

**TESTIMONY OF DAN ASHE, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE,
DEPARTMENT OF THE INTERIOR, BEFORE THE U.S. HOUSE OF
REPRESENTATIVES, COMMITTEE ON NATURAL RESOURCES, REGARDING
IMPLEMENTATION OF THE CRITICAL HABITAT REQUIREMENTS OF THE
ENDANGERED SPECIES ACT OF 1973**

April 19, 2016

Introduction

Good morning Chairman Bishop, Ranking Member Grijalva, and Members of the Committee. I appreciate the opportunity to testify before you today on the Endangered Species Act of 1973 (ESA). At the Committee's request, my testimony will focus on the U.S. Fish and Wildlife Service's (FWS) implementation of Congress' mandate under the ESA to designate critical habitat for threatened and endangered species.

The ESA is one of the nation's most important conservation laws. It is implemented jointly by FWS and the National Marine Fisheries Service (NMFS), collectively referred to as the Services. The law's stated purpose includes the conservation of threatened and endangered species and the ecosystems upon which they depend. The ESA provides a safety net for species that are at risk of going extinct. When a species is designated as threatened or endangered – or “listed” under the ESA – it is in dire need of help. FWS uses the best available scientific and commercial information to determine whether species need to be listed, to identify and address the reasons that listed species are at risk of going extinct, and to facilitate the recovery of the species.

The ESA has been successful in its essential goal to conserve listed species, which effectively protects the nation's biological diversity heritage for the benefit of future generations of Americans. Since it was enacted by Congress in 1973, the ESA has successfully prevented the extinction of more than 99 percent of the over 1,500 domestic species that have been protected through the Act.

The continued success of the ESA is predicated upon FWS's partnerships with states, other Federal agencies and private landowners, as demonstrated by several conservation achievements that recently culminated in “delisting” several recovered species. Recovering species to the point where they no longer need the protections of the ESA often requires focused efforts over many years to implement recovery actions that include, for example, habitat restoration, best management practices for various human activities, and consistent monitoring. Partnerships developed and maintained by FWS have sustained years of recovery efforts for a myriad of species. As a result, during the Obama Administration, FWS has delisted more species due to recovery than during any prior administration. Recently delisted species include the Louisiana black bear, Oregon chub, Delmarva fox squirrel, Virginia northern flying squirrel, Modoc sucker, and brown pelican.

Partnerships have similarly been essential to conserving species that are candidates for listing to the point where those species don't need the protection of the ESA. Recent examples include the Sonoran desert tortoise in Arizona, the New England cottontail in six northeastern states, and the

greater sage grouse in eleven western states. Ensuring the conservation of these species and the ecosystems upon which they depend is good for a myriad of other wildlife species and for humans who use the same ecosystems for hunting, fishing, outdoor recreation, and other services like clean air and water. These conservation success stories are also a measure of the success and importance of the ESA.

Critical Habitat

Part of the ESA's program for conserving listed species includes designating "critical habitat." When FWS proposes an animal or plant for listing, Section 4 of the ESA also requires FWS to designate critical habitat for the species. FWS proposes critical habitat designations based on the best available scientific and commercial information on what an animal or plant species needs to survive, reproduce, and recover. The ESA also directs the FWS to evaluate the anticipated economic impacts of the proposed critical habitat designation. FWS makes both the proposed designation and economic analysis available for public review and comment. The proposed designation is also submitted to independent peer review. It is only after this public comment period, peer review, and consideration of the impacts of the designation and potential exclusion of specific areas that the FWS makes a final designation of critical habitat.

Section 3(5)(A) of the ESA defines critical habitat in two parts:

- (i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protection; and,
- (ii) 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.

Critical habitat designations do not affect land ownership or impose liens on property. Designating critical habitat does not allow the government to take or manage private property, nor does it establish a refuge, reserve, preserve, or other conservation area. Designation also does not authorize, in any way, government or public access to private land.

The only effect of designating an area as critical habitat is to trigger the ESA requirement that actions authorized, funded, or carried out by federal agencies must not destroy or adversely modify designated critical habitat. FWS assists federal agencies in meeting this responsibility by consulting with them pursuant to section 7 of the ESA when their actions may affect designated critical habitat.

As I testified in September 2015, FWS is continuing to take steps to improve the implementation of the ESA. We are committed to making the ESA work for the American people to accomplish its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend. Our efforts to make the ESA work better are consistent with President Obama's Executive Order 13563, Improving Regulation and Regulatory Review, and are outlined in the Department of Interior's Preliminary Plan for Retrospective Regulatory Review.

As part of the Administration's ongoing efforts, the Services finalized a policy and two rules in February of this year that will provide a clearer, more consistent and predictable process for designating critical habitat. One rule clarifies the procedures and standards used for designating critical habitat. The new policy is intended to provide greater predictability, transparency, and consistency regarding how the Services consider exclusion of areas from critical habitat designations. The other rule revises the definition of "destruction or adverse modification." These three components are discussed in greater detail below.

Designating Critical Habitat Rule – Part 424

Under the ESA, Congress requires the Services to designate critical habitat for listed species to the maximum extent "prudent and determinable." The ESA sets forth the general framework for designating critical habitat, and the Services have regulations in 50 CFR part 424 that further set out standards and processes for designation of critical habitat. However, there had been no comprehensive revisions to the ESA implementing regulations since 1984. In the years since those last revisions, we have gained considerable experience in implementing the critical habitat requirements of the ESA, and there have been numerous court decisions regarding the designation of critical habitat that have further informed the designation process. For the benefit of the public, and as a basic matter of good government, we used this substantial body of experience to finalize a rule in February 2016 that updates and clarifies the procedures, standards, and criteria used for designating critical habitat.

In addition to a number of minor and technical changes, this rule includes a definition for "geographical area occupied by the species," which was previously undefined. Of note, this definition recognizes the importance of areas used throughout all or part of the species' life cycle, often referred to as the "range" of the species, and can include important areas such as migratory corridors, seasonal habitats, and habitats used periodically.

The rule also revises the Services' regulations to be consistent with the 2004 National Defense Authorization Act (NDAA) that make certain lands managed by the Department of Defense ineligible for designation as critical habitat. In order to be exempted from a designation of critical habitat, lands must be covered by an integrated natural resources management plan (INRMP) under the Sikes Act, with a determination made by the Secretary of the Interior or the Secretary of Commerce that the plan provides a conservation benefit to the species.

As mentioned above, the second part of the statutory definition of critical habitat provides that areas outside the geographical area occupied by the species at the time of listing, i.e., unoccupied areas, should be designated as critical habitat if they are determined to be "essential for the conservation of the species." Our previous regulations specified that the Services should only designate unoccupied areas when the designation of occupied areas would be inadequate to ensure the conservation of the species. Based on years of applying the previous regulations, the Services concluded that this rigid step-wise approach is both unnecessary and unintentionally limiting. It does not necessarily serve the best conservation strategy for the species and, in some circumstances, may result in a designation that is geographically larger but less effective as a conservation tool.

This rule allows us to consider including occupied and unoccupied areas at the same time during a critical habitat designation, based on any conservation strategy, criteria, or plan for the species that may be developed. This improved ability to designate unoccupied areas will help us make more effective and defensible designations for species dependent upon highly dynamic and short-lived habitats, such as sandbars and early successional habitats, and will be increasingly important as the effects of global climate change continue to drive rapid change in the environment.

The concurrent evaluation of occupied and unoccupied areas for a critical habitat designation, using the best available science and reliable predictions, will allow us to develop more precise designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing any regulatory burdens that are not needed.

Critical Habitat Exclusions Policy – Section 4(b)(2)

Under section 4(b)(2) of the ESA, Congress provided discretionary authority to the Secretary to exclude any specific area from a critical habitat designation if the benefits of such exclusion outweigh the benefits of designation, so long as the exclusion will not result in the extinction of the species.

Over the years, much attention has been focused on the process by which the Services consider critical habitat exclusions. In February of 2016, we finalized a policy to provide greater predictability and transparency regarding our process and methods. This policy covers several fact patterns that frequently arise in the context of exclusions. It establishes that we will exercise our authority to exclude specific areas in a way that encourages voluntary conservation efforts on non-federal lands; and it focuses designations on federal lands because that is where a critical habitat designation is most likely to make a difference for conservation of the species.

The policy clarifies how we evaluate the benefits that conservation plans and partnerships on private lands provide to species as we analyze potential critical habitat exclusions. These considerations can include private conservation plans, agreements, and partnerships that do not involve the Services, as well as those developed under section 10 of the ESA, including Habitat Conservation Plans (HCPs), Candidate Conservation Agreements with Assurances (CCAAs), and Safe Harbor Agreements (SHAs).

We recognize the strong conservation benefit for listed species that can be provided by efforts of private landowners. These benefits often cannot be achieved through the designation of critical habitat, and a critical habitat designation generally has little effect on private lands. As such, we generally give great weight to the benefits of excluding areas where there have been demonstrated partnerships. We anticipate consistently excluding from critical habitat designations areas that are covered by properly implemented conservation plans.

This policy clarifies how the Services will address Tribal lands when designating critical habitat. Following the direction of Secretarial Order 3206 regarding tribal rights and Federal-Tribal trust responsibilities, when we undertake a critical habitat exclusion analysis, we will always consider

exclusions of Tribal lands prior to finalizing a designation of critical habitat, and will give great weight to Tribal concerns in analyzing the benefits of exclusion.

The new policy also clarifies that in addition to the exemption of DOD lands with completed INRMPs (as explained above), the Services will always consider excluding areas based on likely impacts to national security or homeland security, when those exclusions are requested and justified by DOD, Department of Homeland Security (DHS), or another Federal agency.

FWS recognizes Congress' intent to focus on Federal agencies in ESA implementation. Accordingly, under the policy, federal lands are prioritized as sources of support in the recovery of listed species. To the extent possible, the Services will focus designation of critical habitat on Federal lands in an effort to avoid any possible regulatory burdens related to critical habitat on non-Federal lands. As such, we will focus our critical habitat exclusions on non-Federal lands.

Adverse Modification Rule

Section 7 of the ESA requires Federal agencies to ensure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.

The ESA does not define "destruction or adverse modification." The Services promulgated regulations in 1986 to clarify this statutory requirement. After two circuit court decisions invalidated the regulatory definition of "destruction or adverse modification" in 2001 and 2004, the Services issued guidance instructing biologists to no longer rely on the regulatory definition. The guidance, issued in 2004 by FWS and in 2005 by NMFS, provides an analytical framework for making destruction or adverse modification determinations.

The final rule issued in February 2016 provides a new regulatory definition of "destruction or adverse modification" of critical habitat. This new definition does not change how the Services conduct consultations to assess destruction or adverse modification of critical habitat. Instead, the definition is consistent with our approach for the past decade. The rule codifies the principles of the 2004/2005 guidance, and takes into consideration public comments, Congressional intent, relevant case law, and the Services' collective experience in applying the "destruction or adverse modification" standard over the last three decades. The definition continues the intent of the 2004/2005 guidance to evaluate the effects of a federal action on the recovery, not just the survival, of listed species. Under the new definition, FWS will maintain our approach to assessing the effects of an action on critical habitat by evaluating the impacts to certain physical and biological features. Specifically, we will continue to consider alterations to physical and biological features that are necessary for the recovery of the species as "effects" to the critical habitat. We will also continue to consider as "effects" those alterations to critical habitat that prevent or delay the development of those physical and biological features, which may or may not be present, or which may be present only in sub-optimal quantity or quality, at the time of critical habitat designation.

For the past ten years, the Services have followed this approach to consulting on the effects of federal actions on designated critical habitat. As such, we do not expect this final rule to alter the

section 7 consultation process from our current practice, and previously completed biological opinions do not need to be reevaluated.

This rulemaking will improve the predictability and transparency of these determinations for federal agencies and the public.

Conclusion

In conclusion, these two final rules and policy codify and cohesively present to the public certain aspects of our implementation of the critical habitat mandates in the ESA. They build upon a substantial body of experience and court rulings and have benefitted from peer review, and review and comment by the public. They provide a clearer, more consistent, and more predictable process for designating critical habitat for listed species under the ESA.

As the Administration moves forward with efforts to improve the implementation of the ESA, we ask the Congress to join this effort that benefits the public through more effective conservation of listed species and more efficient, transparent, and predictable processes for the regulated public. We note that preventing extinction and facilitating recovery requires people on the ground – “in the field” – to do the science, prevent extinction, foster partnerships, and develop and implement recovery actions. To that end, the most significant step that Congress can take to improve the effectiveness of the ESA is to provide the resources needed to get the job done in the field. We therefore ask that Congress support the President’s budget request for endangered species conservation for Fiscal Year 2017.