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Journal

UCLA Journal of Environmental Law and Policy, 34(1)

Authors

James, Norman D.
Ward, Thomas J.

Publication Date

2016

DOI

10.5070/L5341030025

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Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into “Recovery” Habitat

Norman D. James and Thomas J. Ward***

ABSTRACT

The Endangered Species Act (ESA) requires that areas be designated as critical habitat for species that are protected under the Act. Once designated, critical habitat is protected from “destruction or adverse modification” by Section 7(a)(2) of the ESA, which applies to any action authorized, funded, or carried out by a federal agency, including permits and other authorizations issued to private landowners and resource users. In 1978, Congress enacted extensive amendments to the ESA that were intended to limit the scope of critical habitat to areas essential for the survival of protected species. Based on these amendments, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service adopted regulations that recognized critical habitat’s limited role in conserving species, including a definition of “destruction or adverse modification” that emphasized impacts to the protected species’ survival. In

* J.D. University of Utah College of Law; B.A. Stanford University. Mr. James is an attorney at Fennemore Craig, P.C., and specializes in environmental and natural resources law.

** J.D. Widener University Law School; B.S.M.E. University of Delaware. Mr. Ward is the Vice President, Legal Advocacy, of the National Association of Home Builders.

Sierra Club v. U.S. Fish and Wildlife Service and *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, however, the Fifth Circuit and the Ninth Circuit respectively held that the agencies' adverse modification definition is unlawful and that the purpose of critical habitat is to recover species. These cases have strongly influenced the administration of the ESA over the past decade and the Services recently relied on these cases to justify regulations that will transform critical habitat into recovery habitat. The authors maintain that a reassessment of the role of critical habitat is needed to ensure that the regulatory and judicial treatment of critical habitat conforms to the intent of Congress.

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I.

INTRODUCTION

Congress enacted the Endangered Species Act (ESA)¹ in 1973 to provide a program for the conservation of endangered species and to comply with certain treaties and conventions concerning species of wildlife, fish, and plants.² Since its enactment, the ESA has evolved into one of the nation's most demanding environmental laws. In *Tennessee Valley Authority v. Hill*, the Supreme Court, in affirming an injunction preventing the completion of the Tellico Dam to protect a species of minnow called the snail darter, stated that the "plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the cost," and that the ESA "reveals a conscious decision to give endangered species priority over the 'primary missions' of Federal agencies."³

One of the most confounding aspects of the ESA has been the requirement that critical habitat be designated for species that have been listed as endangered or threatened.⁴ The agencies that

1. 16 U.S.C. §§ 1531-1544 (2015).

2. *See id.* at § 1531.

3. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184–85 (1978). Notably, in *Hill*, the parties agreed that the dam's operation would destroy the species' critical habitat. *Id.* at 171 (stating that "we begin with the premise that the operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat").

4. Under the ESA, species subject to protection are "listed," i.e., placed on the lists of endangered and threatened species codified at 50 C.F.R. § 17.11 (fish and wildlife) and § 17.12 (plants). The ESA permits the Services to list a group of animals if it is a "species" as defined by ESA § 3(16), i.e., a species, subspecies, or a distinct population segment, and only if that species is determined to be an "endangered species" or a "threatened species." 16 U.S.C. § 1532(16). To constitute an "endangered species," the species must be "in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6).

administer the ESA, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (jointly called the “Services” below), must designate a species’ critical habitat at the time a species is listed “to the maximum extent prudent and determinable.”⁵ Critical habitat normally should be occupied by members of the species, and consists of specific areas that contain “physical and biological features” which are “essential to the conservation of the species” and “require special management considerations or protection.”⁶ Specific areas that are not occupied may be designated as critical habitat “upon a determination by the Secretary that such areas are essential to the conservation of the species.”⁷

Critical habitat has significant legal and economic consequences for landowners and resource users. Section 7(a)(2) of the ESA requires federal agencies to ensure 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.”⁸ Thus, federal actions may not proceed if they would destroy or adversely modify a listed species’ critical habitat, unless a cabinet-level committee called the Endangered Species Committee grants an

To constitute a “threatened species,” the species must be “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). This determination is based on five statutory factors, after taking into account any efforts being made by any foreign country, state, or political subdivision to protect the species. *Id.* § 1533(a)(1), (b)(1)(A) (2015).

5. 16 U.S.C. § 1533(a)(3)(A).

6. *Id.* § 1532(5)(A) (definition of the term “critical habitat”); *see also* Alaska Oil and Gas Ass’n v. Salazar, 916 F. Supp. 2d 974, 998-1003 (D. Alaska 2013) (setting aside the FWS’s critical habitat designation for the polar bear because the record lacked evidence showing that critical habitat areas actually contained the physical or biological features essential for the conservation of the species).

7. 16 U.S.C. § 1532(5)(A)(ii); *see also* Cape Hatteras Access Pres. Alliance v. Dep’t of Interior, 344 F. Supp. 2d 108, 124-25 (D.D.C. 2004) (discussing the designation of unoccupied land as critical habitat).

8. 16 U.S.C. § 1536(a)(2); *see, e.g.*, Butte Env’l Council v. U.S. Army Corps of Eng’rs, 620 F.3d 936, 947-48 (9th Cir. 2010) (addressing the claim that the development of business park would adversely modify species’ critical habitat).

exception.⁹ Moreover, federal agencies must “consult” with the relevant Service prior to proceeding with a proposed action to ensure that the “jeopardy” and “adverse modification” standards imposed by Section 7(a)(2) are not violated.¹⁰

The term “action” is broadly defined in the Services’ Section 7 consultation regulations and includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high

9. *See* 16 U.S.C. § 1536(e)(1). Given the complexity of the exemption process, it has rarely been used. *See* MICHAEL J. BEAN & MELANIE J. ROWLAND, *The Evolution of National Wildlife Law* 263-65 (3rd ed. 1997). In short, the federal agency proposing the action, the Governor of the state in which the action will occur, or a federal permit applicant may apply to the Secretary for an exemption. 16 U.S.C. § 1536(g)(1). The Secretary must then determine whether the application satisfies certain threshold requirements. *Id.* § 1536(g)(3). Next, a formal hearing is conducted, following which the Secretary prepares a report that is submitted to the Endangered Species Committee, which consists of six high-ranking administrative officials and one individual from each affected state appointed by the President. *Id.* § 1536(g)(4)-(5). At least five members must agree that:

- (i) there are no reasonable and prudent alternatives to the agency action;
- (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;
- (iii) the action is of regional or national significance; and
- (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by [Section 7(d)]

Id. § 1536(h)(1). In addition, the committee must establish “reasonable mitigation and enhancement measures . . . as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.” *Id.* § 1536(h)(1)(B). Any person may challenge the committee’s decision in the United States Court of Appeals where the action will take place. *Id.* § 1536(n).

10. *See, e.g.*, *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008) (as amended) (“The ESA imposes a procedural consultation duty whenever a federal action may affect an ESA-listed species.”); *Ariz. Cattle Growers’ Ass’n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1238-39 (9th Cir. 2001) (summarizing the consultation process). As discussed below, the Services have adopted regulations that govern the consultation process, which are codified at 50 C.F.R. Part 402. In the case of proposed actions that adversely affect a listed species or its critical habitat, the relevant Service must complete a “formal” consultation, which includes the issuance of a biological opinion. *See* 50 C.F.R. § 402.14 (2015) (requirements for formal consultation and biological opinions).

seas.”¹¹ The term includes “the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid.”¹² Consequently, the issuance of various federal permits and authorizations in connection with private land uses may trigger the application of Section 7(a)(2).

As federal regulatory programs have expanded, an increasing number of non-federal activities require some sort of federal permit or approval, or have some other federal nexus that triggers Section 7(a)(2) and the duty to avoid the adverse modification of critical habitat.¹³ Consequently, private landowners are often required to consult with the Services when they need federal permits and authorizations to utilize their property.¹⁴ And beginning in the 1990s, the Services became

11. 50 C.F.R. § 402.02 (2015) (defining the term “action”). *See also* Karuk Tribe v. U.S. Forest Serv., 681 F.3d 1006, 1020-21 (9th Cir. 2012) (en banc) (discussing examples of agency actions triggering Section 7(a)(2)). The Services’ regulations limit the application of Section 7(a)(2) to actions “in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. Therefore, Section 7(a)(2) does not apply where a federal agency is performing an action mandated by statute. *See, e.g.*, Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662-69 (2007) (finding that Section 7(a)(2) did not apply to EPA’s approval of a state’s National Pollution Discharge Elimination System permitting program because EPA lacked discretion to consider the impacts on listed species).

12. 50 C.F.R. § 402.02.

13. For example, in order to conduct land use activities, many landowners are required to obtain federal permits to discharge fill material under Section 404 of the Clean Water Act, 33 U.S.C. § 1344(a). The Supreme Court discussed the dramatic expansion of federal jurisdiction under this provision in *Rapanos v. United States*, stating:

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act The [Army Corps of Engineers] has . . . asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated “waters of the United States” include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory “waters of the United States” engulf entire cities and immense arid wastelands.

547 U.S. 715, 722 (2006) (plurality opinion).

14. If the project has no effect on listed species or critical habitat,

increasingly aggressive in exploiting the Section 7 consultation process to control how land and water resources are used.¹⁵ Therefore, the designation of an area as critical habitat is likely to result in restrictions on land and water uses that go beyond those caused by a species' listing and application of the jeopardy standard. Critical habitat is particularly problematic when it includes land unoccupied by members of the species, because in the absence of critical habitat, Section 7(a)(2) would not be triggered.¹⁶

consultation is not required. *See, e.g.,* *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1069-70 (9th Cir. 2005) (holding that a real estate developer and the Army Corps of Engineers had no duty to consult with the FWS on the effects of issuing a Clean Water Act permit for the developer's project when no listed species occupied the project area and no critical habitat was present).

15. While it may seem obvious that the federal action is the issuance of the federal permit and the activities authorized by that permit, the action is frequently described in terms of the larger project, without regard to the scope of federal jurisdiction. For example, when the pygmy-owl was listed in southern Arizona, the FWS relied on the nexus created by Clean Water Act permits and the Section 7 consultation process to regulate the development of private land to preserve habitat for the species. The FWS's land use requirements included limits on surface disturbance (typically less than 30 percent of the project site), restoration and revegetation of disturbed areas, limited access to open areas within the subdivision, restrictions on the size and locations of fences and pedestrian walkways, and restrictions on outdoor lighting and activities such as cooking. These land use requirements and restrictions were enforced as conditions in the project's Clean Water Act permit that must be met to achieve compliance. *See, e.g.,* U.S. DEP'T OF THE INTERIOR, BIOLOGICAL OPINION ON THE EFFECTS OF THE PROPOSED PUEBLO OASIS DEVELOPMENT IN PIMA COUNTY, ARIZONA (July 9, 2002), http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/02088_Pueblo_Oasis.pdf; U.S. DEP'T OF THE INTERIOR, BIOLOGICAL OPINION ON THE EFFECTS OF THE PROPOSED CHAPARRAL HEIGHTS DEVELOPMENT IN PIMA COUNTY, ARIZONA (Apr. 30, 2002), http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/00131_Chaparral_Heights.pdf; U.S. DEP'T OF THE INTERIOR, BIOLOGICAL OPINION ON THE EFFECTS OF THE PROPOSED BUTTERFLY MOUNTAIN DEVELOPMENT IN MARANA, ARIZONA (Apr. 10, 2002), http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/01277_Butterfly_Mtn.pdf.

16. *See, e.g.,* *Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1244 (9th Cir. 2001) (explaining that, in the absence of critical habitat, "there is no evidence that Congress intended to allow the [FWS] to regulate any parcel of land that is merely capable of supporting a protected species"). Thus, federally authorized or funded activities taking place in areas that are not occupied by members of a species will typically not be subject to Section 7(a)(2) *unless* critical habitat is present.

At the same time, critical habitat designations by the Services have expanded dramatically, often including vast expanses of land.¹⁷ Given that habitat loss is frequently the principal justification for listing a species, common sense suggests that if there are millions of acres of land that contain the physical and biological features essential to the species, the species should not be listed. In many cases, however, areas designated as critical habitat are unoccupied and lack habitat essential for the species' survival. Instead, they are set aside for future population expansion—a practice Congress strongly criticized in 1978 when it amended the ESA to restrict critical habitat.¹⁸

Finally, in 2014, the Services proposed dramatic changes to their rules governing the designation of critical habitat and to the regulatory definition of “destruction or adverse modification.”¹⁹ These proposed rule changes would effectively

17. See, e.g., Designation of Revised Critical Habitat for the Northern Spotted Owl, 77 Fed. Reg. 71,876 (Dec. 4, 2012) (codified at 50 C.F.R. § 17.95) (designating nearly 9.6 million acres of land as critical habitat); Designation of Critical Habitat for the Polar Bear (*Ursus maritimus*) in the United States, 75 Fed. Reg. 76,086 (Dec. 7, 2010) (codified at 50 C.F.R. § 17.95) (designating approximately 120 million acres of land as critical habitat); Revised Designation of Critical Habitat for Bull Trout, 75 Fed. Reg. 63,899 (Oct. 18, 2010) (codified at 50 C.F.R. § 17.95) (designating 19,729 miles of streams and 488,252 acres of reservoirs as critical habitat); Revised Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx, 74 Fed. Reg. 8,616 (Feb. 25, 2009) (codified at 50 C.F.R. § 17.95) (designating nearly 25 million acres of land as critical habitat).

18. For example, in 2013, the FWS designated 208,973 acres of critical habitat along 1,227 miles of waterways in six western states for the southwestern willow flycatcher—a 73 percent increase over the 2005 designation. See Designation of Critical Habitat for the Southwestern Willow Flycatcher, 78 Fed. Reg. 344 (Jan. 3, 2013) (to be codified at 50 C.F.R. § 17.95). The FWS explained that it relied on that species' 2002 recovery plan to designate “areas for critical habitat that have never been known to be occupied by flycatchers but are essential for the conservation of the flycatcher *in order to meet recovery goals.*” *Id.* at 359 (emphasis added); see also *id.* at 351 (“In general, the areas designated as critical habitat are designed to provide sufficient riparian habitat . . . in order to reach the geographic distribution, abundance, and habitat-related *recovery goals described in the Recovery Plan*”) (emphasis added).

19. Definition of Destruction or Adverse Modification of Critical Habitat, 79 Fed. Reg. 27,060 (proposed May 12, 2014) (to be codified at 50 C.F.R. § 402.02); Implementing Changes to the Regulations for Designating Critical Habitat, 79 Fed. Reg. 27,066 (proposed May 12, 2014) (to be codified at 50 C.F.R. §§ 424.01,

convert critical habitat into “recovery habitat” by authorizing areas that lack the physical and biological features necessary to support the species to be designated as critical habitat and preserved in the hope that these features may develop later, and defining “destruction or adverse modification” as impairment of the species’ recovery.²⁰

The legal underpinning of the Services’ proposed rules are two circuit court decisions, *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*,²¹ and *Sierra Club v. U.S. Fish and Wildlife Service*,²² which held that the Services’ 1986 regulatory definition of “destruction or adverse modification” was invalid because the definition emphasized impacts to the species’ survival.²³ In both cases, the court equated the term “conservation”²⁴ with recovery and concluded that “destruction or adverse modification” should be a recovery-based standard.²⁵ As discussed below, the courts read the term “conservation” far too narrowly. As used in the ESA, “conservation” has its ordinary meaning—to manage and protect wildlife—and includes actions that support a species’ survival. It is not limited to actions that recover listed species.

424.02, 424.12).

20. Implementing Changes to the Regulations for Designating Critical Habitat, 79 Fed. Reg. at 27,069. The term “recovery” is not defined in the ESA, but is defined in the Services’ regulations as “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.” 50 C.F.R. § 402.02. *See also* Friends of Blackwater v. Salazar, 691 F.3d 428, 432-34 (D.C. Cir. 2012) (discussing the legal effect of a recovery plan and its relationship to delisting a species).

21. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004), *amended by* 387 F.3d 968 (9th Cir. 2004).

22. *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001).

23. *See* Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,933-35 (June 3, 1986) (codified at 50 C.F.R. pt. 402). This rulemaking is discussed in greater detail below. The definition of “destruction or adverse modification,” codified at 50 C.F.R. § 402.02, was intended to emphasize impacts to critical habitat that jeopardized the species’ continued existence, rather than impairment of the species’ recovery.

24. *See* U.S.C. § 1532(3) (definition of “conserve,” “conserving,” and “conservation”).

25. *See Gifford Pinchot*, 378 F.3d at 1069-71; *Sierra Club*, 245 F.3d at 441-43.

More critically, however, each court relied on the ESA's legislative history to support its holding.²⁶ In *Gifford Pinchot*, the Ninth Circuit strongly criticized the Services for ignoring the intent of Congress, describing the regulatory definition of "destruction or adverse modification" as "blatantly contradictory to Congress' express command" and a "failure . . . to implement Congressional will."²⁷ Yet, as explained below, Congress has clearly indicated that critical habitat should be limited to specific areas that are essential to the species' survival and should not include areas for future population expansion.

Notwithstanding these errors and the conflict between their holdings and the legislative history, *Sierra Club* and *Gifford Pinchot* have been cited as authoritative, allowing critical habitat to be transformed into "recovery" habitat.²⁸ Moreover, in

26. See *Gifford Pinchot*, 378 F.3d at 1070-71; *Sierra Club*, 245 F.3d at 442-43.

27. *Gifford Pinchot*, 378 F.3d at 1070.

28. Numerous courts have followed the *Gifford Pinchot* court's characterization of critical habitat as habitat that is necessary for the species' recovery. See, e.g., *Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (stating that "*Gifford Pinchot* requires FWS to be more generous in defining area [sic] as part of the critical habitat designation" (emphasis original)); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 934 (9th Cir. 2008) (concluding that the NMFS's "adverse modification analysis did not adequately consider recovery needs and was therefore deficient under *Gifford Pinchot*"); *Nw. Env'tl. Advocates v. U.S. Env'tl. Prot. Agency*, 855 F. Supp. 2d 1199, 1223 (D. Or. 2012) (stating that "recovery is an essential component of the ESA that must be considered when an agency carves out critical habitat for a species or makes a jeopardy analysis," citing *Gifford Pinchot*); *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 997-98 (D. Ariz. 2011) (applying *Gifford Pinchot* in requiring that the impacts on the species' recovery be separately analyzed); *Rock Creek Alliance v. U.S. Forest Serv.*, 703 F. Supp. 2d 1152, 1192-94 (D. Mont. 2010), *aff'd*, 663 F.3d 439, 443 (9th Cir. 2011) (explaining that adverse modification occurs when an action diminishes the value of critical habitat for a species' recovery, following *Gifford Pinchot*); *Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1369-70 (N.D. Fla. 2009) (explaining that the Fifth and Ninth Circuits have invalidated the regulation that defines "destruction or adverse modification" because the regulation "fail[ed] to provide protection of habitat when necessary only for conservation of the species," quoting and following *Gifford Pinchot* and *Sierra Club*); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 128-29 (D. D.C. 2004) (discussing and following *Gifford Pinchot* and *Sierra Club*, noting that those courts "struck the adverse modification definition because it was blatantly inconsistent with the ESA's recovery goal").

their proposed rule redefining the term “destruction and modification,” the Services cited and discussed *Sierra Club* and *Gifford Pinchot* to justify this rule change,²⁹ and further explained:

[T]he courts have concluded that Congress intended that “conservation and survival be two different (though complementary) goals of the (Act).” *Gifford Pinchot* at 1070. In light of congressional intent that critical habitat be established for conservation purposes, the courts concluded, and we agree, that the purpose of establishing “critical habitat” is for the government to designate habitat “that is not only necessary for the species’ survival but also essential for the species’ recovery.” *Id.* From these cases, it is clear that any definition of “destruction or adverse modification” must reflect the purpose for which the critical habitat was designated—the recovery of the species.³⁰

Like the *Gifford Pinchot* and *Sierra Club* courts, the Services failed to carefully review the legislative history to ascertain Congress’ intent, repeating the mistake made by those courts.

The following section of this article provides a detailed discussion of the legislative history pertaining to critical habitat, focusing on the amendments enacted in 1978, which added the definition of critical habitat and the procedures for its designation and required that economic and other impacts be considered. This article will then discuss how the language and structure of the ESA supports critical habitat’s narrow scope and limited role. Finally, this article discusses *Gifford Pinchot* and *Sierra Club* in greater detail. As explained below, the *Sierra Club* court badly misread the legislative history, while the *Gifford Pinchot* court relied on *Sierra Club*’s erroneous analysis to support its holding. The term “conservation” is also discussed, including this term’s use in various statutory provisions and in the Services’ regulatory documents in the ordinary sense of managing and protecting a resource.

29. See Definition of Destruction or Adverse Modification of Critical Habitat, 79 Fed. Reg. 27,060, 27,061 (proposed May 12, 2014) (to be codified at 50 C.F.R. § 402.02).

30. *Id.* at 27,062.

II.

THE LEGISLATIVE HISTORY

A. *The Endangered Species Act of 1973 and the Services' 1978 Rule Defining Critical Habitat*

As originally enacted in 1973, the ESA contained no definition of critical habitat and no procedures or requirements for determining what areas should be specified as critical habitat.³¹ The only reference to critical habitat appeared in the original, one-paragraph version of Section 7, which stated:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purpose of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of this Act and by taking such action as necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in *the destruction or modification of habitat of such species which is determined by the Secretary, after consultation, as appropriate with the affected States, to be critical.*³²

The 1973 Act's legislative history does not discuss critical habitat in any detail, which is not surprising given that the Act only mentions critical habitat once. The legislative history indicates that Congress believed critical habitat should be acquired pursuant to ESA Section 5³³ and set aside, rather than

31. See generally Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (showing the absence of a definition of critical habitat and no discussion on the subject).

32. *Id.* § 7, 87 Stat. at 892 (emphasis added) (codified at 16 U.S.C. § 1536).

33. 16 U.S.C. § 1534. This provision, entitled "Land Acquisition," directs the Secretaries of Commerce (the NMFS) and the Interior (the FWS), as well as the Secretary of Agriculture with respect to the National Forest System, to implement a program to conserve fish, wildlife and plants, including the acquisition of land for such purpose. *Id.* This authority is not limited to species listed under the ESA.

regulated through the adverse modification standard.³⁴ In fact, the House Committee Report estimated that by 1976, about 35 percent of the annual cost of the entire ESA program would be for “habitat acquisition.”³⁵ The Senate Committee Report also stated that “an accelerated land acquisition program is essential” to protect habitat for endangered wildlife.³⁶ Finally, the conference committee report, in describing Section 5, stated:

Any effective program for the conservation of endangered species demands that there be adequate authority vested in the program managers to acquire habitat which is *critical to the survival of those species*.³⁷

In short, while the 1973 legislative history is limited, it suggests Congress intended critical habitat to be habitat essential to the species’ survival and that land containing such habitat should be acquired and protected, rather than regulated, through Section 7.

As explained, the 1973 Act contained only one mention of critical habitat and no guidance on how Section 7 was intended to work. To address this uncertainty, the Services jointly issued guidelines to other federal agencies in 1976 and, after notice-and-comment rulemaking, regulations in 1978.³⁸ The regulations defined “critical habitat” as:

[A]ny air, land, or water (exclusive of those man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would *appreciably decrease the likelihood of the survival and recovery of a listed species* or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and

34. See H.R. Rep. No. 93-412, at 5, 9 (1973), *reprinted in* Cong. Research Office, 97th Cong., A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980, at 144, 148 (1982) [hereinafter Legislative History of the ESA].

35. Legislative History of the ESA, *supra* note 34, at 159.

36. S. Rep. No. 93-307, at 4 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2992.

37. H.R. Rep. No. 93-740, at 25 (1973) (Conf. Report), *reprinted in* 1973 U.S.C.C.A.N. 3001, 3004 (emphasis added).

38. See Interagency Cooperation, 43 Fed. Reg. 870 (Jan. 4, 1978).

the quality and chemical content of land, water, and air. *Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.*³⁹

As discussed below, Congress believed this definition was too broad and amended the ESA to narrow the scope of critical habitat to focus on species' survival and reduce its regulatory impact on land uses.

B. *The 1978 ESA Amendments*

1. Overview

In 1978, Congress enacted major amendments to the ESA.⁴⁰ The amendments were considered and passed in the wake of the Supreme Court's decision in *Tennessee Valley Authority v. Hill*,⁴¹ following extensive oversight hearings conducted by the Senate Subcommittee on Resource Protection in July 1977, and by the House Merchant Marine and Fisheries Committee in May and June 1978.⁴² As one Congressman stated, the goal of the 1978 Amendments was to "mak[e] the agency in charge of enforcing the provisions of the [ESA] conform to its original intent."⁴³

At that time, there was widespread recognition in Congress that the ESA was flawed and administered improperly. Senator Garn's comments summarized the views of a number of members of Congress:

I think it was very important that the [ESA] was passed in 1973, but I think what we have seen happen is what often happens in Congress. There obviously was a problem. We were building without regard to various species. We were not as concerned about the environment as we should have been. But then we passed an act that goes to the other extreme. It goes too far, and beyond correcting a problem that needed to be

39. *Id.* at 874-75 (emphasis added).

40. *See* Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (codified as amended at 16 U.S.C. § 1531).

41. *See supra* note 3 and accompanying text.

42. *See* Legislative History of the ESA, *supra* note 34, at 643-46.

43. *Id.* at 796 (statement of Rep. Lott).

corrected, we create new side effects that were not foreseen at the time.

... The [ESA] passed the Senate extremely easily, with no dissenting votes. But, talking to many of my colleagues, I learn that they certainly would not have voted for it if they had known the implications and the extremes to which the act would be carried.⁴⁴

In particular, the breadth of the Service's definition of critical habitat and how critical habitat was being designated and used to stop federal projects disturbed Congress.⁴⁵ As a result, the standards and requirements for critical habitat, including the term's statutory definition, were enacted in the 1978 Amendments with the purpose of limiting the scope and regulatory impact of critical habitat.

2. House Bill 14104

House Bill 14104, as reported out of the House Merchant Marine and Fisheries Committee, contained a definition of critical habitat largely modeled after the definition in the Services' 1978 regulations. This definition provided:

The term critical habitat for an endangered species or threatened species means any air, land, or water area (exclusive of those

44. *Id.* at 1006; *see also id.* at 805 (statement of Rep. Beard) (“[I]t is my impression that the entire membership is aware that the [ESA] is seriously flawed and in need of amendment.”); *id.* at 837 (statement of Rep. Burgener) (“Many zealous bureaucrats have discarded human needs from their considerations with regard to endangered species. The amendments . . . recognize that there are important human considerations to be dealt with and people are an important factor in this equation.”); *id.* at 1017 (statement of Sen. Stennis) (describing the ESA as “an intolerable law”).

45. *See, e.g., id.* at 802 (statement of Rep. Bowen) (stating that the critical habitat for the Houston toad “is a good example of the mistakes and, frankly, what I must consider ineptitude we have seen from time to time on the part of many of the officials of the Office of Endangered Species.”); *id.* at 821 (statement of Rep. Murphy) (“The designation of critical habitat amounts to nothing less than a form of restrictive zoning from Washington, D.C.”); *id.* at 1015 (statement of Sen. McClure) (“When it comes to the extension of habitat [beyond occupied areas] we run into some very, very unusual problems.”). In fact, the first critical habitat designation was made in 1976 for the snail darter, on an emergency basis, in an apparent effort by the Interior Department to halt the Tennessee Valley Authority's construction of the Tellico Dam. *See* BEAN & ROWLAND, *supra* note 9, at 253 n.302.

manmade structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would significantly decrease the likelihood of conserving such species.⁴⁶

The committee report accompanying House Bill 14104 emphasized that this definition was intended to restrict the scope of critical habitat:

The term "critical habitat" is defined for the first time. The definition is modeled after that found in present Department of Interior regulations. Under the present regulations, critical habitat includes air, land or water areas—the loss of which would appreciably decrease the likelihood of conserving a listed species. Under the present regulations, the Secretary could designate as critical habitat all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured.

In the Committee's view, the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat.

Under the definition of critical habitat included in H.R. 14104, air, land or water areas would be designated critical habitat only if their loss would significantly decrease the likelihood of conserving the species in question. The committee believes that *this definition narrows the scope of the term as defined in the existing regulations.*⁴⁷

The committee also directed the Services to "be exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species."⁴⁸

As explained above, the Services' then-existing regulations defined critical habitat as "any air, land, or water (exclusive of those man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed

46. H.R. 14104, 95th Cong., at § 5(1) (2d Sess. 1978)

47. H.R. Rep. No. 95-1625, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9475 (emphasis added).

48. *Id.* at 18, *reprinted in* 1978 U.S.C.C.A.N. 9468.

species or a distinct segment of its population.”⁴⁹ In House Bill 14104, the word “significantly” was substituted for “appreciably” and the word “conserving” was substituted for “survival and recovery,” eliminating the reference to recovery. In addition, the definition eliminated the regulatory definition’s authorization to include as critical habitat “additional areas for reasonable population expansion.”

During the House floor debate on House Bill 14104, a number of Congressmen stated that the committee bill did not go far enough in limiting critical habitat and the Services’ discretion when critical habitat is designated. Representative Bowen, for example, explained:

The present law provides no definition of what critical habitat is, and [House Bill 14104] makes some steps in that direction. It points out that critical habitat must include the range the loss of which would significantly decrease the likelihood of preserving such species. So we have given some fairly rigid guidelines.

. . . I believe the majority of the House is in agreement on that, that the Office of the Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of *what is actually needed for survival of this species*.⁵⁰

In response to the concerns expressed by Representative Bowen and other Congressmen,⁵¹ Representative Duncan explained that he was offering an amendment to the bill “to define critical habitat to be that area essential to the preservation and conservation of the species.” He added, “if we are concerned with critical habitat, *that word ‘critical’ implies essential to its survival*.”⁵² His floor amendment struck the existing definition of critical habitat in the bill and substituted the following:

49. Interagency Cooperation, 43 Fed. Reg. at 874-75.

50. Legislative History of the ESA, *supra* note 34, at 817 (emphasis added).

51. *See id.* at 801-18.

52. *Id.* at 818 (emphasis added).

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

(A) the specific areas within the geographic 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) which are essential to the conservation of the species and (ii) which require special management consideration or protection; and

(B) specific areas periodically inhabited by the species which are outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act (other than any marginal habitat the species may be inhabiting because of pioneering efforts or population stress), upon a determination by the Secretary at the time it is listed that such areas are essential for the conservation of the species.⁵³

As discussed below, this definition is similar to the amended definition adopted by the Senate and ultimately included in the final version of the 1978 Amendments.

Representative Duncan explained that his amendment to the bill was intended to further narrow the scope of critical habitat, noting that the committee had relied on the Services’ definition of critical habitat and “changed only the word ‘appreciably’ to the word ‘significantly’.”⁵⁴ In Representative Duncan’s opinion, the committee had tried to address the lack of a critical habitat definition, “but failed miserably in doing so.”⁵⁵ He went on to explain:

I think that in order to be consistent with the purposes of this bill to preserve critical habitat that there ought to be a showing that it is essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it.

I think this goes to the heart of the problem which every Member has felt in his district. It is entirely consistent with good biological practices and furthermore it maintains intact

53. *Id.* at 879.

54. *Id.* at 880.

55. *Id.*

the purpose of this bill, which is *to prevent the extinction of species who require this critical habitat*.⁵⁶

Representative Duncan's amendment was approved by voice vote with no opposition, and was included in the final version of House Bill 14104.⁵⁷

3. Senate Bill 2899

Senate Bill 2899, as reported out of the Committee on Environment and Public Works, focused on the creation of a process to exempt federal projects from Section 7 in the event of unavoidable conflicts.⁵⁸ Nevertheless, the committee expressed concern about the scope of critical habitat. Like the House, the committee emphasized that the purpose of critical habitat is to ensure the species' survival rather than serving as habitat for future recovery:

It has come to our attention that under the present regulations, the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species. . . . *There seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species' continued survival*.⁵⁹

The committee discussed the critical habitat proposed for the grizzly bear as an example of this regulatory overreaching, stating:

[A]s much as 10 million acres of Forest Service land is involved in the critical habitat being proposed for the grizzly bear in three Western States. Much of the land involved in this proposed designation is not *habitat that is necessary for the continued survival of the bear*. It instead is being

56. Legislative History of the ESA, *supra* note 34, at 880 (emphasis added).

57. *Id.* at 880-81.

58. See S. 2899, 95th Cong., at § 3 (2d Sess. 1978).

59. S. Rep. No. 95-874, at 10 (1978) (emphasis added).

*designated so that the present population within the true critical habitat can expand.*⁶⁰

Senator Wallop, one of the Senate bill's sponsors and floor managers, repeated these concerns during the floor debate on Senate Bill 2899, stating: "[T]he committee has been concerned over the Fish and Wildlife Service's policy to treat areas used to extend the range of an endangered species the same as *areas critical for the species' survival*."⁶¹ The Senator also discussed the proposed critical habitat for the grizzly bear, explaining that "[m]uch of this area is not critical to *the continued existence* of the [species], but is instead proposed so that populations within truly critical habitat can expand."⁶²

The Senate debated Senate Bill 2899 over three days and a number of amendments were proposed and discussed.⁶³ Senator McClure proposed an amendment to the bill that included a new definition of critical habitat, which provided:

(6) the term "critical habitat" for a threatened or endangered species means:

(A) the specific areas within the geographic 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 and biological features (1) essential to the conservation of the species and (2) which require special management considerations or protection;

(B) "critical habitat" for a threatened or endangered species may include 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, into which the species can be expected to expand naturally upon a determination by the Secretary at the time it is listed, that such areas are essential for the conservation of the species[;]

(C) critical habitat may be established for those species now listed as threatened or endangered for which no critical habitat

60. *Id.* (emphasis added).

61. Legislative History of the ESA, *supra* note 34, at 970-71 (emphasis added).

62. *Id.* at 971 (emphasis added).

63. *See id.* at 951-1168.

has heretofore been established as set forth in subsection (A) and (B) of this section;

(D) except in those circumstances determined by the Secretary, critical habitat will not include the entire geographical area which can be occupied by the threatened or endangered species.⁶⁴

Senator McClure explained that his amendment was intended to deal with “the establishment of a critical habitat, the manner in which that is to be done, and primarily and most importantly, the extension of the critical habitat once established.”⁶⁵ He also explained that while the Secretary of Interior may include an unoccupied area, the population must be expected to “naturally expand” into the area, and that “the designation must be made at the time [species] are placed on the list.”⁶⁶ He emphasized: “Mr. President, this is in response to the difficulty of how large an area should there be established and if that species then expands beyond that area must humans then be displaced in that area.”⁶⁷ Senator Wallop added: “One of the things that the [Senate oversight] hearings brought out was that the [FWS] was having a difficult time [on] its own distinguishing between critical habitat and range.”⁶⁸ Senator McClure’s amendment was ultimately adopted without a vote.

Senator McClure’s amendment was intended to require critical habitat designations to be made at the time of listing, based on currently occupied areas. While the amendment’s critical habitat definition contained the phrase “at the time of listing,” the definition did not clearly establish the timing of designation. A subsequent amendment, offered by Senator Garn, addressed that problem.

Initially, Senator Garn offered an amendment defining critical habitat that was very similar to Senator McClure’s amendment, but would have also amended Section 4 to require designation “concurrently with determination of th[e] species’ status,” except

64. *Id.* at 1065.

65. *Id.*

66. *Id.* at 1066.

67. Legislative History of the ESA, *supra* note 34, at 1066.

68. *Id.*

where an emergency exists or the species was listed prior to the ESA's enactment in 1973.⁶⁹ He explained:

It may well be the case, Mr. President, that the designation of critical habitat is more important than the determination of an endangered species itself. In many cases, it will not be until habitat is declared to be *critical to the continued existence of an endangered species* that it will have impacts in the real world. . . .

When a Federal land manager begins consideration of a project, or an application for a permit, it is essential that he know, not only of the existence of an endangered species, but also of the extent and nature of the habitat that is *critical to the continued existence of that species*. Unless he knows the location of *the specific sites on which the endangered species depends*, he may irrevocably commit Federal resources, or permit the commitment of private resources to the detriment of the species in question.⁷⁰

However, because of the similarities between Senator McClure's amendment, which already had been adopted, and his amendment, Senator Garn modified his amendment to address only the timing of critical habitat designation.⁷¹ In responding to questions about the purpose of the amendment, Senator Garn explained:

69. *Id.* at 1108. Two federal laws preceded the ESA, under which species were listed and subject to certain protections. First, the Endangered Species Preservation Act of 1966 directed the Secretary of Interior to "carry out a program in the United States of conserving, protecting, restoring and propagating selected species of native fish and wildlife that are threatened with extinction." *See* Pub. L. No. 89-669, § 2(a), 80 Stat. 926, 926 (repealed 1973). The Secretary published the first official list of threatened species protected under the 1966 act on February 24, 1967. *See* Endangered Species, 32 Fed. Reg. 4001, 4001 (Mar. 11, 1967). Second, the Endangered Species Conservation Act of 1969 expanded the Secretary's authority beyond the listing of native wildlife, and authorized the listing of species that were "threatened with worldwide extinction." *See* Pub. L. No. 91-135, § 3(a), 83 Stat. 275, 275 (repealed 1973). For additional background on these laws, *see* BEAN & ROWLAND, *supra* note 9, at 194-98.

70. Legislative History of the ESA, *supra* note 34, at 1108-09 (emphasis added).

71. *Id.* at 1109.

[W]e sincerely want to protect the endangered species. Placing it on the list does not necessarily do that. If you do not have the area designated for its critical habitat *necessary for its continued existence*, then you may have infringements upon that area that could endanger the species.

On the other hand, it also would allow people who are looking at projects, and so on, to look into the future and decide whether or not they would be able to go ahead with their projects.⁷²

Following this discussion, Senator Garn's amendment was also agreed to without a vote.⁷³

4. The Final Law

House Bill 14104 differed in certain respects from Senate Bill 2899. These differences include the makeup of the Endangered Species Committee, the procedures to list species and designate critical habitat, and exemptions from the Act for certain federal projects.⁷⁴ By means of a conference committee, the two houses of Congress resolved these differences, and on October 14, 1978, enacted Public Law 95-632, which was signed into law on November 10, 1978.⁷⁵

During the hearing on the conference report in the House, Representative Murphy explained that "the Senate and House bills were not really all that far apart," and that "the guts of the House bill [had] been retained . . ."⁷⁶ One of the key provisions was "[a]n extremely narrow definition of critical habitat, virtually identical to the definition passed by the House."⁷⁷ That definition, which was virtually identical to Senator McClure's amendment to Senate Bill 2899 and similar to Representative Duncan's amendment to House Bill 14104, provided:

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

72. *Id.* at 1111 (emphasis added).

73. *Id.*

74. *Id.* at 644.

75. *See id.* at 644-46; H.R. REP. NO. 95-1804 (1978) (Conf. Report), *reprinted in* 1978 U.S.C.C.A.N. 9484.

76. Legislative History of the ESA, *supra* note 34, at 1220.

77. *Id.* at 1221.

(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 determined to be essential for the conservation of the species.⁷⁸

This two-part definition, which has not changed since 1978, evidenced Congress' intent that critical habitat focus on areas that are currently occupied by members of the species, but allows unoccupied areas to be designated when they are essential to the species' continued existence.

ESA Section 3 was also amended to include the balance of Senator McClure's amendment:

(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.

(C) 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.⁷⁹

Again, these provisions have not been changed since 1978. Of particular importance here is the meaning of subparagraph (C), which is intended to ensure that critical habitat is limited to specific areas rather than including areas for population expansion.

The law also required that critical habitat be specified by regulation at the time a species is listed "to the maximum extent prudent," based on Senator Garn's amendment to the Senate bill. And it adopted notice-and-comment rulemaking

78. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 2(2), 92 Stat. 3751, 3751 (codified at 16 U.S.C. § 1532(5)(A)(i)-(ii) (2012)).

79. *Id.*

requirements for the designation of critical habitat, including the publication of notice in local newspapers and, if requested, public hearings.⁸⁰ These amendments addressed Congress' concerns about the Services' designation process, including notice to the public, and its timing.

In addition, Congress added the requirement that economic costs and other non-biological factors be considered before areas are designated as critical habitat.⁸¹ This amendment originated in House Bill 14104.⁸² The House committee report explained that Section 4(b)(2) is intended to provide greater flexibility and reduce conflicts between critical habitat and other land use activities:

The result of the committee's proposed amendment would be increased flexibility on the part of the secretary in determining critical habitat Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat *The committee expects that in some situations, the resultant critical habitat will be different from that which would have*

80. *See id.* § 11(1), (4), 92 Stat. at 3764-66 (codified at 16 U.S.C. §§ 1533(a)(3)(A), (b)(3)(D), (b)(5)).

81. *Id.* § 11(7), 92 Stat. at 3766 (codified at 16 U.S.C. § 1533(b)(2)). This provision provided:

In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, 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.

Id. This provision was amended in 2003 to also require consideration of "the impact on national security" when critical habitat is designated. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 318(b), 117 Stat. 1392, 1433 (2003).

82. *See* H.R. 14104, 95th Cong., at § 2(2) (2d Sess. 1978). Originally, this amendment would have applied only to invertebrate species. However, House Bill 14104 was amended by unanimous consent during the floor debate on the bill to apply generally to critical habitat designations. *See* Legislative History of the ESA, *supra* note 34, at 812-13, 884-85.

*been established using solely biological criteria. In some situations, no critical habitat would be specified.*⁸³

Representative Murphy stated that this provision, which was retained from the House bill, “is the most significant provision in the entire bill.”⁸⁴ The requirement that economic costs and other land use impacts be considered was another repudiation of the Services’ 1978 regulation defining critical habitat, under which the socioeconomic impacts of designating areas as critical habitat were not considered.⁸⁵

In summary, Congress intended that critical habitat consist of specific areas that are essential to the species’ continued existence. Given the purpose of critical habitat, the adverse modification standard parallels the jeopardy standard, which is also based on ensuring the continued existence of the species.⁸⁶ Furthermore, Congress intended that critical habitat focus on specific areas that are occupied at the time of listing, which is logical given the purpose of critical habitat. As the Senate Committee on Environment and Public Works emphasized, critical habitat should not include vast amounts of land for future population growth, as was the case of the then-proposed critical habitat for the grizzly bear. If unoccupied areas are designated, the legislative history, as well as the plain language of the definition, require that these areas must be essential to the species’ conservation, which, as the legislative history shows, means essential to the species’ continued existence. Finally, Congress intended that critical habitat be designated when the species is listed and that economic and other impacts be considered and, whenever appropriate, areas excluded from critical habitat to minimize resource conflicts, provided that exclusion does not result in the species’ extinction.

83. H.R. Rep. No. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 9467 (emphasis added).

84. Legislative History of the ESA, *supra* note 34, at 1221.

85. Interagency Cooperation, 43 Fed. Reg. 870, 872 (Jan. 4, 1978) (formerly codified at 50 C.F.R. pt. 402) (stating that socioeconomic factors are “irrelevant” to determining critical habitat, and their consideration would “diminish the effectiveness of conservation programs for the recovery of a listed species by distorting the estimate of its true habitat needs.”).

86. *See* 16 U.S.C. § 1536(a)(2).

C. *Subsequent ESA Amendments*

The ESA was subsequently amended in 1979 and 1982.⁸⁷ These amendments did not change the narrow scope and limited role of critical habitat. Instead, the discussion in the legislative history reaffirmed Congress' view that critical habitat must be essential to the continued existence of the species.

1. 1979 ESA Amendments

The primary purpose of the 1979 Amendments was to increase the level of funding to the Services to carry out ESA program activities, which were expanded in the prior year's amendments.⁸⁸ These amendments also made certain changes and corrections to the Act in response to problems that were overlooked in the 1978 Amendments. But the definition of critical habitat and basic requirements for its designation were not changed.⁸⁹

The House report contained a summary of critical habitat, including the requirement that the Services "evaluate the economic impact of designating critical habitat for listed species."⁹⁰ The report also noted the Services' 1978 regulatory definition of critical habitat, and explained that the 1978 Amendments had "significantly altered" that definition.⁹¹

The Senate committee report, by contrast, contained virtually no mention of critical habitat. The report did state, consistent with the 1973 committee reports, that "[s]ince protection of habitat is a key element of the protection of all species, the act authorizes the [Services] to acquire land for the conservation and propagation of affected plants and animals," again indicating Congress' intent that critical habitat areas on non-federal land

87. See Authorization, Appropriations—Endangered Species Act, Pub. L. No. 96-159, 93 Stat. 1225 (1979); Endangered Species Act Amendments of 1982, Pub. L. 97-304, 96 Stat. 1411 (1982).

88. See H.R. Rep. No. 96-167, at 8 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2557, 2564.

89. See H.R. Rep. No. 96-697, at 9-19 (1979) (Conf. Rep.), *reprinted in* 1979 U.S.C.C.A.N. at 2572, 2572-83 (summarizing the amendments in the final bill).

90. H.R. Rep. No. 96-167, at 4 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2557, 2560.

91. *Id.* at 5-6.

be acquired and protected, rather than regulated by the Services through the Section 7 consultation process.⁹²

2. 1982 ESA Amendments

In 1982, Congress enacted more extensive amendments to the ESA, which, in addition to authorizing appropriations, were intended to address problems that arose following the 1978 and 1979 Amendments. These changes included authority to postpone critical habitat designations for up to one year after the species' listing so that the economic impact analyses mandated by Section 4(b)(2) could be completed without delaying listings.⁹³ The House committee report stated that notwithstanding these changes, the Services are expected "to make the strongest attempt possible to determine critical habitat within the time period designated for listing."⁹⁴ Otherwise, as the conference committee report explained, "[t]he standards in the Act relating to the designation of critical habitat remain unchanged."⁹⁵ Moreover, the discussion of critical habitat in the committee reports is consistent with the 1978 legislative history.

For example, the House report described critical habitat as "habitat *critical to the survival of the species* at the time of listing."⁹⁶ The Senate report noted that the Services were still failing to designate specific areas as critical habitat, and instead were designating large geographic areas:

When designating critical habitat, the Secretary is expected to comply with the statutory definition and designate "specific areas." Several witnesses suggested that instead of such "specific areas" the Secretary was designating "geographic

92. S. Rep. No. 96-151, at 1 (1979).

93. See Endangered Species Act Amendments of 1982, Pub. L. 97-304, § 2(a), 96 Stat. 1411, 1411-16; H.R. REP. NO. 97-835, at 23-24 (1982) (Conf. Rep.), reprinted in 1982 U.S.C.C.A.N. 2860, 2864-65 (summarizing final legislation).

94. H.R. Rep. No. 97-567, at 20 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2820.

95. H.R. Rep. No. 97-835, at 20 (1982) (Conf. Rep.), reprinted in 1982 U.S.C.C.A.N. 2860, 2861; see also H.R. Rep. No. 97-567, at 20 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2820 ("[T]he provisions in the Act relating to designation of critical habitat remain unchanged.").

96. H.R. Rep. No. 97-567, at 10 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2810 (emphasis added).

ranges.” Section 3(5)(c) of the Act states as a general rule that “critical habitat shall not include the entire geographic area which can be occupied by the threatened or endangered species.”⁹⁷

Finally, Congress again explained that the consideration of economic impacts and exclusion of areas from critical habitat to avoid resource conflicts should play an important role in critical habitat designation:

Although the Secretary is to determine whether a species should be listed based on biological information on the status of that population, the critical habitat designation, which is to accompany the species’ listing to the maximum extent prudent, also takes into account the economic impacts of listing such habitat as critical. . . . Desirous to restrict the Secretary’s decision on species listing to biology alone, *the committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests.* For this reason, the Committee elected to leave critical habitat as an integral part of the listing process but to prevent its designation from influencing the decision on the listing of a species.⁹⁸

97. S. Rep. No. 97-418, at 12 (1982).

98. H.R. Rep. No. 97-567, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2811-12 (emphasis added). The requirement that economic and other impacts be considered in connection with designating critical habitat is now largely irrelevant as a result of agency regulatory policy and court decisions. The most significant of these changes is the use of an incremental or baseline approach to evaluating the economic impacts of designating critical habitat, under which all or virtually all of the impacts on land and resource uses are attributed to the species’ listing—the pre-existing regulatory “baseline”—and are not considered to be an impact of the critical habitat designation. *See* *Ariz. Cattle Growers Ass’n v. Salazar*, 606 F.3d 1160, 1172-74 (9th Cir. 2010) (affirming the validity and use of the baseline approach); *but see* *N.M. Cattle Growers Ass’n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277, 1285 (10th Cir. 2001) (holding that the baseline approach renders the consideration of economic impacts required by Section 4(b)(2) “virtually meaningless” and is “not in accord with the language or intent of the ESA.”). In 2013, the Services revised their regulations to formally adopt the baseline approach and affirm the agencies’ broad discretion to decide whether to exclude particular areas under Section 4(b)(2). *See* Revisions to the Regulations for Impact Analyses of Critical Habitat, 78 Fed. Reg. 53,058 (Aug. 28, 2013) (to be codified at 50 C.F.R. § 424.19). As a result, a

In short, the legislative history subsequent to the 1978 Amendments lends additional support to the limited scope and role of critical habitat. It is apparent that Congress expected critical habitat to consist of specific areas that are essential to the species' continued existence, paralleling the jeopardy standard in Section 7(a)(2). As shown in the following section, the language and structure of the ESA also supports critical habitat's narrow scope and limited role in conserving species.

III.

THE LANGUAGE AND STRUCTURE OF THE ESA SHOWS THAT CRITICAL HABITAT CONSISTS OF AREAS ESSENTIAL FOR THE SPECIES' SURVIVAL

A. *The Definition of Critical Habitat Distinguishes Between Occupied and Unoccupied Areas, Reflecting Congress' Intent that Critical Habitat Focus on Occupied Areas*

As explained above, Congress added the definition of "critical habitat" to the ESA in 1978 to "narrow[] the scope of the term as it is defined in the existing regulations."⁹⁹ This definition deliberately distinguishes between occupied and unoccupied areas:

(5)(A)(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(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.¹⁰⁰

cursory evaluation of economic impacts is normally performed, and land is almost never excluded from critical habitat on economic grounds, even when areas are designated as critical habitat for future population expansion.

99. H.R. Rep. No. 95-1625, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9475.

100. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632,

This two-part definition addressed Congress' concern about the Services' practice of designating unoccupied areas for future population expansion, rather than limiting critical habitat to areas that are truly critical to the species' survival.¹⁰¹ It effectively creates a regulatory hierarchy, under which unoccupied areas should not be designated as critical habitat absent exceptional circumstances.¹⁰² The deliberate distinction between occupied and unoccupied areas shows that the role of critical habitat under the ESA is limited—it is not intended to provide habitat for a species' population expansion, i.e., for recovery.

B. *The Timing of Critical Habitat Designation Is Consistent With Its Limited Role Under the ESA*

The Services are required to designate a species' critical habitat concurrently with its listing of the species "to the maximum extent prudent and determinable."¹⁰³ As discussed

§ 2(1), 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532(5)(A)(i)-(ii)).

101. See, e.g., S. Rep. No. 95-874, at 9-10 (1978) ("It has come to our attention that under present regulations the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to *the continued existence of a species.*") (emphasis added); *id.* at 10 ("There seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are *critical to a species* [sic] *continued survival.*") (emphasis added).

102. See, e.g., *Ariz. Cattle Growers Ass'n*, 606 F.3d at 1163 (stating that 16 U.S.C. § 1532(5)(a) "differentiates between 'occupied' and 'unoccupied' areas, imposing a more onerous procedure on the designation of unoccupied areas . . ."). The court also explained that "occupied areas" are areas that "the [species] uses with sufficient regularity that [the species] is likely to be present during any reasonable span of time." *Id.* at 1165. Thus, for an area proposed as critical habitat to be occupied, there must be evidence of regular use by members of the species.

103. 16 U.S.C. § 1533(a)(3)(A) (1982). See also, e.g., H.R. Rep. No. 95-1625, at 17, (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 ("The committee intends that in most situations the Secretary will . . . 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."); H.R. Rep. No. 97-567, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2810 ("The Secretary is directed, to the maximum extent prudent, to designate habitat

above, both houses of Congress, in connection with the 1978 ESA Amendments, discussed the timing of designating critical habitat. Senator Garn explained, for example, because critical habitat is habitat “necessary for [the species]’ continued existence,” it should be designated when the species is listed to reduce resource conflicts.¹⁰⁴

The courts have followed the plain language of the statute and legislative history in requiring that critical habitat be designated when listing occurs. For example, in *Natural Resources Defense Council v. Department of Interior*, the court rejected the FWS’s “not prudent” determination with respect to critical habitat for the coastal California gnatcatcher, concluding that the agency “failed to discharge its statutory duty to designate critical habitat when it listed the gnatcatcher.”¹⁰⁵ Similarly, in *Northern Spotted Owl v. Lujan*, the court explained that the “language employed in Section 4(a)(3) and its place in the overall statutory scheme evidence a clear design by Congress that designation of critical habitat coincide with the species listing determination.”¹⁰⁶

The requirement that critical habitat be designated concurrently with listing (or in no event later than 12 months after listing when additional information is needed¹⁰⁷) also indicates that critical habitat is not recovery habitat. In *Northern Spotted Owl*, the court rejected the FWS’s argument that it should be excused from designating critical habitat pending development of a comprehensive conservation plan for the species.¹⁰⁸ Relying on the plain language of the statute and legislative history, the court recognized that critical habitat plays a limited role under the ESA, stating:

critical to the survival of the species at the time of listing.”).

104. LEGISLATIVE HISTORY OF THE ESA, *supra* note 34, at 1111.

105. *Natural Res. Def. Council v. Dep’t of Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997). *See also* *Conservation Council for Haw. v. Babbitt*, 2 F. Supp. 2d 1280, 1288 (D. Hawaii 1998) (rejecting the agency’s “not prudent” finding in holding that the agency’s failure to timely designate critical habitat for 245 plant species was arbitrary and capricious).

106. *N. Spotted Owl v. Lujan*, 758 F. Supp. 621, 624 (W.D. Wash. 1991).

107. 16 U.S.C. § 1533(b)(6)(C)(ii) (2012).

108. *N. Spotted Owl*, 758 F. Supp. at 628-29.

Thus, even though more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention.¹⁰⁹

If the Services comply with the law and designate critical habitat when the species is listed, they are unlikely to know what specific actions are needed to recover species. Conversely, if Congress had intended that critical habitat include unoccupied areas for recovery purposes, Congress would have allowed the designation to be delayed pending the development of a recovery strategy for the species. As the *Northern Spotted Owl* court explained, Congress chose not to do so.

C. *The Services' Authority to Exclude Areas from Critical Habitat Is Consistent With Critical Habitat's Limited Role Under the ESA*

The language Congress employed in Section 4(b)(2),¹¹⁰ which grants the Services broad authority to exclude areas from critical habitat, also is consistent with the limited scope and purpose of critical habitat. This provision states:

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*.¹¹¹

Congress' use of the word "extinction" in Section 4(b)(2) is consistent with Congress' intent that critical habitat be limited to specific areas that are critical to the species' survival. Thus,

109. *Id.* at 623. In a more recent case, the court quoted and followed *Northern Spotted Owl* in setting aside the critical habitat designated for the Rio Grande silvery minnow. *See* Middle Rio Grande Conservancy Dist. v. Babbitt, 206 F. Supp. 2d 1156, 1169 (D.N.M. 2000) (quoting *N. Spotted Owl*, 758 F. Supp. at 623), *aff'd sub nom.* Middle Rio Grande Conservation Dist. v. Norton, 294 F.3d 1220 (10th Cir. 2002).

110. 16 U.S.C. § 1533(b)(2).

111. *Id.* (emphasis added).

for example, Representative Duncan, who sponsored the floor amendment that further narrowed the definition of critical habitat in the House bill, explained:

I think that in order to be consistent with the purposes of this bill to preserve critical habitat that there ought to be a showing that it is essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it.

I think this goes to the heart of the problem which every Member has felt in his district. It is entirely consistent with good biological practices and furthermore it maintains intact the purpose of this bill, which is *to prevent the extinction of species who require this critical habitat*.¹¹²

Representative Duncan also explained “that if we are concerned with critical habitat, *that word ‘critical’ implies essential to its survival*.”¹¹³

When considered in light of the legislative history relating to critical habitat, the language Congress employed in Section 4(b)(2) is perfectly logical: Because critical habitat consists of areas essential to the species’ continued existence, areas may be excluded as long as their exclusion does not cause the species’ extinction. It is immaterial whether the exclusion of an area may impede the species’ recovery as long as the species’ survival is not jeopardized. Thus, the authority to exclude areas that otherwise qualify as critical habitat because they are essential to the conservation of the species to avoid conflicts with development is further evidence of critical habitat’s limited role under the Act.

112. Legislative History of the ESA, *supra* note 34, at 880 (emphasis added).

113. *Id.* at 818 (emphasis added).

IV.

THE *SIERRA CLUB* AND *GIFFORD PINCHOT* DECISIONSA. *The Services' Post-Amendment Rulemakings*

Shortly after the ESA was amended in 1978, 1979 and 1982, the Services adopted regulations governing the process and criteria for listing species and designating critical habitat,¹¹⁴ and governing the Section 7 consultation process (the “1986 Section 7 Rules”).¹¹⁵ The latter regulations are of particular importance because they contained the definition of “destruction or adverse modification” of critical habitat that was determined to conflict with the ESA and the intent of Congress in the *Sierra Club* and *Gifford Pinchot* decisions.¹¹⁶

Under the 1986 Section 7 Rules, the “jeopardy” and “adverse modification” standards were intended to emphasize impacts to critical habitat that jeopardized the species’ continued existence—its survival. To “jeopardize the continued existence of” was defined as:

[T]o engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.¹¹⁷

114. *See* Rules for Listing Endangered and Threatened Species, Designating Critical Habitat, and Maintaining the Lists, 45 Fed. Reg. 13,010 (Feb. 27, 1980) (codified at 50 C.F.R. pt. 424) (creating a separate part for the agencies’ regulations governing the listing of species and critical habitat designation and addressing the 1978 procedures for critical habitat designation); Listing Endangered and Threatened and Designating Critical Habitat; Amended Procedures to Comply with the 1982 Amendments to the Endangered Species Act, 49 Fed. Reg. 38,900 (Oct. 1, 1984) (codified at 50 C.F.R. pt. 424) (revising the 1980 regulations to incorporate the 1982 amendments to the ESA).

115. *See* Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926 (June 3, 1986) (codified at 50 C.F.R. pt. 402). Notably, the House Committee on Merchant Marine and Fisheries, which is responsible for oversight of the ESA and its administration, reviewed and submitted comments on the Services’ proposed rules (issued in 1983), indicating which rules did not conform to Congress’ intent. *Id.* at 19,927.

116. *See* *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441-43 (5th Cir. 2001); *Gifford Pinchot*, 378 F.3d at 1069-72.

117. Interagency Cooperation—Endangered Species Act of 1973, as Amended,

The term “destruction or adverse modification” was similarly defined as:

[A] direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and 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.¹¹⁸

Both definitions, unfortunately, contain the phrase “survival and recovery,” which has led to confusion.¹¹⁹ This phrase originally appeared in the Services’ 1978 regulations defining critical habitat and destruction or adverse modification.¹²⁰ As discussed previously, the Services’ 1978 definition of critical habitat included areas for future population expansion, and the agencies suggested in their rulemaking preamble that impairment of a species’ recovery would alone violate Section 7(a)(2).¹²¹ As shown above, that interpretation was strongly criticized by Congress, and the ESA was amended to limit critical habitat to specific areas essential to the species’ survival.¹²²

51 Fed. Reg. at 19,958.

118. *Id.*

119. *See, e.g.,* Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., 524 F.3d 917, 932 (9th Cir. 2008) (rejecting the NMFS’s reading of the regulation defining “jeopardize the continued existence of” because it focused on survival and describing the definition as incorporating a “joint survival and recovery concept”).

120. *See* Interagency Cooperation, 43 Fed. Reg. 870, 875 (Jan. 4, 1978) (formerly codified at 50 C.F.R. pt. 402) (defining “destruction or adverse modification”).

121. *See id.* at 872 (stating that consideration of socioeconomic factors in determining a species’ critical habitat would “diminish the effectiveness of conservation programs for the recovery of a listed species by distorting the estimate of its true habitat needs.”).

122. *See, e.g.,* H.R. Rep. No. 97-567, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N 2807, 2810 (describing critical habitat as “habitat *critical to the survival of the species* at the time of listing” (emphasis added)); Legislative History of the ESA, *supra* note 34, at 817 (statement of Rep. Bowen) (“What we want [the FWS] to do is make a very careful analysis of *what is actually needed for survival of this species.*” (emphasis added)); *id.* at 818 (statement of Rep. Duncan) (“[I]f we are concerned with critical habitat, that word ‘critical’ implies *essential to its survival.*” (emphasis added)); *id.* at 970 (statement of Sen.

To comply with the ESA Amendments and the intent of Congress, the Services added the word “both” to the definitions of “jeopardize the continued existence of” and “destruction or adverse modification.” This change was intended to “emphasize that, except in exceptional circumstances, injury to recovery alone would not warrant the issuance of a ‘jeopardy’ biological opinion.”¹²³ The Services also rejected comments that they should prohibit actions that, regardless of the impact on the species’ survival, would adversely affect the recovery of a species, explaining:

The “continued existence” of the species is the key to the jeopardy standard, placing an emphasis on injury to a species’ “survival.” However, significant impairment of recovery efforts or other adverse effects which rise to the level of “jeopardizing” the “continued existence” of a listed species can also be the basis for issuing a jeopardy opinion. . . .

Congress intended that the “jeopardy” standard be the ultimate barrier past which Federal actions may not proceed, absent the issuance of an exemption.¹²⁴

In short, the jeopardy and adverse modification definitions adopted by the Services were intended to emphasize impacts to the species’ survival. This shift in emphasis was mandated by the 1978, 1979 and 1982 ESA Amendments and their legislative history. Under the definitions, while the impact of an action on a species’ recovery may be considered, only in exceptional circumstances would the impairment of recovery cause an action to be prohibited under Section 7(a)(2). As discussed below, the Services’ emphasis on survival rather than recovery was determined to be unlawful by the *Sierra Club* and *Gifford Pinchot* courts.

Wallop) (“[T]he committee has been concerned over the Fish and Wildlife Service’s policy to treat areas to extend the range of an endangered species the same as *areas critical for the species’ survival*.” (emphasis added)); *id.* at 971 (statement of Sen. Wallop) (“Much of the proposed critical habitat for the grizzly bear is not *critical to the continued existence* of the [species], but is instead proposed so that populations within truly critical habitat can expand.” (emphasis added)).

123. Interagency Cooperation–Endangered Species Act of 1973, as Amended, 51 Fed. Reg. at 19,934.

124. *Id.*

B. *The Fifth Circuit's Decision in Sierra Club*

In *Sierra Club*, an environmental organization challenged the Services' failure to designate critical habitat for the Gulf sturgeon in 1998.¹²⁵ The agencies had determined that the designation of critical habitat would not be prudent because it would not provide any additional benefit to the species.¹²⁶ Thus, the challenged agency action in *Sierra Club* was a determination made pursuant to ESA Section 4(a)(3); the Services' definition of "destruction or adverse modification" was not directly at issue. Instead, the definition became an issue because the Services relied on the similarities between the jeopardy and adverse modification standards to support their decision that the designation of critical habitat would not be prudent.¹²⁷

125. *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 436-37 (5th Cir. 2001). During this period, the Services had relegated critical habitat to its lowest priority of all actions under Section 4 and in many cases failed to designate critical habitat until ordered to do so by a court. See Steven P. Quarles & Thomas R. Lundquist, *Critical Habitat: Current Centerpiece of Endangered Species Act Litigation and Policymaking: Critical for Whom? The Species or the Landowner?*, 48 Rocky Mountain Min. L. Found. Proc. 18-1, 18-20 to 18-26 (2002).

126. One of the exceptions to the requirement that critical habitat be designated at the time of listing is when designation would not be prudent. See 16 U.S.C. § 1533(a)(3)(A) (1994). Under the Services' regulations, the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and the identification of critical habitat can be expected to increase the degree of threat to the species, or (2) the designation of critical habitat would not be beneficial to the species. 50 C.F.R. § 424.12(a)(1) (2012). As discussed above, courts have rejected the agencies' attempts to avoid designating critical habitat on prudency grounds. See, e.g., *Natural Res. Def. Council v. Dep't of Interior*, 113 F.3d 1121, 1125-27 (9th Cir. 1997) (rejecting the FWS's argument that critical habitat would provide no benefit to the species and, therefore, was not prudent).

127. See *Sierra Club*, 245 F.3d at 439-40; see also *Decision on Designation of Critical Habitat for the Gulf Sturgeon*, 63 Fed. Reg. 9967, 9972-73 (Feb. 27, 1998). In their decision, the Services relied on the Gulf sturgeon's recovery plan and prior biological opinions issued after the sturgeon was listed as a threatened species in 1991, explaining that no high priority recovery actions had been identified for unoccupied areas, and, for occupied areas, consultation under the jeopardy standard would necessarily involve consideration of impacts on habitat and adequately protect the species. *Id.* Given these circumstances, the Services' concluded that the designation of critical habitat would not provide any additional conservation benefit to the sturgeon. *Id.* at 9973.

In addressing the appellant's arguments, the Fifth Circuit rejected the contention that the similarity between the Services' definitions of jeopardy and adverse modification impermissibly conflated the two statutory phrases, resulting in a single Section 7 consultation standard. The court explained that the "mere fact that both definitions are framed in terms of survival and recovery does not render them equivalent."¹²⁸

Significantly, the destruction/adverse modification standard is defined in terms of actions that diminish the "value of critical habitat" for survival and recovery. Such actions conceivably possess a more attenuated relationship to the survival and recovery of the species. The destruction/adverse modification standard focuses on the action's effects on critical habitat. In contrast, the jeopardy standard addresses the effect of the action itself on the survival and recovery of the species. The language of the ESA itself indicates two distinct standards; the regulation does not efface this distinction.¹²⁹

However, the court went on to declare (unnecessarily¹³⁰) that the Services' definition of adverse modification was invalid because the definition "imposes a higher threshold than the statutory language permits."¹³¹ In support of this holding, the court relied, first, on the statutory definition of critical habitat, under which areas designated as critical habitat must be "essential to the conservation of the species."¹³² The court concluded that Congress' use of the word "conservation" was intended to expand the purpose of critical habitat beyond "mere survival," concluding that "conservation" "speaks to the recovery

128. *Sierra Club*, 245 F.3d at 441.

129. *Id.* (footnote omitted).

130. The Fifth Circuit acknowledged that it was reviewing the validity of the regulatory definition of adverse modification even though it was not challenged in the complaint, and the administrative record concerning the 1986 Section 7 Rules was not before the court. *Id.* at 440 n.37. Instead, the court's "review was limited to the extent to which the regulation is consistent with the statute—a task we are competent to perform without the administrative record." *Id.* Consequently, it is arguable that the court's ruling on the validity of the regulatory definition of adverse modification was dicta.

131. *Id.* at 442.

132. *See* 16 U.S.C. § 1532(A)(i)-(ii) (2012).

of a threatened or endangered species.”¹³³ As discussed below, however, it is apparent from the manner in which “conservation” is used in the ESA that it refers to the management and protection of wildlife in the ordinary sense and is not synonymous with recovery. The court did not consider any other aspects of the ESA, such as the two-part definition of critical habitat or the timing of designation, which indicates that critical habitat is not intended to be “recovery” habitat.

Second, and more troubling, the court relied on the legislative history of the 1978 Amendments to support its holding, concluding that the legislative history “affirms the inconsistency of 50 C.F.R. § 402.02 and the statute.”¹³⁴ In doing so, the court badly misread the legislative history. The court correctly stated that Congress had rejected the Services’ 1978 regulatory definition of critical habitat (under which critical habitat included unoccupied areas for population expansion), but erroneously explained that Congress intended to expand the scope of critical habitat rather than limiting it.¹³⁵ For the reasons discussed previously, this reading of the legislative history is obviously incorrect.¹³⁶

133. *Sierra Club*, 245 F.3d at 441-43.

134. *Id.* at 442.

135. *Id.* at 442-43.

136. *See, e.g.*, H.R. Rep. No. 95-1625, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 9475 (“Under the present regulations, the Secretary could designate as critical habitat all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured.”); *id.* at 18, *reprinted in* 1978 U.S.C.C.A.N. at 9468 (The Services should “be exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species.”); Legislative History of the ESA, *supra* note 34, at 817 (statement of Rep. Duncan) (“I believe the majority of the House is in agreement . . . that the Office of the Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of this species.”); *id.* at 818 (statement of Rep. Duncan) (“[I]f we are concerned with critical habitat, that word ‘critical’ implies essential to its survival.”); S. REP. NO. 95-874, at 10 (1978) (“It has come to our attention that under the present regulations, the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species.”); *id.* (“[T]he committee has been

Finally, the Fifth Circuit believed that the emphasis on survival in the definition of “destruction or adverse modification” would make it less likely that critical habitat would be designated.¹³⁷ The court believed this result would conflict with the intent of Congress that only in rare circumstances would the designation of critical habitat not be prudent.¹³⁸ In that respect, the decision is consistent with the legislative history and other court decisions.¹³⁹ It was unnecessary, however, for the court to transform critical habitat into “recovery” habitat to support its ultimate ruling. While Congress intended that critical habitat should be designated in most cases, Congress also intended that critical habitat be limited to specific areas essential to the species’ continued existence.

In summary, *Sierra Club’s* invalidation of the regulatory definition of “destruction or adverse modification” was based on its erroneous belief that Congress, in amending the ESA in 1978, intended to expand the scope and purpose of critical habitat. In fact, the opposite was true. This error undermined the court’s holding.

C. *The Ninth Circuit’s Decision in Gifford Pinchot*

Gifford Pinchot involved challenges to a group of biological opinions issued by the FWS under ESA Section 7(a)(2) rather than a critical habitat designation.¹⁴⁰ These opinions addressed whether timber harvesting on federal land in the Pacific Northwest would jeopardize the continued existence of the northern spotted owl, a threatened species under the ESA, or

concerned over the Fish and Wildlife Service’s policy to treat areas to extend the range of an endangered species the same as areas critical for the species’ survival.”).

137. *Sierra Club*, 245 F.3d at 443.

138. *Id.*

139. *See, e.g., Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 624-27 (W.D. Wash. 1991) (discussing the legislative history and concluding that the “designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances”).

140. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1062-65 (9th Cir. 2004).

adversely modify that species' critical habitat.¹⁴¹ The FWS concluded that although small numbers of spotted owls would be incidentally taken, the proposed timber harvesting would not jeopardize the species or adversely modify its critical habitat.¹⁴²

The appellants challenged the biological opinions on multiple grounds,¹⁴³ including a facial challenge to the validity of the Services' definition of "destruction or of adverse modification."¹⁴⁴ In analyzing that challenge, the Ninth Circuit began by summarizing the Services' interpretation of "destruction or adverse modification," stating:

[T]he FWS has interpreted "destruction or adverse modification" as changes to the critical habitat "that appreciably diminish[] the value of critical habitat for *both* the survival *and* recovery of a listed species." 50 C.F.R. § 402.02 (emphases added). This regulatory definition explicitly requires appreciable diminishment of the critical habitat necessary for survival before the "destruction or adverse modification" standard could ever be met. 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." Given this literal understanding of the regulation's express definition of "adverse modification," we consider whether that definition is a permissible interpretation of the ESA.¹⁴⁵

Referring to the familiar *Chevron* test,¹⁴⁶ the court found that there was no need to go beyond step one in analyzing the

141. *Id.* at 1064-65. As explained in the decision, a biological opinion addresses "both the jeopardy and the critical habitat prongs of Section 7 by considering the current status of the species, the environmental baseline, the effects of the proposed action, and the cumulative effects of the proposed action." *Id.* at 1063 (citing 50 C.F.R. § 402.14(g)(2)-(3)).

142. *Id.* at 1064-65.

143. *Id.* at 1065. The court also rejected the challenge to the jeopardy analyses in the biological opinions. *Id.* at 1066-68.

144. *Id.* at 1069.

145. *Id.*

146. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under *Chevron*, judicial review of an agency's interpretation of a statute proceeds in two steps. First, the court must determine whether the intent of Congress regarding the meaning of the statute is clear from the statute's plain language; if it is, the court must give effect to the plain language

regulation's validity. Following the reasoning of *Sierra Club*, the court noted that the ESA defines "conservation" to include all methods that may "bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary." It further noted that critical habitat includes areas that are "essential to the conservation of the species."¹⁴⁷ On that basis, the court concluded that "the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery."¹⁴⁸

Based on the statutory language, the court reasoned that "Congress intended that conservation and survival be two different—though complementary—goals of the ESA."¹⁴⁹ The Services' definition of "destruction or adverse modification," by contrast, focuses on survival, which, according to the court, conflicted with the intent of Congress:

[A]dverse modification to critical habitat can only occur when there is so much critical habitat lost that a species' very survival is threatened. *The agency's interpretation would drastically narrow the scope of protection commanded by Congress* under the ESA. To define "destruction or adverse modification" of critical habitat to occur only when there is appreciable diminishment of the value of the critical habitat for both survival and conservation [*sic*] fails to provide protection of habitat when necessary only for species' recovery. The narrowing construction implemented by the regulation is regrettably, but *blatantly, contradictory to Congress' express command*. Where Congress in its statutory language required "or," the agency in its regulatory definition substituted "and."

of the statute. *Id.* In determining the intent of Congress, the traditional tools of statutory construction are employed, including review of the legislative history. *See, e.g.,* *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 773 (9th Cir. 2011) ("If the proper interpretation is not clear from th[e] textual analysis, the legislative history offers valuable guidance.") (quoting *Resident Councils of Wash. v. Leavitt*, 500 F.3d 1025, 1031 (9th Cir. 2007)). Second, if the intent of Congress is uncertain, the court must determine whether the agency's interpretation of the statute is a permissible construction of the statute. *See Chevron*, 467 U.S. at 843.

147. *Gifford Pinchot*, 378 F.3d at 1070.

148. *Id.*

149. *Id.*

This is not merely a technical glitch, but rather *a failure of the regulation to implement Congressional will*.¹⁵⁰

Thus, like the Fifth Circuit in *Sierra Club*, the Ninth Circuit purportedly relied on the intent of Congress as the basis for its holding.

After providing its analysis, the Ninth Circuit proceeded to discuss *Sierra Club*, explaining that the Fifth Circuit also had equated “conservation” with recovery and “bolstered its conclusion from the legislative history where Congress had considered an earlier critical habitat regulation that required effects on both recovery and survival and had rejected such an interpretation.”¹⁵¹ Thus, while the Fifth Circuit misread the legislative history and misapprehended the intent of Congress, the *Gifford Pinchot* court relied on *Sierra Club* rather than conducting its own review of the legislative history. As a result, the Ninth Circuit erroneously held that the Services’ definition of adverse modification is unlawful.

D. *The Meaning of the Term “Conservation”*

The *Sierra Club* and *Gifford Pinchot* courts plainly misapprehended the ESA’s legislative history and the intent of Congress in declaring the Services’ definition of “destruction or adverse modification” invalid. But both courts also misapprehended the meaning of “conservation” by improperly equating conservation with recovery. As shown below, the term “conservation” and its variants, “conserve” and “conserving,” are defined broadly in the ESA, and include actions that benefit species by assisting in their survival.

The common meaning of “conservation” is “a careful preservation and protection of something,” especially “planned management of a natural resource to prevent exploitation, destruction, or neglect.”¹⁵² Likewise, “conserve” is defined as, “to keep in a safe or sound state,” especially “to avoid wasteful or

150. *Id.* (emphasis added).

151. *Id.* at 1071 (citing *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 443 (5th Cir. 2001)).

152. Merriam-Webster’s Collegiate Dictionary 245 (10th ed. 2000).

destructive use of” something, such as “natural resources.”¹⁵³ In other words, the ordinary meaning of “conservation” is to protect and manage a resource, whether that resource is water, forest, rangeland, minerals or wildlife. This is the sense in which the term “conservation” is used in the ESA and its legislative history.

The definition of “conservation” and its variants, “conserve” and “conserving,” was originally enacted in 1973, and these terms appear dozens of times and in numerous sections of the ESA. The original definition provided:

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 [chapter] are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.¹⁵⁴

The 1973 conference committee report explained the purpose for this definition:

The Senate bill contained language defining the term “conservation and management” as these concepts relate to endangered species; the House bill did not. In view of the varying responsibilities assigned to the administrative agencies in the bill, the term was redefined to include generally the kinds of activities that might be engaged in to improve the status of endangered and threatened species so that they would no longer require special treatment. The concept of conservation covers the full spectrum of such activities: from total “hands-off” policies involving protection

153. *Id.* at 246.

154. Endangered Species Act of 1973, Pub. L. No. 93-205, § 3(2), 87 Stat. 884, 885. With the exception of the substitution of “chapter” for “Act,” as shown in brackets in the text above, the current definition of these terms is identical to the original version. *See* 16 U.S.C. § 1532(3) (2012).

from harassment to a careful and intensive program of control. In extreme circumstances, as where a given species exceeds the carrying capacity of its particular ecosystem and where this pressure can be relieved in no other feasible way, this “conservation” might include authority for carefully controlled taking of surplus members of the species. To state that this possibility exists, however, in no way is intended to suggest that this extreme situation is likely to occur—it is just to say that the authority exists in the unlikely event that it ever becomes needed.¹⁵⁵

Thus, Congress’ broad definition was intended to clarify that agencies carrying out the ESA have available the “full spectrum” of wildlife management tools, including, in extreme cases, killing or capturing members of the species. Although the definition refers to “bring[ing] any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary,” it does not mention recovery nor does it limit conservation to activities that aid in species’ recovery. The definition is broad enough to generally encompass activities that benefit species—the ordinary meaning of “conservation.” And given the legislative history, it is apparent that Congress did not regard the “conservation” as being synonymous with the recovery of listed species.¹⁵⁶

155. H.R. Rep. No. 93-740, at 23 (1973) (Conf. Report), *reprinted in* 1973 U.S.C.C.A.N. 3002.

156. *See, e.g.*, H.R. REP. NO. 97-567, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2810 (defining critical habitat as “habitat *critical to the survival of the species* at the time of listing.” (emphasis added)); S. REP. NO. 95-874, at 10 (1978) (“It has come to our attention that under the present regulations, the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to *the continued existence of a species*.” (emphasis added)); *id.* (“There seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are *critical to a species’ continued survival*.” (emphasis added)); LEGISLATIVE HISTORY OF THE ESA, *supra* note 34, at 817 (statement of Rep. Bowen) (“What we want [the FWS] to do is make a very careful analysis of *what is actually needed for survival of this species*.” (emphasis added)); *id.* at 818 (statement of Rep. Duncan) (“[I]f we are concerned with critical habitat, that word ‘critical’ implies *essential to its survival*!” (emphasis added)).

Moreover, it is apparent from the manner in which “conserve,” “conserving” and “conservation” are used in the ESA that these words are intended to have their ordinary meaning. In fact, these words appear some fifty times in the ESA in a variety of different contexts, indicating that they are not limited to actions that recover listed species.

For example, the Congressional findings in ESA Section 2 provide:

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and *conservation*; . . . [.]

(4) the United States has pledged itself as a sovereign state in the international community to *conserve* to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—[listing wildlife-related treaties and conventions, including migratory bird treaties with Canada, Mexico and Japan, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora:] [.]

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain *conservation* programs which meet national and international standards is a key to meeting the Nation’s international commitments and to better safeguarding, for the benefit of all citizens, the Nation’s heritage in fish, wildlife, and plants.¹⁵⁷

It makes little sense to say species “have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and *recovery*.” Instead, these species have been rendered extinct due to lack of adequate management and protection. Similarly, the United States has not pledged that it will *recover* fish and wildlife species under various international treaties, but instead has pledged to take steps to manage and protect them. And it makes little sense to interpret the last finding to require that national and

157. 16 U.S.C. § 1531(a)(1), (4)-(5) (emphasis added).

international *recovery* standards be met, given that such standards do not exist.

In determining whether to list a species, the Services must “tak[e] into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other *conservation* practices, within any area under its jurisdiction; or on the high seas.”¹⁵⁸ Again, it is apparent that “conservation” means wildlife management and protection, as these conservation efforts necessarily occur *prior to* the species’ listing under the ESA and may preclude the need to list the species.

The term “State agency” is defined in ESA Section 3 as “any State agency, department, board, commission, or other governmental entity which is responsible for the management and *conservation* of fish, plant, or wildlife resources within a State.”¹⁵⁹ In this definition, “conservation” has its ordinary meaning: State agencies manage and protect wildlife, including regulating hunting and fishing. “Conservation” refers to those types of management activities, not to recovering species that have been listed under the ESA.

Section 5 of the ESA provides that the Secretary of the Interior and the Secretary of Agriculture (with respect to the National Forest System) “shall establish and implement a program *to conserve* fish, wildlife, and plants, *including* those which are listed as endangered species or threatened species pursuant to section 1533 of this title.”¹⁶⁰ If “to conserve” means to recover species, then this provision requires that the Interior Department and Forest Service establish and implement recovery programs for all fish, wildlife and plants, the vast majority of which are not listed and will never be listed under the ESA. This would be illogical.

ESA Section 8 (International Cooperation)¹⁶¹ provides that the Secretaries of Interior and Commerce (i.e., the appropriate

158. *Id.* § 1533(b)(1)(A) (emphasis added).

159. *Id.* § 1532(18) (emphasis added).

160. *Id.* § 1534(a) (emphasis added).

161. *Id.* § 1537.

Service), through the Secretary of State, “shall encourage” “foreign countries to provide for the *conservation* of fish or wildlife and plants including endangered and threatened species” and may enter into “bilateral or multilateral agreements with foreign countries to provide for such conservation.”¹⁶² Again, these provisions address programs and activities that generally concern the management and protection of fish, wildlife and plants, and are not limited to recovering species that are listed under the ESA.

Another example of Congress’ deliberate use of “conservation” in the ordinary sense of the word is found in the legislative history of the 1982 Amendments, which adopted provisions authorizing the issuance of incidental take permits.¹⁶³ To obtain an incidental take permit, a landowner must submit and the Services must approve a “conservation plan.”¹⁶⁴ In discussing the scope of conservation plans, the conference committee report stated:

Although the regulatory mechanisms of the [ESA] focus on species that are formally listed as endangered or threatened, the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species. This is consistent with the purposes of several other fish and wildlife statutes (e.g. Fish and Wildlife Act of 1956, Fish and Wildlife Coordination Act) which are intended to authorize the Secretary to cooperate with the states and private entities on matters regarding conservation of all fish and wildlife resources of this nation. The conservation plan will implement the broader purposes of all of those statutes and allow unlisted species to be addressed in the plan.¹⁶⁵

162. *Id.* § 1537(b) (emphasis added).

163. *See* Endangered Species Act Amendments of 1982, Pub. L. 97-304, § 6(1), 96 Stat. 1411, 1422-23. The ESA generally prohibits the “take” of (i.e., killing or injuring) members of a listed species. *See* 16 U.S.C. § 1538(a)(1). *See also* *Ariz. Cattle Growers Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1237-38 (discussing ESA Section 9). Incidental take permits are used to authorize the taking of members of a listed species in instances where the taking results unintentionally from an otherwise lawful activity. *See* 16 U.S.C. § 1539(a)(1)(B).

164. 16 U.S.C. § 1539(a)(2)(A).

165. H.R. Rep. No. 97-835, at 30 (1982) (Conf. Rep.), *reprinted in* 1982

The committee report refers to “conservation” in the ordinary sense of the term. Thus, a “conservation plan” is intended to address the management and protection of fish and wildlife, regardless of whether the species is actually listed under the ESA. It is not a plan to recover listed species.

The foregoing examples are not exhaustive; however, they clearly show that the terms “conservation,” “conserve,” and “conserving” are used throughout the ESA in the ordinary sense of managing and protecting a resource—in this case, fish, wildlife and plants. As the Fifth Circuit explained in *Sierra Club*, “identical terms used in different parts of the same act are intended to have the same meaning.”¹⁶⁶ Thus, “essential to the conservation of the species” does not mean “essential to the recovery of the species.” To conclude otherwise, as the *Sierra Club* and *Gifford Pinchot* courts erroneously did, would make various provisions in the ESA inexplicable.

In addition, the Services have used “conservation” in the ordinary sense of the word in their own regulatory documents. For example, in 1999, the Services issued their Policy for Candidate Conservation Agreements with Assurances.¹⁶⁷ A candidate conservation agreement with assurances is a voluntary agreement between a non-federal property owner and a Service under which the property owner agrees to implement conservation measures for a species that has been proposed for listing or may be proposed for listing in the near future. If the species subsequently is listed, the property owner receives an incidental take permit along with assurances that no additional requirements will be imposed.¹⁶⁸ In responding to comments questioning the Services’ legal authority for this policy, the Services stated that “conservation” as used in the ESA refers generally to the management and protection of fish and wildlife:

U.S.C.C.A.N. 2860, 2971.

166. *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 442 n.49 (5th Cir. 2001) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)).

167. See Announcement of Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726 (June 17, 1999).

168. *Id.* at 32,733-34.

The Services believe that sections 2, 7, and 10 of the [ESA] allow the implementation of this policy. For example, section 2 states that “encouraging the States and other interested parties through Federal financial assistance and a system of incentives, to develop and maintain conservation programs . . . is a key . . . to better safeguarding, for the benefit of all citizens, the Nation’s heritage in fish, wildlife, and plants.” The Services believe that establishing a program for the development of Candidate Conservation Agreements with assurances provides an excellent incentive to encourage conservation of the Nation’s fish and wildlife. Section 7 requires the Services to review programs they administer and to “utilize such programs in furtherance of the purposes of this Act.” The Services believe that, in establishing this policy, they are utilizing their Candidate Conservation Programs to further the conservation of the Nation’s fish and wildlife.¹⁶⁹

Similarly, in the preamble to the final rule implementing the Safe Harbor Agreement and Candidate Conservation Agreement with Assurances Programs, the Services explained:

Much of the nation’s current and potential habitat for listed, proposed, and candidate species exists on property owned by private citizens, States, municipalities, Tribal governments, and other non-Federal entities. Conservation efforts on non-Federal lands are critical to the long-term conservation of many declining species. More importantly, a collaborative stewardship approach is critical for the success of such an initiative. Many property owners would be willing to manage their lands voluntarily to benefit fish, wildlife, and plants, especially those that are declining, provided that they are not subjected to additional regulatory restrictions as a result of their conservation efforts.¹⁷⁰

169. *Id.* at 32,729 (ellipses in original).

170. Safe Harbor Agreements and Candidate Conservation Agreements With Assurances, 64 Fed. Reg. 32,706, 32,707 (June 17, 1999) (codified in portions of 50 C.F.R. pt. 13, pt. 17). *See also, e.g.*, Policy Regarding Voluntary Prelisting Conservation Actions; Announcement of Draft Policy and Solicitation of Public Comment, 79 Fed. Reg. 42,525 (July 22, 2014) (discussing circumstances under which voluntary “conservation actions” for unlisted species may be used as mitigation for adverse effects if the species is subsequently listed under the ESA).

Thus, even in the Services' regulatory documents, the word "conservation" refers broadly to the management and protection of wildlife, including species that have not, and may never be, protected under the ESA.

In short, "conservation," as used throughout the ESA, is not restricted to actions that further the recovery of listed species. Instead, "conservation" refers broadly to actions that benefit fish, wildlife, and plants, regardless of whether the species is listed. There is nothing in the ESA or the Act's legislative history suggesting that "conservation" is intended to have a special or unique meaning, particularly in light of the various contexts in which the word is used in the ESA and other federal wildlife conservation laws.¹⁷¹ Finally, the legislative history concerning critical habitat reinforces the ordinary meaning of "conservation" by emphasizing that the purpose of critical habitat is to ensure the species' continued existence.

Thus, the reasoning of the courts in *Gifford Pinchot* and *Sierra Club* was simplistic and ultimately erroneous. Both courts improperly construed a common term that is used in a number of different contexts in the ESA as being limited to recovering listing species. In fact, the ESA has many goals, including the conservation of fish and wildlife that are not listed and may never be listed, as the Services have explained in their regulatory documents. The designation of critical habitat conserves species by helping to ensure their ability to survive pending development of a recovery plan, land acquisition and protection, and other actions directed specifically at the species' recovery needs.

171. See, e.g., 16 U.S.C. § 670k(6) (2012) (definition of "conservation and rehabilitation programs" in the Sikes Act); 16 U.S.C. § 1362(2) (2012) (definition of the terms "conservation" and "management" in the Marine Mammal Protection Act). In fact, Title 16 of the United States Code is called "Conservation." That title contains some 90 chapters that address the conservation of natural resources, including various types of fish and wildlife.

V.
CONCLUSION

Congress deliberately amended the ESA in 1978 to narrow the scope of critical habitat. At that time, Congress criticized the Services' regulatory definition of critical habitat as overbroad as well as the agencies' practice of designating critical habitat consisting of extensive areas for population expansion, such as the then-proposed critical habitat for the grizzly bear. By its amendments, Congress intended to limit critical habitat to areas that are truly essential to the species' continued existence, i.e., its survival, and to allow the Services to exclude areas from critical habitat to minimize conflicts with land uses, unless exclusion would result in the species' extinction. Given this especially robust legislative history, it is not surprising that the first court to squarely address the role of critical habitat in species' conservation, *Northern Spotted Owl*, concluded that "even though more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention."¹⁷²

Yet two federal circuits have relied on the same legislative history to conclude that the purpose of critical habitat is to recover species. The *Sierra Club* court misread the legislative history, believing erroneously that Congress intended to expand the role of critical habitat under the ESA,¹⁷³ while the *Gifford Pinchot* court relied on *Sierra Club's* analysis and harshly criticized the FWS for emphasizing survival in defining "destruction or adverse modification."¹⁷⁴ Notwithstanding these errors, a number of courts have followed *Sierra Club* and *Gifford Pinchot*, accepting their mischaracterization of the intent of Congress.¹⁷⁵ These cases demonstrate the steady march away

172. *N. Spotted Owl v. Lujan*, 758 F. Supp. 621, 623 (W.D. Wash. 1991).

173. *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 442-43 (5th Cir. 2001).

174. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1069-71 (9th Cir. 2004), *amended by* 378 F.3d 968 (9th Cir. 2004).

175. *See supra* note 28 and accompanying text. Indeed, some cases have gone even farther, and have emphasized impairment of recovery in applying the

from the intent of Congress as well as the plain language of ESA Section 7(a)(2) itself, which, as the Services explained in their 1986 rulemaking, emphasizes the survival of the species.¹⁷⁶

In short, the erroneous holdings of *Sierra Club* and *Gifford Pinchot* have strongly influenced recent ESA jurisprudence and the manner in which the ESA is being administered. These cases have undermined the 1978 Amendments by concluding that the principal purpose of critical habitat is the recovery of the species and requiring that an impairment-of-recovery standard be used under Section 7(a)(2). Based on *Sierra Club* and *Gifford Pinchot*, the Services have proposed regulations that would codify the erroneous characterization of critical habitat as recovery habitat, allowing areas to be designated for population expansion regardless of whether these areas are occupied by members of the species and contain habitat capable of supporting the species.¹⁷⁷ If these regulations are adopted, we will have come full-circle, with critical habitat consisting of vast expanses of

Section 7 jeopardy standard, citing *Gifford Pinchot*. For example, in *National Wildlife Federation*, which involved a challenge to a biological opinion addressing the impact of the operation of Columbia River dams on listed species of salmon, the court held that the regulatory definition of “jeopardize the continued existence of” requires an analysis of the effects of the action on the species’ recovery. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 931-33 (9th Cir. 2007). The court explained that “[a]s in [*Gifford Pinchot*], we conclude that the jeopardy regulation requires NMFS to consider both recovery and survival impacts.” *Id.* at 931. In support of this conclusion, the court selectively quoted from the preamble to the 1986 Section 7 Rules and provided its own interpretation of the Services’ regulatory definition of “to jeopardize the continued existence of,” which the court characterized as a “joint recovery and survival concept.” *Id.* at 932. By contrast, in their 1986 rulemaking, the Services rejected comments that jeopardy should be a recovery-based standard, explaining that the phrase “continued existence of the species” found in ESA Section 7(a)(2) “is the key to the jeopardy standard, placing an emphasis on a species’ ‘survival.’” 1986 Section 7 Rules, Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,934 June 3, 1986) (codified at 50 C.F.R. pt. 402).

176. Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. at 19,934.

177. See Implementing Changes to the Regulations for Designating Critical Habitat, 79 Fed. Reg. 27,060 (proposed May 12, 2014) (to be codified at 50 C.F.R. §§ 424.01, 424.02, 424.12); Definition of Destruction or Adverse Modification of Critical Habitat, 79 Fed. Reg. 27,060 (proposed May 12, 2014) (to be codified at 50 C.F.R. § 402.02).

land deemed necessary for recovery purposes, and adverse modification consisting of land alterations that merely impede the species' future recovery. The regulations cannot be squared with the legislative history that accompanies the 1978 Amendments and should be reconsidered in light of that legislative history and the limited role that Congress intended critical habitat to play under the ESA.