

CRITICAL HABITAT REFORM ACT OF 2004

NOVEMBER 19, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. POMBO, from the Committee on Resources,  
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2933]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 2933) to amend the Endangered Species Act of 1973 to reform the process for designating critical habitat under that Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Critical Habitat Reform Act of 2004”.

**SEC. 2. DESIGNATION OF CRITICAL HABITAT; STANDARD.**

(a) IN GENERAL.—Section 4(a) of the Endangered Species Act of 1973 (16 U.S.C. 1533(a)) is amended—

(1) by redesignating subparagraph (B) of paragraph (3) as paragraph (4);

(2) in paragraph (4) (as so redesignated)—

(A) by striking “(i)” and inserting “(A)”; and

(B) by striking “(ii)” and inserting “(B)”; and

(C) by striking “(iii)” and inserting “(C)”; and

(3) by amending paragraph (3) to read as follows:

“(3)(A)(i) The Secretary shall, by regulation promulgated in accordance with subsection (b) and to the maximum extent practicable, prudent, and determinable, issue a final regulation designating any habitat of the species determined to be an endangered species or threatened species that is critical habitat of the species.

“(ii) The Secretary shall make any designation required under clause (i) by not later than one year after the final approval of a recovery plan for the species under section 4(f), or 3 years after the date of publication of the final regulation imple-

menting a determination that the species is an endangered species or threatened species, whichever is earlier.

“(B) The Secretary shall reconsider any determination that designation of critical habitat of a species is not practicable, or determinable, during the next review under section 4(c)(2)(A) or at the time of a final approval of a recovery plan for the species under section 4(f).

“(C) The Secretary may, from time-to-time as appropriate, revise any designation of critical habitat under this paragraph.

“(D) Notwithstanding subparagraphs (A), (B), and (C), any designation of an area as critical habitat shall not apply with respect to any action authorized by—

“(i) a permit under section 10(a) (including any conservation plan or agreement under that section for such a permit) that applies to the area;

“(ii) a written statement under section 7(b)(4); or

“(iii) a land conservation or species management program of a State, a Federal agency, a federally recognized Indian tribe located within the contiguous 48 States, or the Metlakatla Indian Community that the Secretary determines provides protection for habitat of the species that is substantially equivalent to the protection that would be provided by such designation.

“(E) Nothing in this paragraph shall be construed to authorize a recovery plan to establish regulatory requirements or otherwise to have an effect other than as non-binding guidance.”.

(b) CONFORMING AMENDMENT.—Section 4(b)(6)(C) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(6)(C)) is repealed.

#### SEC. 3. BASIS FOR DETERMINATION.

Section 4(b)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(2)) is amended—

(1) by inserting “(A)” after “(2)”; and

(2) by adding at the end the following:

“(B) In determining whether an area is critical habitat, the Secretary shall seek and, if available, consider information from State and local governments in the vicinity of the area, including local resource data and maps.

“(C) Consideration of economic impact under this paragraph shall include—

“(i) direct, indirect, and cumulative economic costs and benefits, including consideration of changes in revenues received by landowners, the Federal Government, and State and local governments; and

“(ii) costs associated with the preparation of reports, surveys, and analyses required to be undertaken, as a consequence of a proposed designation of critical habitat, by landowners seeking to obtain permits or approvals required under Federal, State, or local law.

“(D) In designating critical habitat of a species, the Secretary shall first consider all areas that are known to be within the geographical area determined by field survey data to be occupied by the species.”.

#### SEC. 4. CONTENT OF NOTICES OF PROPOSED DESIGNATION OF CRITICAL HABITAT.

Section 4(b)(5)(A) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(5)(A)) is amended—

(1) in clause (i) by striking “, and” and inserting a semicolon;

(2) in clause (ii)—

(A) by striking “and to each” and inserting “to each”; and

(B) by inserting “, and to the county and any municipality having administrative jurisdiction over the area” after “to occur”; and

(3) by adding at the end the following:

“(iii) with respect to a regulation to designate or revise a designation of critical habitat—

“(I) publish maps and coordinates that describe, in detail, the specific areas that meet the definition under section 3 of, and are designated under section 4(a) as, critical habitat, and all field survey data upon which such designation is based; and

“(II) maintain such maps, coordinates, and data on a publicly accessible Internet page of the Department; and

“(iv) include in each of the notices required under this subparagraph a reference to the Internet page referred to in clause (iii)(II);”.

#### SEC. 5. CLARIFICATION OF DEFINITION OF CRITICAL HABITAT.

Section 3(5) of the Endangered Species Act of 1973 (16 U.S.C. 1532(5)) is amended—

(1) in subparagraph (A) by striking clauses (i) and (ii) and inserting the following:

“(i) the specific areas—

“(I) that are within the geographical area determined by field survey data to be occupied by the species at the time the areas are designated as critical habitat in accordance with section 4; and

“(II) on which are found those physical and biological features that are necessary to avoid jeopardizing the continued existence of the species and may require special management considerations or protection; and

“(ii) areas that are not within the geographical area referred to in clause (i)(I) and that the Secretary determines are essential for the survival of the species at the time the areas are designated as critical habitat in accordance with section 4.”;

(2) by striking subparagraph (B) and redesignating subparagraph (C) as subparagraph (B); and

(3) by adding at the end the following:

“(C) For purposes of subparagraph (A)(i) the term ‘geographical area determined by field survey data to be occupied by the species’ means the specific area that, at the time the area is designated as critical habitat in accordance with section 4, is being used by the species for breeding, feeding, sheltering, or another essential behavioral pattern.”.

#### PURPOSE OF THE BILL

The purpose of H.R. 2933 is to amend the Endangered Species Act of 1973 to reform the process for designating critical habitat under that act.

#### BACKGROUND AND NEED FOR LEGISLATION

Born of the best intentions, the Endangered Species Act of 1973 (ESA, 16 U.S.C. 1531 et seq.) has failed to live up to its promise, and species are more threatened today than ever before. The current system is broken and in need of strengthening and updating to protect, conserve and recover America’s species for the future. While the ESA has many unique provisions designed to recover threatened and endangered species, H.R. 2933 focuses primarily on the process by which the Secretary of the Interior and the Secretary of Commerce designates critical habitat for the species in question.

Prior to 1966, authority for wildlife protection rested primarily with the States, except where the wildlife was highly migratory or where wildlife was taken in violation of State or federal law was transported across State boundaries. In response to a concern that various species had become or were in danger of becoming extinct, the federal government began to enact legislation protecting endangered and threatened fish, wildlife and plants. Congress’ efforts culminated in 1973 with the passage of the ESA (Public Law 93-205) which has become our Nation’s strictest and most stringent environmental law. In conjunction with the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the ESA embodies a rigid and comprehensive approach to species protection in the United States and throughout the world.

The ESA was enacted with the intent to protect and preserve species that have been identified as threatened or endangered. Over the past 30 years more than 1800 species have been listed for protection. Under the ESA, the Secretary of the Interior, through U.S. Fish and Wildlife Service (FWS), has responsibility for plants, wildlife and inland fishes. The Secretary of Commerce, through the National Marine Fisheries Service (NMFS), is responsible for implementing the ESA with respect to ocean-going fish and marine animals. In addition, the Department of Agriculture’s Animal and Plant Health Inspection Service oversees the import and export of

endangered species from foreign countries through the Nation's ports.

#### CRITICAL HABITAT UNDER THE ESA

At the time a species is listed, FWS or NMFS is required to designate critical habitat for the species under section 4 of the ESA. Critical habitat is designated to alert the public and governmental units to the habitat needs of the species. The only exception to this rule is where the relevant Secretary finds that it is not prudent to do so. However, the failure to designate critical habitat has resulted in numerous lawsuits against FWS and NMFS. While it is theoretically mandatory, critical habitat has not been designated for all listed species.

Additionally, the Committee notes that FWS has been unable to comply with certain deadlines imposed by the ESA for completing critical habitat designations, and in response, litigation has overtaken the critical habitat program. Currently, there are 12 active critical habitat lawsuits against FWS for approximately 25 species, 11 Notices of Intent to Sue specific to critical habitat for approximately 20 species, and FWS is complying with 16 court orders involving critical habitat for 32 species. This has rendered the program bankrupt, as compliance with these court actions consumes nearly the entire listing program budget. This rampant litigation is preventing FWS from actually working to protect species, including those with the greatest risk of extinction. Moreover, litigation and court orders take precedence over implementing recovery actions.

Current law requires the relevant Secretary to designate critical habitat "to the maximum extent prudent and determinable" within one year of the listing of a threatened or endangered species. This provision has caused two major problems. First, at least FWS has routinely stated that one year is not sufficient time to review all of the pertinent field survey data and scientific information to make an informed decision as to what land is necessary for critical habitat. By giving the Secretary additional time to formulate a decision, the decision will be less vulnerable to litigation. Second, the courts have defined "prudent" and "determinable" as allowing very little discretion to the Secretary when designating critical habitat. Therefore, adding the term "practicable" puts decisions back in the hands of the Secretary.

The term "practicable" is currently used in the ESA. H.R. 2933 simply adds the frequently used term to the section of the law specific to designating critical habitat. This inclusion is not radical or unprecedented given the wide use of the term in the ESA and in other environmental laws, such as the Marine Mammal Protection Act, Clean Water Act, and Clean Air Act. This term has been defined by the courts in the context of these other laws in a number of cases dating back over 30 years. A survey of the cases shows that the courts and the statutes use the word "practicable" according to its generally known meaning: capable of being affected, done or executed; feasible; or capable of being used for a specific purpose.

Additionally, under current law, the Secretary must designate critical habitat unless it is: (1) not determinable; or (2) not prudent to do so. The ESA does not give the Secretary an opportunity to

revisit an initial “not prudent” determination (although the Secretary must revisit a determination that critical habitat was not determinable at the time of listing.). Accordingly, the bill does not give the Secretary another opportunity to revisit “not prudent,” because that is not within the current law.

In summary, H.R. 2933 aims to strengthen and update the critical habitat process by focusing on how FWS designates critical habitat for a species in question, bringing common sense to the ESA. H.R. 2933 tightens and defines the critical habitat designation process to reduce the amount of litigation by private interests against FWS. The legislation provides State and local governments as well as landowners more input and participation in the designation process. It requires the Secretary of the Interior to designate critical habitat for a species within one year of the approval of a recovery plan or three years from the date of publication of the final regulation determining that the species is endangered or threatened, whichever is earlier. It rewards actions in areas already subject to a habitat conservation plan or a State, federal or tribal land conservation program by not allowing the Secretary to designate such areas as critical habitat, in turn eliminating overlapping critical habitat designation and therefore making available limited resources for other species. Additionally, it moves the ESA’s current economic impact analysis requirement to be done before a critical habitat designation. Finally, it requires FWS to evaluate local data when considering designating an area critical habitat and limits the designation of critical habitat to the maximum extent “practicable, prudent and determinable.”

#### COMMITTEE ACTION

H.R. 2933 was introduced on July 25, 2003, by Congressman Dennis A. Cardoza (D-CA). The bill was referred to the Committee on Resources. On April 28, 2004, the Full Resources Committee held a hearing on the bill. On July 21, 2004, the Full Resources Committee met to consider the bill. Congressman Cardoza offered an amendment in the nature of a substitute to make technical changes. Congressman Nick J. Rahall II (D-WV) offered a substitute amendment to the amendment in the nature of a substitute to, among other things, provide criteria, standards and deadlines for designation of critical habitat and the development of recovery plans. A point of order was sustained against the amendment. Mr. Rahall offered a second substitute amendment to require designation of critical habitat for all species listed under the ESA. It was not adopted by a roll call vote of 14–30, as follows:



Congressman Joe Baca (D-CA) offered an amendment to the amendment in the nature of a substitute which provided that the designation of critical habitat will not apply to any action authorized by tribal species management programs. It was adopted by voice vote. The Cardoza amendment in the nature of a substitute as amended was then adopted by voice vote. The bill as amended was then ordered favorably reported to the House of Representatives by a roll call vote of 28-14, as follows:



## SECTION-BY-SECTION ANALYSIS

*Section 1. Short title*

The bill is to be cited as the “Critical Habitat Reform Act of 2004.”

*Section 2. Designation of critical habitat; standard*

This section amends section 4 of the ESA to require the relevant Secretary to the maximum extent practicable, prudent, and determinable to designate critical habitat for a species within one year of the approval of a recovery plan or three years from the date of publication of the final regulation determining that the species is endangered or threatened, whichever is earlier. The section further requires the Secretary to review a determination that critical habitat is either not practicable or not determinable during the next five year review period or at the time a recovery plan is established.

The language will still strongly encourage the development of recovery plans while providing additional time for the Service to make the best informed decision as to what land should be designated as critical habitat for the species in question. Subsection (E) was added to clarify that recovery plans are intended to be non-binding guidance documents. Currently, the Secretary is under a general duty to develop a recovery plan but federal courts are in unanimous agreement that the contents of a recovery plan are discretionary.

This section prohibits the Secretary from designating an area as critical habitat of a species if the area is already subject to permit under section 10(a), a written statement under section 7(b)(4) or a land conservation or species management program of a State, a federal agency, a federally recognized Indian tribe located within the contiguous 48 States, or the Metlakatla Indian Community. Currently, the Secretary is allowed to exempt habitat conservation plans but action on other conservation plans are unclear. H.R. 2933 will codify and expand current practices as common sense would dictate that areas already under protection of conservation plans should not have overlapping critical habitat designation. In addition, by exempting these areas, H.R. 2933 encourages greater use and creation of these plans, which have proven to be useful incentive tools for land conservation and species recovery.

*Section 3. Basis for determination*

This section requires the economic impact analysis done before a critical habitat designation to consider direct, indirect, and cumulative economic costs and benefits, including the consideration of changes in revenues received by landowners, the federal government, and State and local governments as a result of a critical habitat designation as well as to include costs associated with the preparation of reports, surveys and analyses for landowners seeking to obtain approval from state, federal or local permitting agencies. It also encourages the Secretary to first consider areas that are currently occupied by the species for inclusion when designating critical habitat.

Under current law the Secretary is required to consider economic impact of a proposed designation but in practice the Secretary has

routinely overlooked clear indications that the designation would result in major property value loss. The expanded definition of “economic impact” provides the Secretary with a more accurate picture of the costs and benefits associated with proposed critical habitat designations and will provide the Secretary with greater tools in a determination as to whether the proposed designation is economically feasible.

*Section 4. Content of notices of proposed designation of critical habitat*

This section requires the Secretary to consider local resource data, including maps, when considering areas for possible critical habitat designation. Currently, the Secretary generally does not seek to obtain information from local governments or landowners which, in many instances, is more accurate than the Secretary’s resource information.

The section further requires the Secretary to publish maps and coordinates that describe, in detail, the specific areas that are designated as critical habitat and maintain these maps on a publicly accessible Internet page and include on any notices of designations or listings a reference to the Internet page. Currently, if the Secretary provides maps of a proposed critical habitat designation they are either so general or so difficult to read that landowners and local governments often have a difficult time determining whether their land falls within the proposal. Detailed maps will help those on the ground understand their requirements under a proposed critical habitat designation.

*Section 5. Clarification of definition of critical habitat*

This section more clearly defines critical habitat to be the specific areas within the geographical area determined by field survey data to be occupied by the species at the time the areas are designated as critical habitat in accordance with ESA section 4 and on which are found those physical or biological features that are necessary to avoid jeopardizing the continued existence of the species and may require special management considerations. Area designated can also include areas that are not within the geographical area determined by field survey data to be occupied by the species if the Secretary determines those areas are essential for the survival of the species.

Current law contains certain qualifiers for designation that have been widely interpreted by the courts and provide little guidance to local governments or landowners. Tightening the definitions will provide for less ambiguity for the designation process.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the rules of the House of Representatives, the Committee on Resources’ oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. General Performance Goals and Objectives. This bill does not authorize funding and therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives does not apply.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

*H.R. 2933—Critical Habitat Reform Act of 2004*

Summary: Under the Endangered Species Act (ESA), certain species of plants and animals are listed as threatened or endangered based on assessments of the risk of their extinction. The act generally requires federal agencies to designate habitat that is critical to the recovery of such species. H.R. 2933 would amend current law to alter the process for designating such habitat.

Assuming appropriation of the necessary amounts, CBO estimates that implementing H.R. 2933 would cost \$2 million in 2005 and \$12 million over the next five years. The bill would not affect direct spending or revenues. H.R. 2933 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 2933 is shown in the following table. The costs of this legislation fall within budget function 300 (natural resources and environment).

	By fiscal year, in millions of dollars—				
	2005	2006	2007	2008	2009
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Estimated Authorization Level .....	2	2	2	3	3
Estimated Outlays .....	2	2	2	3	3

Basis of estimate: Under the ESA, the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) designate habitat that is critical to the recovery of threatened or endangered species. Based on information from those agencies, CBO estimates that spending for designating critical habitat will total about \$10 million in fiscal year 2004. That amount includes the cost of biological surveys of species' habitat require-

ments, analysis of the direct economic impact of potential designations, efforts to inform and involve the public in the designation process, and administrative expenses.

H.R. 2933 would amend the ESA to alter the process for designating critical habitat for threatened and endangered species. The bill would change the definition of critical habitat to include more specific criteria, specify new deadlines for designating critical habitat, require federal agencies to conduct broader economic analyses of the impact of designating critical habitat, and direct those agencies to consider input from state and local governments.

Based on information from the USFWS and the NMFS, CBO estimates that implementing H.R. 2933 would cost \$2 million in 2005 and \$12 million over the 2005–2009 period, assuming appropriation of the necessary amounts. That estimate includes \$1 million in 2005 and \$7 million over the next five years for the cost of broader economic analyses of critical habitat designations. The estimate also includes \$1 million a year for increased administrative costs to the agencies.

Intergovernmental and private-sector impact: H.R. 2933 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Megan Carroll. Impact on State, Local, and Tribal governments: Marjorie Miller. Impact on the Private Sector: Amina Masood.

Estimate approved by: Peter H. Fontaine, Deputy Assistant director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

**ENDANGERED SPECIES ACT OF 1973**

\* \* \* \* \*

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) \* \* \*

\* \* \* \* \*

(5)(A) The term “critical habitat” for a threatened or endangered species means—

[(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 this Act, on which are found those

physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

[(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

[(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.]

(i) *the specific areas—*

(I) *that are within the geographical area determined by field survey data to be occupied by the species at the time the areas are designated as critical habitat in accordance with section 4; and*

(II) *on which are found those physical and biological features that are necessary to avoid jeopardizing the continued existence of the species and may require special management considerations or protection; and*

(ii) *areas that are not within the geographical area referred to in clause (i)(I) and that the Secretary determines are essential for the survival of the species at the time the areas are designated as critical habitat in accordance with section 4.*

[(C)] (B) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(C) *For purposes of subparagraph (A)(i) the term “geographical area determined by field survey data to be occupied by the species” means the specific area that, at the time the area is designated as critical habitat in accordance with section 4, is being used by the species for breeding, feeding, sheltering, or another essential behavioral pattern.*

\* \* \* \* \*

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) GENERAL.—(1) \* \* \*

\* \* \* \* \*

[(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

[(i) 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; and

[(ii) may, from time-to-time thereafter as appropriate, revise such designation.]

(3)(A)(i) *The Secretary shall, by regulation promulgated in accordance with subsection (b) and to the maximum extent practicable, prudent, and determinable, issue a final regulation designating any habitat of the species determined to be an endangered species or threatened species that is critical habitat of the species.*

(ii) *The Secretary shall make any designation required under clause (i) by not later than one year after the final approval of a recovery plan for the species under section 4(f), or 3 years after the date of publication of the final regulation implementing a determination that the species is an endangered species or threatened species, whichever is earlier.*

(B) *The Secretary shall reconsider any determination that designation of critical habitat of a species is not practicable, or determinable, during the next review under section 4(c)(2)(A) or at the time of a final approval of a recovery plan for the species under section 4(f).*

(C) *The Secretary may, from time-to-time as appropriate, revise any designation of critical habitat under this paragraph.*

(D) *Notwithstanding subparagraphs (A), (B), and (C), any designation of an area as critical habitat shall not apply with respect to any action authorized by—*

*(i) a permit under section 10(a) (including any conservation plan or agreement under that section for such a permit) that applies to the area;*

*(ii) a written statement under section 7(b)(4); or*

*(iii) a land conservation or species management program of a State, a Federal agency, a federally recognized Indian tribe located within the contiguous 48 States, or the Metlakatla Indian Community that the Secretary determines provides protection for habitat of the species that is substantially equivalent to the protection that would be provided by such designation.*

(E) *Nothing in this paragraph shall be construed to authorize a recovery plan to establish regulatory requirements or otherwise to have an effect other than as non-binding guidance.*

**[(B)(i)]** (4)(A) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

**[(ii)]** (B) Nothing in this paragraph affects the requirement to consult under section 7(a)(2) with respect to an agency action (as that term is defined in that section).

**[(iii)]** (C) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 9, including the prohibition preventing extinction and taking of endangered species and threatened species.

(b) BASIS FOR DETERMINATIONS.—(1) \* \* \*

(2)(A) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

*(B) In determining whether an area is critical habitat, the Secretary shall seek and, if available, consider information from State and local governments in the vicinity of the area, including local resource data and maps.*

*(C) Consideration of economic impact under this paragraph shall include—*

*(i) direct, indirect, and cumulative economic costs and benefits, including consideration of changes in revenues received by landowners, the Federal Government, and State and local governments; and*

*(ii) costs associated with the preparation of reports, surveys, and analyses required to be undertaken, as a consequence of a proposed designation of critical habitat, by landowners seeking to obtain permits or approvals required under Federal, State, or local law.*

*(D) In designating critical habitat of a species, the Secretary shall first consider all areas that are known to be within the geographical area determined by field survey data to be occupied by the species.*

\* \* \* \* \*

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3), the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register**[, and]**;

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, **[and]** to each county or equivalent jurisdiction in which the species is believed to occur, *and to the county and any municipality having administrative jurisdiction over the area*, and invite the comment of such agency, and each such jurisdiction, thereon;

(iii) *with respect to a regulation to designate or revise a designation of critical habitat—*

*(I) publish maps and coordinates that describe, in detail, the specific areas that meet the definition under section 3 of, and are designated under section 4(a) as, critical habitat, and all field survey data upon which such designation is based; and*

*(II) maintain such maps, coordinates, and data on a publicly accessible Internet page of the Department; and*

(iv) *include in each of the notices required under this subparagraph a reference to the Internet page referred to in clause (iii)(II);*

\* \* \* \* \*

(6)(A) \* \* \*

\* \* \* \* \*

**[(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—

【(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

【(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.】

\* \* \* \* \*

## DISSENTING VIEWS

For more than 30 years the Endangered Species Act (ESA) has stood as one of the great achievements of American environmental conservation, leading to similar laws in other countries, and demonstrating that great nations can simultaneously maintain economic prosperity, military preparedness, and environmental values. The ESA establishes the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species. Unfortunately H.R. 2933 would undermine this fundamental policy by weakening the critical habitat provisions in the ESA, making it virtually impossible for endangered and threatened species to recover.

When a species is listed as endangered or threatened, the Secretary of the Interior or Commerce is required to designate critical habitat; this a geographic area essential to the recovery of a species, such as food sources and spaces for birds to nest and fish to spawn.

There are two key conservation benefits that stem from critical habitat designation. First, Federal agencies under the consultation requirements in Section 7(a)(2) of the ESA must ensure that activities they undertake, approve or fund do not result in the destruction or adverse modification of habitat. Second, a critical habitat designation can enable a species to return to an area where it once lived; this area is called unoccupied habitat. For most species, recovery will likely require that the population expand into areas not presently occupied.

### *Deadlines for critical habitat designations and recovery plans*

We support the change in H.R. 2933 to allow the Secretary to determine critical habitat within three years after a species is listed as endangered or threatened. However, H.R. 2933 does not include deadlines for the issuance of recovery plans and fails to address the backlog of species without critical habitat designations and/or recovery plans. Of the 1,265 listed U.S. species today, only 451 have designated critical habitat and only 1,021 have approved recovery plans.

### *Definition of critical habitat*

The ESA defines critical habitat as a specific area essential to the conservation of the species, including areas occupied and unoccupied by the species. The term conservation means recovery, according to the definition in Section 3 of the ESA.

By striking essential to the conservation of the species, H.R. 2933 would wipe out the link established in conservation biology between critical habitat and species recovery. Animals which are adaptable to different environments do not need the protections of the ESA; but those which have evolved specific needs cannot sur-

vive without it. In any area given area where there is a 90 percent loss in habitat, about 50 percent of the species will die, according to conservation biologists.

Under H.R. 2933, critical habitat designation for occupied species would be limited only to those areas determined by field data survey to be necessary to avoid jeopardizing the continued existence of the species. H.R. 2933 would only allow critical habitat designation on unoccupied areas if the Secretary determines it is essential for the survival of the species. Instead of promoting species recovery, H.R. 2933 would limit critical habitat to those instances when it would keep a species alive, and in most cases would virtually eliminate the change of species recovery. This is like saying that cancer patients can only be given the medicines they need to stay alive on life-support systems, but not the medicines they need to recover their health. The change in the definition of critical habitat under H.R. 2933 is a far cry from the purpose of the ESA to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.

H.R. 2933 would require the Secretary to use field data to define the geographical area occupied by the species. While it makes sense for the Secretary to use field data to define occupied areas, we are concerned that species will suffer in those situations when the Secretary does not have the resources to hire field surveyors, and as a result, no field data is available.

#### *Exemptions to critical habitat designation*

H.R. 2933 would require the Secretary to designate critical habitat to the maximum extent practicable, prudent and determinable. While prudent and determinable are defined in the ESA and case law, no definition of practicable is provided. The change in H.R. 2933 would make designation discretionary, and unlikely to occur given the slim budget for the endangered species program at the Fish and Wildlife Service.

H.R. 2933 also would prohibit critical habitat designation on any area subject to a State or Federal land conservation program providing protection substantially equivalent to critical habitat. Because the bill does not define substantially equivalent, programs like the Department of Agriculture's Conservation Reserve Program, could fall under this exemption even though its purpose is not species recovery. For a person with high blood pressure and salt restrictions, two diets might appear substantially equivalent, but the difference between a high salt diet and no salt diet could be fatal.

H.R. 2933 also would allow actions covered by incidental take permits issued under Section 7 and Section 10 of the ESA to not be subject to critical habitat designations. It is already the policy of the Bush Administration to exclude from critical habitat designations areas that the Secretary determines are already managed to provide for the conservation of the species. However, H.R. 2933 would undermine existing law and policy by eliminating the Secretary's existing discretion to review the plans to ensure that they adequately provide for the recovery of species.

## CONCLUSION

Harmed by decades of human activities, endangered and threatened species will not recover overnight, but populations of many species are stabilizing or increasing in number. As of September 30, 2000, 98 percent of listed species are known to survive and 39 percent are stabilized or moving towards recovery, according to the Fish and Wildlife Service.

While ESA critics often cite the relatively small number of species which have been saved from extinction, species which include the American peregrine falcon and the gray whale, a more important measure of success may be the species which have not become extinct.

“Fewer species have become extinct than would have without the ESA,” according to the National Research Council in its 1995 report, *Science and the Endangered Species Act*. This is a significant accomplishment. All of us would lament the Bald Eagle if it had been allowed to pass into the ever growing list of magnificent creatures with whom we have shared the earth, and which will never be seen again.

We are open to statutory amendments or regulatory actions that genuinely promote species conservation, but H.R. 2933 would do the opposite. If enacted, we would expect the number of species extinctions to rise dramatically over time. This would be a tragic failure of our responsibilities as citizens of the United States and as stewards of God’s creatures.

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