agency's later decisions be challenged.

#### A. Designation

The ESA requires that critical habitat be designated “concurrently” with listing a species as threatened or endangered, at least “to the maximum extent prudent and determinable.”<sup>19</sup> The “prudent and determinable” language has been used as a source of discretion by the Services, forcing the courts to define and limit the terms.<sup>20</sup> One of the factors to consider in designating critical habitat is the economic impact of doing so, though this factor is strictly forbidden in making decisions regarding the listing of species in the first place.<sup>21</sup> This distinction is important to understanding the arguments I make in Part III.B of this article.

Critical habitat is defined as habitat which is “essential to the conservation of the species.”<sup>22</sup> As noted above, the ESA defines “conservation” as synonymous with recovery, so the combination of these two definitions makes clear that critical habitat is that habitat which the species needs in order to recover to the point of no longer being identifiable as threatened or endangered.<sup>23</sup> Although these two definitions make it

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<sup>17</sup> Id. § 1536(a)(1).

<sup>18</sup> Id. § 1536(b)(3)(A).

<sup>19</sup> Id. § 1533(a)(3).

<sup>20</sup> See, e.g., *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1263 (11<sup>th</sup> Cir. 2007); *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 438-39 (5<sup>th</sup> Cir. 2001).

<sup>21</sup> 16 U.S.C. § 1533(b)(2).

<sup>22</sup> Id. § 1532(5)(A)(i)(I).

<sup>23</sup> <sup>23</sup> See Id. § 1532(3) (“The terms “conserve,” “conserving,” and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to

abundantly clear that the goal of critical habitat is to recover the species to health, Congress took it a step further and provided for the designation of critical habitat that is *no longer occupied* by the species, but which is also deemed “essential to the conservation of the species.”<sup>24</sup> The only conceivable reason to designate habitat not currently occupied by the species as critical habitat is in the hope that the species may use that habitat in order to expand its occupation to what it once was, i.e. recovery.

So, in a nutshell, what we see thus far is that the ESA requires the Services to list species as threatened or endangered, and then adds to that listing the designation of critical habitat. Listing and designation are the essential labeling provisions which set the scene for later provisions with actual teeth. The listings and designations are tools to work with later in the Act, and Congress must have sought to achieve something beyond what it could by working with listing alone. The statutory definition of critical habitat indicates that this something was recovery.

## B. Consultation

As noted above, federal agencies are not to take action “likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of its critical habitat.<sup>25</sup> This requirement is referred to as the “consultation” requirement because action agencies must consult first with one of the Services.<sup>26</sup> The prohibition against jeopardy is provided to a species simply because it is listed. Because the very first factor considered in the decision to list a

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the point at which the measures provided pursuant to this Act are no longer necessary.”).

<sup>24</sup> Id. § 1532(5)(A)(ii).

<sup>25</sup> Id. § 1536(2).

<sup>26</sup> See id.

species is “the present or threatened destruction, modification, or curtailment of its habitat or range,”<sup>27</sup> it is clear that a listed species can be jeopardized via harm to its habitat.<sup>28</sup> Indeed, harm to habitat is frequently at issue in cases involving jeopardy.

Nonetheless, Congress saw fit to set aside certain habitat to be protected from any destruction or adverse modification at all, not just that which rises to the level of jeopardizing the continued existence of the species. Clearly something more was at stake here or it would be superfluous. Species were to be listed and protected from actions, including habitat modification, that placed their very existence in jeopardy, but on top of that certain habitat was to be identified for the conservation (i.e. recovery) of these species, and that habitat was to be more heavily protected in order to be available for that purpose. In other words, agencies cannot damage critical habitat even if it would not jeopardize the continued existence of the species, as that habitat is there to promote conservation. Clearly this adds value for the species above listing alone.

The Services published regulations defining both the jeopardy standard and the adverse modification standard, for the purpose of responding to consultations on actions proposed by other federal agencies.<sup>29</sup> The key language in both definitions (as still currently codified, in spite of court decisions striking down portions of the language) is identical for both standards. Adverse modification “appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.”<sup>30</sup> To jeopardize is

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<sup>27</sup> Id. § 1533(a)(1)(A).

<sup>28</sup> Habitat modification can even rise to the level of qualifying as a “take” under section 9. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

<sup>29</sup> 50 C.F.R. § 402.02.

<sup>30</sup> *Id.*

“to reduce appreciably the likelihood of both the survival and recovery of a listed species  
... .”<sup>31</sup>

There are two issues with these definitions that are relevant to my proposal. First, the use of the term “both” before “survival and recovery” (as well as the “and”) takes recovery completely out of the picture. Any action that reduces the chances of survival reduces the chances of recovery, but not vice versa. Actions that drastically reduce the chances of recovery but not of survival would all be permitted under these definitions.<sup>32</sup> Second, the substantive terms in the definitions are identical, thus calling into question the value of designating critical habitat at all (if doing so adds no protections above being listed).<sup>33</sup> As discussed in the previous subsection, this simply cannot be. The statute clearly envisions added protection via critical habitat, specifically protection of the ability to recover to the point of delisting.

### C. Importance

The Supreme Court has recognized that “[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.”<sup>34</sup> Recovery of struggling species is the goal, not merely protecting the status quo. As a practical matter, however, there is only one provision in the ESA that lends itself to any significant potential for recovery, and that is critical habitat.<sup>35</sup> The prohibition against “take” protects individuals of a listed species from harm, which is more about

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<sup>31</sup> *Id.*

<sup>32</sup> For a discussion of this problem, see Daniel J. Rohlf, *Jeopardy Under the Endangered Species Act: Playing a Game Protected Species Can't Win*, 41 Washburn L.J. 114 (2001).

<sup>33</sup> See generally Scarpello, *supra* note \_\_.

<sup>34</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

<sup>35</sup> Second place goes to recovery planning, which lacks the teeth of critical habitat as its implementation is optional, whereas the language relating to both designation and protection of critical habitat is mandatory.

survival. Likewise, the jeopardy standard, albeit not purely about survival (as I propose in Part V, there is and should be some concern for recovery in this analysis as well), is primarily focused on “continued existence,” which does not necessarily require full recovery to the point of delisting. The only place in the ESA where the express goal of a specific provision (as opposed to the general purposes stated for the Act) is recovery to this point is critical habitat. It is thus arguably the most important piece of the entire puzzle.

Destruction and/or adverse modification of habitat is the leading danger to species in North America.<sup>36</sup> Even with the protection of critical habitat as weak as it has been under the Services’ regulations, species with designated critical habitat are more than twice as likely to improve their status and less than half as likely to decline in status.<sup>37</sup> It is not difficult to see how significantly this could increase with critical habitat protected at a higher level focused on recovery. Species with designated critical habitat are also more likely to have recovery plans created for them than the far more numerous species without designated critical habitat.<sup>38</sup> Also, of all species with recovery plans those with designated critical habitat have greater task implementation than the rest.<sup>39</sup> Moreover,

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<sup>36</sup> Amy N. Hagen & Karen E. Hodges, *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology*, 20 CONSERVATION BIOLOGY 399, 400 (2006).

<sup>37</sup> Martin F. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 BIOSCIENCE 360 (2005). See also J. Alan Clark et al., *Improving U.S. Endangered Species Act Recovery Plans: Key Findings and Recommendations of the SCB Recovery Plan Project*, 16 CONSERVATION BIOLOGY 1510 (2002) (finding that species with designated critical habitat were less likely to decline, more likely to remain stable, and more likely to improve).

<sup>38</sup> E. Harvey et al., *Recovery Plan Revisions: Progress or Due Process?*, 12 ECOLOGICAL APPLICATIONS 682 (2002).

<sup>39</sup> Carolyn J. Lundquist et al., *Factors Affecting Implementation of Recovery Plans*, 12 ECOLOGICAL APPLICATIONS 713 (2002).

public awareness of critical habitat areas tends to result in greater general care efforts in these areas.<sup>40</sup>

A road realignment proposal in Hawaii provided an excellent example of how differently a species can be treated simply because it has critical habitat. The project was to take place within the critical habitat designated for the Palila, leading the U.S. Army and the federal Department of Transportation to propose \$14 million in mitigation projects.<sup>41</sup> However, there were more than a dozen other listed species in the project area, none of which had critical habitat designations.<sup>42</sup> No mitigation measures were considered for these other listed species.<sup>43</sup>

Finally, a key advantage to critical habitat designation is that it is the only provision in the entire ESA that provides any protection for unoccupied habitat. It stands to reason that a species that has diminished to the point of listing under the ESA is going to occupy less habitat than it did when it was doing well. Naturally, if our goal is to recover the species to its prior condition, it will be necessary to protect some of its former habitat as well as that which it currently occupies. That Congress acknowledged this need is evident from the fact that it provided for designation of unoccupied critical habitat. The majority of species still do not have designated critical habitat and as such nothing is being done to prevent the complete development of their former habitat, which could make it too late for recovery once the Services are eventually forced to designate critical habitat for all.

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<sup>40</sup> Testimony before the subcommittee on Fisheries, Wildlife, and Water of the Senate Committee on Environment and Public Works. 108 Senate Hearings, Endangered Species Act: Critical Habitat Issues (April 10, 2003).

<sup>41</sup> Hagen & Hodges, *supra* note \_\_ at 400.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

### III. The Functional Equivalence Theory and its Impact on Critical Habitat

The Services, unfortunately, have not recognized the distinction between the protections for listed species and those for critical habitat.<sup>44</sup> The Fish and Wildlife Service has repeatedly expressed the view that critical habitat adds no protection beyond what is already provided to listed species via the jeopardy prohibition.<sup>45</sup> Former Secretary of the Interior (which houses the Fish and Wildlife Service) Bruce Babbitt called critical habitat the *least* important provision in the ESA, stating that “[y]ou could strike critical habitat from the statute tomorrow and no one would miss it.”<sup>46</sup>

The big mistake was in drafting the defining regulations to treat the two protective standards identically in the first place, but the Services have used these regulations to bootstrap this position ever since. The policy position that critical habitat adds nothing to listing has been informally known as the “functional equivalence” policy, as the idea is that the two protections (jeopardy and adverse modification) serve identical functions for

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<sup>44</sup> According to the Services, “interpretation of the regulations, by definition, the adverse modification of critical habitat consultation is nearly identical to the jeopardy consultation standard.” Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31,871, 31,872 (June 14, 1999).

<sup>45</sup> In its most recent public information document explaining critical habitat on its website, the Fish and Wildlife Service states:

In consultations for species with critical habitat, Federal agencies are required to ensure that their activities do not destroy or adversely modify critical habitat to the point that it will no longer aid in the species’ recovery. In many cases, this level of protection is similar to that already provided to species by the “jeopardy standard.” However, areas that are currently unoccupied by the species, but are needed for its recovery, are protected by the prohibition against destruction and adverse modification of critical habitat.

[http://www.fws.gov/endangered/factsheets/critical\\_habitat.pdf](http://www.fws.gov/endangered/factsheets/critical_habitat.pdf) (visited March 17, 2010). In other words, only unoccupied critical habitat provides additional protection, as the jeopardy standard accomplishes the same thing as the adverse modification standard in occupied areas.

<sup>46</sup> Norris, *supra* note \_\_ at 291.

the species and are thus redundant. This notion is contrary to both science and congressional intent.

#### A. Designation Dearth

This situation led the Services to informally adopt a policy of disinterest in designating critical habitat because it was functionally equivalent to just being listed, and thus not the best use of limited resources.<sup>47</sup> Although the ESA was amended in 1978 to make critical habitat designation mandatory, the Fish and Wildlife Service has only rarely done so, even since that time.<sup>48</sup> As of March 17, 2010, out of the 1902 species (1542 endangered and 360 threatened) that are listed as threatened or endangered under the ESA,<sup>49</sup> only 546 have critical habitat designated for them.<sup>50</sup> The Bush administration went so far as to require the Services to place a disclaimer in every proposed critical habitat designation, stating that “designation of critical habitat provides little additional protection to species.”<sup>51</sup>

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<sup>47</sup> See, e.g., *Sierra Club v FWS*, 245 F.3d 434, 439 (5<sup>th</sup> Cir. 2001), which described the following circumstance:

The 1998 critical habitat decision by the Services relied on the “not prudent” exception to the ESA. The Services noted, first, that “[c]ritical habitat, by definition, applies only to Federal agency actions.” They observed that agencies would have to engage in “jeopardy consultation” under the ESA where agency action could jeopardize the existence of a listed species. The Services 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 Services concluded that designation of critical habitat would provide no additional benefit to the sturgeon beyond the protections currently available through jeopardy consultation.

(internal citations omitted).

<sup>48</sup> For a discussion of this practice, see generally Thomas F. Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 *Harv. Envtl. L. Rev.* 209 (2000).

<sup>49</sup> <http://www.fws.gov/endangered/wildlife.html#Species> (visited March 17, 2010).

<sup>50</sup> [http://ecos.fws.gov/tess\\_public/CriticalHabitat.do?nmfs=1](http://ecos.fws.gov/tess_public/CriticalHabitat.do?nmfs=1) (visited March 17, 2010).

<sup>51</sup> Hagen & Hodges, *supra* note \_\_ at 400-01.

The Services use their discretion under the “prudent and determinable” language to support their inaction some of the time, but often they simply don’t bother, and there is nothing the resource-limited wildlife advocates can do about it with such a huge number of species at issue. The few that can be challenged are frequently won by the advocates, leading to a tiny handful of additional designations.<sup>52</sup> This drop in the bucket is not enough. Congress tasked the agencies with designating critical habitat concurrently with listing, and the tiny proportion of actual designations does not come close to fulfilling this statutory duty.

#### B. Twisted Economic Analyses for Designations

Although the ESA forbids consideration of economic impact during the listing process,<sup>53</sup> it expressly includes it for designating critical habitat.<sup>54</sup> This, of course, makes it necessary to assess the economic impact in order to take it into account, thus creating room for a great deal of error and/or disagreement. Economic analyses invite challenge by their very nature as seemingly clear-cut but actually quite debatable. What formula do you use and what figures do you run through that formula? This has been an area of great confusion and has caused more trouble than one might expect given how little effort there has been to resolve it.

The Fish and Wildlife Service carried its functional equivalence philosophy into its economic analyses for the critical habitat designations it did perform. Using what is known as the “baseline method,” it placed all the existing costs to land-owners from the

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<sup>52</sup> See Norris, *supra* note \_\_ at 291.

<sup>53</sup> See 16 U.S.C. § 1533(b)(1)(A) (listing decisions to be based solely on scientific information). This just makes sense, as listing a species is simply a factual statement that the species meets a certain level of vulnerability and not a management action.

<sup>54</sup> *Id.* § 1533(b)(2).

listing of the species into the baseline, then only considered the additional costs of the critical habitat designation, which was (thanks to the functional equivalence policy) generally nothing. The use of the baseline method was based both on the fact that the ESA prohibited the consideration of economic impacts in listing species, and (more importantly) on the fact that these costs were not part of the cost of designating the habitat. It was a reasonable exclusion of sunk costs, much as one would do in almost any kind of economic evaluation, but the combination of this method with functional equivalence was a bit nonsensical, given that the cost was always zero. Essentially, the formula was correct but the data input was not.

This process effectively resulted in no economic analysis at all, writing yet another provision out of the statute. Congress would not have required analysis of the economic impact of designating critical habitat if it did not envision that critical habitat would have a cost. This is additional evidence of congressional intent that critical habitat would contribute further protections for the species beyond listing alone, as this is the only way for critical habitat designation to have a cost. Indeed, the Fish and Wildlife Service impliedly acknowledges this with its position that there is no cost to consider because there is no added protection. We cannot, however, pick and choose which parts of a statute to implement. Critical habitat is in the statute, and Congress expressed its expectation that it would have an economic impact beyond listing (and thus that it would add further protections for the species).

In 2001, after many years of the Fish and Wildlife Service using this bizarre zero-cost economic analysis for designations, the Tenth Circuit rejected the baseline approach for the very reason that it resulted in zero economic costs (under the functional

equivalence theory, which was not itself challenged in that case) and thereby rendered the ESA's requirement to consider economic impacts meaningless.<sup>55</sup> The *New Mexico Cattle Growers* Court held that if the Fish and Wildlife Service could find no additional cost from designating critical habitat, then it must take the cost of listing out of the baseline and consider that cost instead, because the statute requires an economic impact analysis when designating critical habitat.<sup>56</sup>

This was a very odd result, in that it 1) rejected a perfectly appropriate method of considering what costs the designation added to a baseline of the economic impact of the existing listing; and 2) forced the agency to decide how much critical habitat to designate by considering the economic impact of the listing, which had nothing to do with the critical habitat designation. How should the agency consider the economic impact of the designation, as required by the statute, when the cost is the same whether it designates one million acres or half that? If the cost of listing is the only cost recognized, the figure will be the same regardless of how much critical habitat is designated. This cannot be the type of analysis that Congress envisioned.

The approach after *New Mexico Cattle Growers* is equally nonsensical to the approach before the case, with the only difference being that the court required the *appearance* of following the statute via some form of economic analysis. But that is not what the statute mandates – it requires consideration of the economic impact *of designating the critical habitat*. The court even showed some discomfort with its own

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<sup>55</sup> *New Mexico Cattle Growers v. FWS*, 248 F.3d 1277, 1285 (10<sup>th</sup> Cir. 2001) (“Because economic analysis done using the FWS's baseline model is rendered essentially without meaning by [the regulations defining jeopardy and adverse modification identically], we conclude 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.”). An obvious flaw in this reasoning is that the court states that because of a problem with the *regulations*, “Congress intended” something, which is backward thinking, as Congress may have intended a world with different regulations.

<sup>56</sup> *Id.* at 1284-85.

result, but was in a bind as there had been no challenge to the functional equivalence theory itself.<sup>57</sup> As a result, the wrong thing was struck down. Instead of striking down the operating principle that was contradictory to the Act, the case struck down a method of economic analysis (the baseline method) that is entirely appropriate and has been widely embraced in many other contexts throughout environmental law.

The practical implications of this result were just as horrible as its logic. Now that the Services were required to consider the cost of listing in determining the economic impact of designating critical habitat, that cost became far more significant and weighed more heavily against the benefit of designating the critical habitat, especially given that the agency saw no benefit anyway. Not only did this place the species' needs at a disadvantage in the cost-benefit-analysis for new designations, but it also resulted in numerous challenges by developers to many prior designations, because that critical habitat was costing them money, but it had been designated after being deemed to have no cost at all.<sup>58</sup> The irony, of course, of this position is the outright admission that critical habitat does impede development (or they would not have standing) and therefore does add protections that the jeopardy standard alone would not provide. Perhaps there was just enough of a mess here for them to have their cake and eat it too. In any event, Congress did not mandate an actual cost-benefit analysis for designating critical habitat – rather, it allowed the agencies to “take into account” economic impacts,<sup>59</sup> which is quite

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<sup>57</sup> See *id.* at 1283 (“The root of the problem lies in the FWS's long held policy position that CHDs are unhelpful, duplicative, and unnecessary. Between April 1996 and July 1999, more than 250 species had been listed pursuant to the ESA, yet CHDs had been made for only two. Further, while we have held that making a CHD is mandatory once a species is listed, the FWS has typically put off doing so until forced to do so by court order.”) (internal citations omitted).

<sup>58</sup> For a detailed discussion of post *New Mexico Cattle Growers* cost-benefit analyses for critical habitat designations, see generally Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129 (2004).

<sup>59</sup> This is clear from the legislative history, which states that “[t]he Secretary is not required to give

different, and does not lend itself to striking down designations for inadequate consideration of economic impacts.<sup>60</sup>

### C. Easy Breezy Consultation Results

The final sting of the functional equivalence policy is the effect it has on the consultation process. Because critical habitat is deemed to add no extra protection, everything gets pulled together under a jeopardy standard. As mentioned before, under the current<sup>61</sup> regulations, adverse modification “appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species,” much as to jeopardize is “to reduce appreciably the likelihood of both the survival and recovery of a listed species ... .”<sup>62</sup> If a species’ very survival is not at stake, at least as the regulations were drafted, we can do what we want to critical habitat. And this is how it has been applied for the many years that these regulations (and the corresponding functional equivalence policy) were going strong. Sure enough, protecting critical habitat with this standard – a jeopardy standard, and a weak one at that – did not add much protection beyond listing alone.<sup>63</sup> It was a self-fulfilling prophesy, and so long as the Fish and Wildlife Service followed its own regulations, never mind that the whole system was contrary to the statute. Although this problem has received some attention via litigation, real change has yet to come.

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economics or any other ‘relevant impact’ predominant consideration in his specification of critical habitat.” Rather, “[t]he consideration and weight given to any particular impact is completely within the Secretary’s discretion.” H.R.Rep. No. 95-1625, at 16-17 (1978), as reprinted in 1978 U.S.C.C.A.N. 9453, 9467.

<sup>60</sup> See Sinden, *supra* note \_\_ at 196-97 (arguing that Congress only intended to give the agencies flexibility and not to require a cost-benefit analysis).

<sup>61</sup> “Current” in the sense that they have not been redrafted, though as we will see in the Part IV they have been heavily damaged by the courts.

<sup>62</sup> 50 C.F.R. § 402.02.

<sup>63</sup> At least not as much as it could – and should – have, though as discussed above it has made some difference even as it is.

#### IV. Addressing the Problem in Piecemeal Fashion via Courts

The courts have begun to pick away at some of these issues, and have done some good case by case, but collectively these cases have actually muddied the waters significantly. The various outcomes have generally increased protections but decreased clarity as to how the system should all work together. This is to be expected as we cannot develop legislation or regulation via court cases dealing with only one issue and not addressing the whole. Not one case has tackled the problematic functional equivalence theory itself, which is at the heart of all the critical habitat implementation problems. In order to move toward a consistent and logical system that is compatible with the ESA, it is necessary for the Services to revise the regulations. Judicial opinions have been striking down elements of the regulations or their implementation, but they cannot build a new system from scratch as is needed.

The two most important cases to move us in the right direction can be found in the Ninth and Fifth Circuits, both of which have held the critical habitat regulation to be in conflict with the statute. In *Gifford Pinchot Task Force v. FWS*, the Ninth Circuit rejected the regulatory definition of adverse modification to the extent that the “both” language did away with any protection for the goal of recovery, a goal that is clear from the statutory definition of critical habitat.<sup>64</sup> The court stated:

Because it is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species survival, the regulation's singular focus becomes “survival.” ... The FWS could authorize the complete elimination of critical habitat necessary only for recovery, and so long as the smaller amount of critical habitat necessary for survival is not appreciably diminished, then no “destruction or adverse modification,” as defined by the regulation, has taken place. This cannot

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<sup>64</sup> *Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059 (9<sup>th</sup> Cir. 2004).

be right. If the FWS follows its own regulation, then it is obligated to be indifferent to, if not to ignore, the recovery goal of critical habitat.<sup>65</sup>

Years earlier, in *Sierra Club v FWS*, the Fifth Circuit invalidated the very same regulation, likewise because of the conservation goal behind critical habitat.<sup>66</sup> The *Sierra Club* Court was dealing with a different context: the refusal to designate critical habitat on the basis that it was not prudent because it added no protection.<sup>67</sup> The court held that the consultation regulation defining destruction or adverse modification of critical habitat needed to protect it at a level sufficient to support recovery, not just survival.<sup>68</sup> Although this was a jab at the functional equivalence policy, the case did not address it head-on, and, in any event, it persisted thereafter.

These cases may have brought some life back to critical habitat's recovery goal, but frankly little has changed. The regulations remain unedited, listings continue to be published without critical habitat designation, and consultations continue to be a farce. Even if we consider *GP Task Force* to be the current state of the law (as the Supreme Court has not spoken on the issue), this newly revived recovery element applied only to adverse modification of critical habitat and not to jeopardy. Not surprisingly, a handful of district courts have since begun pointing out that *NM Cattle Growers* is no longer good law after *GP Task Force* (now that critical habitat protection has a higher recovery standard than mere jeopardy of a listed species, though *GP Task Force* never said the jeopardy standard was fine as-is – it simply wasn't at issue in the case), and have resultantly held that the baseline method is indeed the most appropriate way to consider

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<sup>65</sup> Id. at 1069-70.

<sup>66</sup> *Sierra Club v. U.S. Fish & Wildlife Service*, 245 F.3d 434, 441-42 (5<sup>th</sup> Cir. 2001).

<sup>67</sup> Id.

<sup>68</sup> Id.

economic costs.<sup>69</sup> This is true not only in light of the fact that consideration of the cost of listing is not permitted, but more importantly because that is the only way to determine the true cost of designating the critical habitat.<sup>70</sup>

This string of cases may seem like a somewhat straightforward process that is gradually working its way to a clearly defined system (jeopardy considers only survival, adverse modification considers recovery as well, and those additional costs are the economic impact to consider when designating critical habitat), but the situation is not so simple. In the midst of all this the Ninth Circuit rejected the practice of reading recovery out of the jeopardy definition, noting (among other points) that the word “recovery” was used in the regulation and thus must have some meaning, and thus holding that the Services must in fact consider impacts on recovery when conducting a jeopardy analysis.<sup>71</sup> The *National Wildlife Federation* Court went as far as to liken its impact on the jeopardy analysis to that of *GP Task Force* on adverse modification of critical habitat,<sup>72</sup> thereby renewing the potential for functional equivalence. Oddly, this opinion was not mentioned in the more recent *Fisher v. Salazar* decision (one of the district court opinions mentioned in the last paragraph as treating *GP Task Force* as the end for *NM Cattle Growers*), which based its reasoning for returning to the baseline method on

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<sup>69</sup> See, e.g., *Fisher v. Salazar*, 656 F.Supp.2d 1357, 1371 (N.D.Fla. 2009); *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F.Supp.2d 1013, 1032-33 (D.Ariz. 2008); *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F.Supp.2d 108, 129-30 (D.D.C. 2004).

<sup>70</sup> See Sinden, *supra* note \_\_\_ at 163 (“[C]omparing the world with critical habitat against the “baseline” of a world without critical habitat is the only sensible way to measure the impacts (economic or otherwise) of a designation. An analysis that does otherwise--for example, an analysis that includes impacts that are caused co-extensively by listing and therefore would also exist in a world without critical habitat--cannot serve the purpose Congress intended.”).

<sup>71</sup> *National Wildlife Federation v. NMFS*, 524 F.3d 917, 931-32 (9<sup>th</sup> Cir. 2008). It is interesting to note that the reasoning in this Ninth Circuit opinion is exactly opposite that used in its *GP Task Force* opinion. In the *GP Task Force*, it observed the regulatory language, “both survival and recovery,” and stated that it meant only survival and was thus ignoring the recovery goal of critical habitat. In *NWF*, it looked at this same language and stated that it used the term recovery and thus must have a recovery element.

<sup>72</sup> *Id.* at 931-32.

distinguishing jeopardy from adverse modification in a manner inconsistent with the Ninth Circuit's holding in *NWF*.

Ultimately, the entire system is in a state of confusion right now. Does *NWF* bring back functional equivalence, thereby reviving *NM Cattle Growers* and the bizarre method of considering the economic impact of listing rather than of habitat designation? Or should we go with the recent district court case, *Fisher v. Salazar*, ignoring *NWF* and maintaining the different levels of protection along with the baseline method for calculating the economic impact of designation? The former brings us recovery protection for both standards, but leads to a nonsensical process for designation, and the latter provides a logical approach to designation but leaves an inappropriately weak standard in place for jeopardy analyses. In reality the situation is more complicated than either of these approaches would suggest, as the survival/recovery dichotomy is a false one, and goals might exist in many places along the continuum in between.<sup>73</sup> This language is purely regulatory, and it has caused a great deal of difficulty with implementing the statute, which itself does suggest a difference between jeopardy and

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<sup>73</sup> There is evidence of a fleeting moment in time when some FWS staff recognized this, as we can see in the critical habitat designation for northern spotted owls in 1992:

Section 7 prohibitions against the destruction or adverse modification of critical habitat apply to actions that would impair survival and recovery of the listed species, thus providing a regulatory means of ensuring that Federal actions within critical habitat are considered in relation to the goals and recommendations of a recovery plan. As a result of the link between critical habitat and recovery, the prohibition against destruction or adverse modification of the critical habitat should provide for the protection of the critical habitat's ability to contribute fully to a species' recovery. Thus, the adverse modification standard may be reached closer to the recovery end of the survival continuum, whereas, the jeopardy standard traditionally has been applied nearer to the extinction end of the continuum.

Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796, 1822 (Jan. 15, 1992). This statement, as we have seen above, is contradictory to nearly everything we've heard from the FWS either before it or since. Indeed, it contains concepts that the agency normally does not even seem to be aware of.

adverse modification (adequate to allow for a baseline method when analyzing the economic impact of designating critical habitat), but not such a stark one.

## V. Interpreting the Statute Holistically and Moving Forward Sensibly

### A. Congressional Intent

A basic principle of statutory interpretation is that we must “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”<sup>74</sup> To say that critical habitat protection is redundant to the existing protection against jeopardy is to refuse to give effect to several clauses in the statute. Congress expressly included the requirement that critical habitat be designated concurrently with listing,<sup>75</sup> so it must add something beyond listing. Congress expressly required that federal agencies refrain from destroying or adversely modifying this habitat, once designated, and because Congress told the Services what to look for in designating critical habitat (areas of land “on which are found those physical or biological features essential to the conservation of the species”<sup>76</sup>), it provided a powerful suggestion as to what it meant by adverse modification (logically, harm to the features that led to the designation in the first place).

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<sup>74</sup> *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

<sup>75</sup> Section 4(b)(6)(C), codified at 16 U.S.C. § 1533(b)(6)(C), provides in pertinent part:

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that-

. . . . .

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

<sup>76</sup> 16 U.S.C. § 1532(5)(A)(i).

These inclusions in the statute are enough on their own, without resort to legislative history.<sup>77</sup> However, the legislative history supports the importance of critical habitat as well. “[T]he ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.”<sup>78</sup> Indeed, throughout the legislative history we find efforts to ensure that the limited areas of discretion provided to the agencies not be construed as diminishing the necessity of designating critical habitat.<sup>79</sup>

Indeed, Congress even went so far as to amend the statutory definition of critical habitat in 1978 to reject the regulatory “survival and recovery” definition and give critical habitat more strength. An appropriations bill from the following year describes the 1978 amendments as follows:

The term “critical habitat” was not defined in the 1973 Act, but regulations promulgated pursuant to the Act defined it to include “air, land or water areas . . . the loss of which would *appreciably reduce the likelihood of the survival and recovery* of a listed species . . . .” The amendments adopted during the 96<sup>th</sup> Congress *significantly altered* this definition. The Act now defines “critical habitat” as “specific areas . . . on which are found those physical or biological features (I) essential to the *conservation* of the species and (II) which may require special management consideration or protection.”<sup>80</sup>

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<sup>77</sup> “Where the language of the statute is plain, it is improper for this Court to consult legislative history in determining congressional intent.” *St. Charles Inv. Co. v. CIR*, 232 F.3d 773, 776 (10th Cir. 2000).

<sup>78</sup> H.R. REP. NO. 94-887, at 3 (1976).

<sup>79</sup> See, e.g., H.R. REP. NO. 1625, 95th Cong., 2d Sess. (1978):

The phrase “to the maximum extent prudent” is intended to give the Secretary the discretion to decide not to designate critical habitat concurrently with the listing where it would not be in the best interests of the species to do so.

As an example, the designation of critical habitat for some endangered plants may only encourage individuals to collect these plants to the species' ultimate detriment. The committee intends that in most situations the Secretary will, in fact, designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.

See also *Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir. 1985) (holding that Congress intended the agencies “only fail to designate a critical habitat under rare circumstances”); *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991) (“This legislative history leaves little room for doubt regarding the intent of Congress: The designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances.”).

<sup>80</sup> H.R. Rep. No. 96-167, at 5-6 (1979), reprinted in 1979 U.S.C.C.A.N. 2557, 2561-62 (emphases added).

In spite of the decades that the Services have spent treating critical habitat as superfluous and thus unnecessary, and in spite of the generations of leaders that have accepted that interpretation, this issue is the easy one. There is no question now that Congress intended more, and this is gradually being recognized at all levels (though it has yet to be formally recognized or implemented). Critical habitat must be protected to a degree adequate to promote recovery.

The tougher question is what degree of protection we provide via the jeopardy standard. Although this article's focus is on how to move forward with critical habitat, the jeopardy interpretation is essential to doing so, as the two standards relate to one another in a very important way. How do we calculate the economic impact of designating critical habitat, as is required by the statute, without knowing what to put in the baseline? The only way to determine the cost of critical habitat is to determine what protections it adds to listing alone.<sup>81</sup> In order to propose new regulations in a holistic manner we must interpret congressional intent as to the jeopardy standard as well. Moreover, until we sort out the relationship between the two standards, the Services will not step-up their effort to designate critical habitat.

An excellent starting point to our jeopardy inquiry can be found in the work of Professor Daniel Rohlf, who set out a decade ago to analyze the possible interpretations of jeopardizing the "continued existence" of a species. He stated:

On one hand, one could interpret this phrase to preclude only activities that add to the risks faced by these species. If an action pushes a species at least some degree closer to extinction, that action clearly would render less likely the species' existence over time. Under this view, the implicit assumption is that the species will continue to exist over time unless additional threats or impacts push it closer to extinction. Thus, actions that

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<sup>81</sup> I am assuming the use of the baseline method as that is the most logical way to analyze the cost of an action, as well as the method proposed in this article.

do not increase present risks to the species would not jeopardize that species. Even actions that did increase these risks could be interpreted as not necessarily jeopardizing the species, depending on how much of an increased risk of extinction they created.

On the other hand, by definition listed species already face serious threats to their continued existence, additional potential impacts notwithstanding. Again by definition, these threats persist for a given species until over time its status improves to the point at which the Secretary changes it from its classification as threatened or endangered. In this light, an increase in present risks to the species' very existence would not be the only possible trigger for a jeopardy determination. One could also reasonably interpret an action to jeopardize the continued existence of a listed species if the action precluded or even merely impaired the species' chances for eventual recovery. Put another way, threatened and endangered species' continued existence is in doubt as long as they are listed; therefore, impacts that foreclose or undermine a species' chances of recovery perpetuate its at-risk status and thus jeopardize its continued existence.<sup>82</sup>

The phrase “continued existence” is forward-looking in its terms. It may not invoke a sense of immediate pro-active recovery, but given that eventual recovery is important for continued existence (as a listed, and thus not recovered, species is always at risk of extinction), it would seem that interference with eventual recovery would place continued existence at greater risk. The difference between protecting critical habitat from interference with its value to recovery and protecting species from interference with their potential for eventual recovery is not merely semantic. An action still might take place outside of critical habitat which has the effect of delaying recovery but not foreclosing it, which would survive this jeopardy standard.

Indeed, this potential-for-recovery standard comports with the language used in the existing Consultation Handbook used by the Services, albeit not codified in the regulations.<sup>83</sup> The survival definition in the Consultation Handbook, which has only been

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<sup>82</sup> Rohlf, *supra* note \_\_ at 126-27.

<sup>83</sup> See U.S. Fish & Wildlife Serv., *Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultations and Conferences*, (1998), available at

in place for about a decade, marks a significant improvement over the typical understanding of it as merely the avoidance of immediate extinction. It states:

Survival: the species' persistence, as listed or as a recovery unit, beyond the conditions leading to its endangerment, with sufficient resilience to allow recovery from endangerment. Said another way, survival is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition is characterized by a species with a sufficiently large population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, which exists in an environment providing all requirements for completion of the species' entire life cycle, including reproduction, sustenance, and shelter.<sup>84</sup>

This definition of survival places it closer to the middle of the spectrum from mere survival (ordinary definition, focused on the present) to recovery. It is possible that actions can be proposed that will impede recovery (and thus would not be permitted if on critical habitat under my standard for that) but still not reach jeopardy under this definition (as they do not foreclose future recovery and leave in place the basic building blocks for that). I propose taking a small step further than this definition. However, clearly this standard protects far more than what has been protected in actual practice, both before and since the handbook was issued.<sup>85</sup>

If the Services were to actually follow this standard, it is actually quite reasonable as a *jeopardy* standard, assuming a species also has the appropriate recovery protection via critical habitat and a recovery plan. This is key: *Accepting a jeopardy standard that is anything less than full-recovery-focused requires proper implementation of the ESA as a whole*. No single ESA provision is adequate on its own. The real action in the ESA is

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<http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm> (visited March 29, 2010) [hereinafter Consultation Handbook].

<sup>84</sup> Consultation Handbook, *supra* note \_\_ at 4-35.

<sup>85</sup> Cite cases since handbook where survival-only no-jeopardy findings have been challenged (GP Task Force is one example, but will use others)

found in its recovery provisions: critical habitat designation and recovery planning. These are the pro-active ESA. The prohibitions against jeopardy (applicable to federal agencies only) and take (applicable to all) are the defensive provisions. It is like the efforts we make to build our wealth as compared to the things we do to protect ourselves from being robbed. We need to do both. That said, there is a big difference between getting your wallet swiped with a fresh ATM draw in it – which hurts but does not significantly impact your future – and having invested your retirement fund with Bernie Madoff. There is only so much we can lose without seriously risking our potential for recovery.

Congress clearly envisioned recovery efforts for all listed species, and put in place provisions aimed at this goal.<sup>86</sup> The jeopardy prohibition, referring to “continued existence” even in the statute, does not appear to be a part of the pro-active recovery effort, but given the overall conservation purpose of the statute, federal actions should at a minimum not be permitted to significantly interfere with the attainment of this goal. In order to create this safeguard, we need to protect at the level described in the Consultation Handbook, plus a little further, such that we prohibit not only those actions which foreclose recovery, but also those which *significantly* impede it. This is still less than what is proposed here for critical habitat, which thus maintains its value as the primary recovery zone.

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<sup>86</sup> But see J.B. Ruhl, *Keeping the Endangered Species Act Relevant*, 19 Duke Envtl. L. & Pol’y F. 275, 288 (2009) (“The ESA, perhaps to the chagrin of its most ardent supporters, is at bottom a harm-preventing law, not a benefit-mandating law. Causing take or jeopardy of species is prohibited, but promoting the recovery of species is nowhere required by the statute.”). Even those in favor of working toward recovery for listed species tend to view the ESA as inadequate to the task. However, that is likely due to the fact that it has never been fully implemented. Critical habitat designation is mandated by the statute, and is to be selected as needed for recovery and then protected in order to promote recovery. That, if it were actually followed, is quite pro-active.

Around the turn of the millennium NMFS adopted an approach using similar logic for jeopardy analyses of projects impacting anadromous fish. The basic theory, and it is a sensible one, was that we can interfere with recovery to a point that will reduce the likelihood of survival, given that a listed species is less likely to survive in its depressed state than should its status be improved via recovery efforts.<sup>87</sup> The Ninth Circuit upheld this approach against challenge, but did not go so far as to fully determine how jeopardy should be interpreted or applied.<sup>88</sup> This concept should be applied more broadly, as well as codified, though we must take care to maintain the distinction between this and the recovery value of critical habitat or we render the latter meaningless.

Ultimately, if we are to draw clear distinctions for implementation as well as stay true to congressional intent, critical habitat is the land on which it is impermissible to take any action that appreciably reduces its value to recovery, regardless of whether the likelihood of recovery is appreciably diminished thereby. On the other hand, actions reducing the value of other land to recovery, but not thereby significantly impeding recovery (perhaps due to the existence of other land, including critical habitat), would survive a jeopardy analysis. Such land has not been designated as critical habitat and thus can be used freely so long as doing so does not jeopardize the continued existence of a listed species, including by significantly impeding its recovery. Thus, critical habitat is protected by a far stricter standard. Habitat modification is much more likely to be allowed elsewhere.

## B. Amending the Regulations Defining Jeopardy and Adverse Modification

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<sup>87</sup> Rohlf, *supra* note \_\_ at 135.

<sup>88</sup> *Aluminum Co. of Am. v. Admin'r, Bonneville Power Admin.*, 175 F.3d 1156 (9th Cir. 1999).

Regardless of where you stand politically with regard to the degrees of protection that should be applied to jeopardy and adverse modification, one thing is very clear: the regulations are poorly drafted and need to be replaced. The terms “survival” and “recovery” really do not belong together at all in a well-drafted regulation. As this article has already addressed throughout, using an “and” between these terms writes recovery out of it and means the same thing as the term “survival” would alone. That said, it makes little sense to use the terms with an “or” between them either, as this renders the term “survival” superfluous (if you protect a species or its habitat at a level to promote recovery, you do far more than protect its survival). Because survival is implicit in recovery, if we focus on the latter there is no need to refer to the former, which only serves to cause confusion. Ultimately, the term “survival” should be taken out of these regulations entirely.

That another decade has passed without any effort to amend these regulations in light of their being repeatedly struck down by the courts throughout that period is not only unacceptable; it is a tragedy for the many listed species that are not moving toward recovery under the status quo. The Services have internally acknowledged the need to redraft at least the critical habitat regulation,<sup>89</sup> but have neither done so nor acknowledged the need to redraft the jeopardy standard in light of the obvious problems with the language, also the subject of judicial criticism. In fact, they recently published rulemaking amending 402.02, the definitions section of the consultation regulations in which the problematic jeopardy and adverse modification language is found, and did not

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<sup>89</sup> See 2005 FWS memo (on file with author) to regional directors, providing interim guidance on complying with *G.P. Task Force* pending the necessary regulatory amendments.

include proposed amendments for these portions.<sup>90</sup> This, of course, raises the question as to whether they will ever get around to it, so this article is intended to give them a little push and some suggestions.

I propose the following language (or something like it) for the new regulations, in order to provide as much guidance as possible while still maintaining flexibility for varying circumstances:

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of any portion of designated critical habitat for the 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.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to significantly reduce the likelihood of eventual recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

By using the terms “significantly” and “eventual,” the jeopardy definition does not go as far as that for critical habitat, leaving the pro-active recovery effort to take place on designated critical habitat, where Congress intended. Still, it includes implicitly the former protection of survival and goes a bit further by not letting actions outside of critical habitat seriously interfere with the work that is taking place within it.

Also, note the addition of “any portion” to the adverse modification regulation. This prevents the very dangerous problem of framing the question as one of whether an action appreciably diminishes the value of *all* of a species’ critical habitat, rather than just the action area. It is possible for an action to completely destroy a portion of critical habitat, rendering it useless for recovery, without appreciably diminishing the value of the

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<sup>90</sup> See 74 Fed. Reg. 20421 (May 4, 2009) (reversing amendments made to several of the definitions by the previous administration just a few months earlier – neither administration’s amendments to 402.02 addressed the definitions for jeopardy or adverse modification as had been urgently needed for so long).

whole, if the whole is much larger. This would allow the chipping away of critical habitat little by little, which is contrary to the purpose of the ESA.

#### C. Returning to the Baseline Method for Analyzing the Economic Impact of Critical Habitat Designations

Once we have clarity with regard to the two levels of protection, especially as to the fact that they differ, the baseline method is the natural choice for analyzing the economic impact of critical habitat designations. It is entirely inappropriate to consider any economic impacts that would exist absent the designation. As such, I propose that the agencies publish a formal policy of returning to the baseline method once the new regulations are in place. This will put a stop to the inconsistency we have seen in this area, and thus lead to greater fairness in the designations from species to species.

#### D. One More Problem: Implementation Sequence

There is one more very serious concern raised by what I have proposed in this article. If we accept the view that critical habitat is the place for recovery and that once we are protecting it as such we can accept a lower standard for jeopardy, what happens to all those listed species that have no critical habitat designated for them? There is nothing in place to protect their efforts at recovery, given that Congress placed that responsibility in the hands of critical habitat. This is not a sufficient reason not to move to a holistic approach to the statute as proposed above, but does require special consideration in the short term.

Two steps are needed to resolve this problem, which stems from the decades of non-implementation of the ESA. First, the Services need to request a temporary special

appropriation of funds for the sole purpose of designating habitat for the species already listed but lacking critical habitat. This should not be done in lieu of the Services' other ESA responsibilities such as new listings, but rather a special task force needs to be created to get this done. Second, and in the meantime, listed species lacking critical habitat must receive special consideration in jeopardy consultations. In the event that a proposed project is to take place on land likely to be designated as critical habitat, it should be protected as if it were already so-designated, at least until the actual designation can be determined.

## VI. Conclusion

The ESA is a complex machine with many moving parts and this has caused more confusion than necessary. If we look at it more carefully, we see that Congress designed all these parts to work together and complement each other. We do not need to interpret every single provision as being a pro-active step to recovery, but we do need to implement the critical habitat provisions as such, because Congress designed the statute to work that way. If we interpret the ESA holistically, instead of piece by piece, we see how it all works together. Critical habitat must be designated at the time of listing, as it is the primary conservation tool for listed species. It then must be protected as such. In considering the economic impact of such designations, we must look at the difference between what is achieved on the critical habitat (recovery) and the lesser protections afforded listed species generally. This is the complete package Congress gave to wildlife decades ago, and it is time for its delivery.