

Critical thinking: ESA critical habitat's ongoing redefinition

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Over a year ago, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the “Services”) issued two rules revising implementation of the Endangered Species Act’s (ESA) critical habitat provisions. [81 Fed. Reg. 7,214; 7,413](#) (Feb. 11, 2016) (the “Rules”). Since then, 20 states have sued the Services claiming that the Rules constitute federal overreach, President Trump took office and has sought to withdraw or delay many Obama-era environmental policies, and the frequency with which the Services are designating critical habitat has declined notably. This article discusses these developments, the underlying Rules, and their future prospects.

The Rules

ESA section 4 directs the Services to designate critical habitat for listed species. 16 U.S.C. § 1533(a)(3)(A). Section 3 defines critical habitat as the “areas within the geographical area occupied by the species, at the time it is listed” that are “essential to the conservation of the species” and “which may require special management considerations or protection,” as well as areas outside this occupied area that are “essential for the conservation of the species.” *Id.* § 1532(5)(A)(i).

ESA section 7 directs federal agencies to consult with the Services regarding actions that may affect listed species and prohibits federal agencies from engaging in activities that are likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat. *Id.* § 1536(a)(2).

In the Rules, the Services made a number of changes for identifying critical habitat and determining when the effects of a federal action are deemed to destroy or adversely modify critical habitat. In part, the Rules:

- **Change the framework for designating unoccupied areas.** The Rules provide for designating areas unoccupied by the species if they are “essential” to the species’ conservation. Under earlier regulations, the Services considered designating “areas outside this occupied area” only if a designation of occupied habitat would be

inadequate for the species' conservation. 50 C.F.R. § 424.12(e) (2015). The Services now abandon this requirement as "unnecessary and unintentionally limiting."

- **Define "geographical area occupied by the species."** The Services define the statutory phrase "geographical area occupied by the species" as "the geographical area which may generally be delineated around the species' occurrences, as determined by the Secretary (i.e., range)." This definition includes areas where a species is not continuously found, if there is "evidence of regular periodic use."
- **Include already-degraded habitat.** The Rules recognize that critical habitat may include already-degraded habitat that has the potential to support recovery of listed species if developed and improved and that such habitat will generally be considered destroyed or adversely modified if an action "alters it to prevent it from improving over time relative to its pre-action condition."
- **Redefine "destruction or adverse modification."** Under previous regulations, "destruction or adverse modification" of critical habitat arose only if a federal action affected both the recovery *and* survival of a species. 50 C.F.R. § 402.02 (2015). In response to decisions setting aside this interpretation, *see Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059 (9th Cir. 2004); *Sierra Club v. FWS*, 245 F.3d 434 (5th Cir. 2001), the Rules redefine the term to mean a "direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." The Services use "conservation" to capture both the "survival" and "recovery" concepts, consequently an appreciable diminishment to either may now lead to a destruction or adverse modification determination.

Implementing the Designation Rule

Between March 14, 2106, when the Rules went into effect, and November 2016, the Services issued three proposed and 150 final designations in 12 rulemaking actions. Among these designations were the New Mexico jumping mouse and the Black Warrior waterdog. Both the final designation for the jumping mouse (81 Fed. Reg. 14,264 (Mar. 16, 2016)) and the proposed designation for the waterdog (81 Fed. Reg. 69,475 (Oct. 6, 2016)) included areas unoccupied by the species.

Since November 2016, the Services have designated critical habitat for just two species—the Atlantic sturgeon and the Guadalupe fescue. 82 Fed. Reg. 39,160 (Aug. 1, 2017); 82 Fed. Reg. 42,245 (Sep. 7, 2017). While the National Marine Fisheries Service included unoccupied habitat in the sturgeon proposal, it ultimately determined that the benefits of excluding unoccupied areas outweighed the benefits of designation. The Fish and Wildlife Service did not designate unoccupied habitat for the fescue.

Challenges to the Rules and designations

On November 29, 2016, 18 (now 20) states sued the Services, claiming that the Rules are an unlawful attempt to expand the Services' authority and control over state lands. *Alabama v. NMFS*, No. 1:16-cv-00593 (S.D. Ala.). The states argue that the Rules allow the designation of critical habitat regardless of whether a species occupies the area and whether an area is actually essential to a species' conservation. To give the Trump administration additional time to respond, the court granted the Services' request for a stay until November 10, 2017.

Pending before the U.S. Supreme Court is a certiorari petition in *Markle Interests, L.L.C. v. FWS*, No. 17-74, seeking review of a Fifth Circuit decision upholding the critical habitat designation for the dusky gopher frog. That designation included currently unoccupied habitat in one Louisiana parish, habitat that had been unoccupied for decades but that the Fish and Wildlife Service determined included historic breeding areas and other habitat elements for the species. While the challenged designation was made under the Services' former regulations, the case presents the overarching question of whether the Fish and Wildlife Service appropriately included unoccupied habitat and properly determined that the unoccupied areas were "essential for the conservation of the species." The Fish and Wildlife Service is scheduled to file its response to the certiorari petition on October 13, 2017.

The future of critical habitat

The Services' approach to critical habitat designation has come in three waves. During the first wave, the Services were largely disinterested in critical habitat, declaring that, "in most circumstances," designating critical habitat is of "little additional value for most listed species, yet it consumes large amounts of conservation resources." 64 Fed. Reg. 31,871, 31,872 (June 14, 1999).

The second wave followed a series of lawsuits that enforced the Services' duty to designate critical habitat and overturned their interpretation of the jeopardy and adverse modification standards. The Services then started designating critical habitat regularly and more expansively. These broad designations reached their zenith for the final polar bear and proposed ringed seal designations; the designated habitat for the former being larger than any single state except Alaska or Texas and the latter larger than Texas, Idaho, and Massachusetts combined.

The Rules are the third wave and continue to allow for potentially broad designations. The ultimate scope of future designations is uncertain, and the two final designations under the current administration give little guidance. It will be up to Congress, the courts, or possible executive action to decide the ebb or flow of this third wave. The courts may have the opportunity to do so in the Alabama litigation and perhaps the dusky gopher frog case, both of which generally challenge the designation of unoccupied habitat.