Before the U.S. Department of the Interior

U.S. Fish & Wildlife Service
(FWS)

Endangered and Threatened Wildlife and Plants	**)**	
Proposed Determinations of Prudency and	**)**	
Proposed Designations of	**)**	**FR Doc. 02-11225**
Critical Habitat for Plant Species from the	**)**	
Northwestern Hawaiian Island, HI	**)**	

To Craig Manson, Assistant Secretary for Fish and Wildlife and Parks
c/o Paul Henson, Field Supervisor
U.S. Fish and Wildlife Service
Pacific Islands Office
300 Ala Mona Blvd.
P.O. Box 50088
Honolulu, HI 96850

Filed via FedEx: [(808) 541.3441]

Comments of
Public Employees for Environmental Responsibility
(PEER)

Daniel P. Meyer
Public Employees for Environmental Responsibility (PEER)
2001 S Street, N.W. — Suite 570
Washington, D.C. 20009

Tele: (202) 265.7337
E/ml: dmeyer@peer.org

Its General Counsel and Attorney
District of Columbia Bar No. 455369

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PEER has reviewed the Proposed Designations of Critical Habitat for Plant Species from the Northwest Hawaiian Islands, published at 67 FR 34522, and respectfully submits the following comments:

I. Introduction

A. Mass Extinction Due to Human Activity

The Earth is currently in its sixth era of mass extinction of the last 25 million years. Previous periods of mass extinction were the result of natural disasters, such as the meteorite believed to have destroyed the dinosaurs. The current rate of extinction is the result of human activity, including over-hunting, introduction of exotic species, and destruction of habitat.[1] Up to 50% of the world's species may be on the way to extinction within the next 100 years, and

[1] Stanford Environmental Law Society, Endangered Species Act 2 (2001).

11% of bird species and about one out of every eight plant species are currently threatened with extinction.[2]

We have only just begun to understand the value of natural habitat and associated species, and yet we are destroying species at the rate of about one species per day. Loss of habitat is probably the leading cause of extinction. The economic value of natural habitat and associated species lost is unknown. For example, New York City calculated that it would cost between six and eight million dollars to build a water treatment plant to serve the filtration function served by the Catskill and Delaware watershed ecosystem. The city opted instead to spend 1.5 billion to prevent development of the watershed.[3] If the watershed had already been developed, the New York City residents would have paid an additional 4.5-6.5 billion dollars for their water through taxes and utility fees. These types of costs are frequently overlooked during development of natural areas. Consider also that a large percentage of the medicines used and produced in this country are derived from nature.

> The last word of ignorance is the man who says of an animal or plant: what good is it? . . . If the biota, in the course of aeons, has built something we like but do not understand, who but a fool would discard seemingly useless parts? To keep every cog and wheel is the first precaution of intelligent tinkering.
>
> Aldo Leopold, *A Sand County Almanac* (1949)

B. The Endangered Species Act

In 1973, the United States Congress enacted the Endangered Species Act (ESA) to curb the rate of extinction through listing and recovery of endangered and threatened species. As currently administered, the ESA has failed to meet its objectives. As of 1993, recovery plans were available for 344 listed species. Analysis of these recovery plans revealed that species are actually "managed for extinction," rather than for survival or recovery. For example, 28% of the

[2] Virginia Morell, *Biodiversity: The Fragile Web*, 195 National Geographic 2, 46. (Feb. 1999).

plans that included population size goals set recovery goals below existing population sizes, and 37% that included population number goals set recovery goals below existing number of populations.[4]

In addition to failing to implement tasks under recovery plans, which are discretionary, agencies responsible for implementation of the ESA have consistently missed statutory deadlines and have used regulations and definitions that conflict with the language and intent of the ESA.[5] The U.S. Fish and Wildlife Service (FWS) is currently facing several law suites, challenging failure to list, failure to designate critical habitat, and sufficiency of recovery plans. The heart of the problem is insufficient appropriations from Congress, which do not allow the FWS to meet statutory obligations. The FWS yearly listing budget is only about $6 million. As a result, the agency has become vulnerable to a flood of litigation and court orders, which increasingly control prioritization of tasks and assignment of funds within the agency.

C. Critical Habitat Designation under the ESA

Under section 7(a)(2) of the ESA, the Secretary of the Interior is responsible for designating critical habitat, and each Federal agency must consult with the Secretary to "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical habitat]." 16 USC § 1536(a)(2). Subsequent amendments to the act included definition of critical habitat as:

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[3] *Id*. at 80.

[4] T.H. Tear, J.M. Scott, P.H. Hayward, and B. Griffin, *Status and Prospects for Success of the Endangered Species Act: A Look at Recovery Plans*, 262 Science 976 (Nov. 1993)

[5] The Department of the Interior regulations limit the application of section 7 to "discretionary" actions. 50 C.F.R. § 402.03 (1998). The insertion of the term discretionary is contrary to the plain language of the statute, according to which section 7 applies to "any actions." The regulations are also contrary to the Supreme Court interpretation of section 7 in Tennessee Valley Authority v. Hill, 437 U.S. 153, 173 (1973). For a full discussion, *see* Derek Weller, *Limiting the Scope of the Endangered Species Act: Discretionary Federal Involvement or Control Under Section 402.03*, 5 Hastings W.-NW. J. Envlt. L. & Pol'y 309 (1999). In

> 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 . . . 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. 16 USC § 1532(a)(2).

Section 4(a)(3) requires designation of critical habitat "to the maximum extent prudent and determinable," at the time of listing, allowing for revision of critical habitat as appropriate. 16 U.S.C § 1533.

Statutory regulation of designated critical habitat only occurs through section 7, which applies only to federal actions, but private parties have vigorously opposed designation of critical habitat. In a statement prepared for Congress on behalf of the American Forest and Paper Association, William R. Murray wrote: "Designation produces a map with lines drawn by a federal regulatory agency. Most landowners, and their bankers, find it difficult to believe that the lines mean nothing." [6] Indeed, one of the benefits of designation of habitat is advocacy value in and out of court. ESA section 9 "take" and "harm" prohibitions do apply to private individuals. 16 U.S.C. § 1538(a). "Harm" has been defined to include "significant modification of degradation where it actually kills or injures wildlife"[7], and a court is more likely to find a section 9 violation when a private actor has effected designated critical habitat.[8]

In opposition to the section 4(a)(3) requirement that critical habitat be designated at the time of listing, the FWS has only designated habitat for about 10% of listed species. The "not prudent" loophole provided in section 4(a)(3) has been used to justify failure to designate critical habitat for most species. However, the FWS has indicated that the designation of critical habitat is the lowest of its priorities, because designation produces public opposition, and because the

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addition, the FWS uses definitions which deprive critical habitat designation of intended substantive protection, discussed in section 3B of this comment.

[6] *See* Hearing before the Subcommittee of Fisheries, *Wildlife and Drinking Water*, 106th Congress.

[7] *See* 50 C.F.R. § 17.3 and Babbitt v. Sweet Home, 515 U.S. 687, 697 (1995).

[8] *See* J. Slazman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 Harv. Envtl. L. Rev. 311, 327 (1990).

agency believes that designation does not provide protection beyond that provided by the "jeopardize" prong of section 7.[9]

In 1978, Congress clarified the intended use of the "not prudent" determination, indicating that it is only to be used when designation is not in the best interest of the species, giving the example of a species for which designation may encourage further collection, and noted that "It is only a rare circumstance where the specification of critical habitat concurrently with the listing would not be beneficial to the species."[10] Courts have been able recognize abuse of the "not prudent" determination when the FWS does not present facts indicating that the species would not benefit from critical habitat designation, and have found such determinations to be arbitrary and capricious when challenged in court. The finding of an arbitrary "not prudent" determination forces the FWS to reconsider the determination and designate critical habitat if it will benefit the species, which results in a reordering of agency priorities and resources.

II. The Proposed Critical Habitat Designation and the Cost of Litigation

The proposed designations of critical habitat for plant species from the Northwestern Hawaiian Islands resulted from a court order overturning "not prudent" determinations for 245 endangered and threatened Hawiian plants. Conservation Counsel for Hawaii v. Babbitt, 24 F.Supp.2d 1074 (1998). The court ordered the FWS to determine critical habitat designations or nondesignations for all 245 species by April 30, 2002. Id. at 1079. Recovery plans are available for two of the five plants for which critical habitat designations have been proposed, *Mariscus pennatiformis* and *Sesbania tomentosa*, both of which are included in the Recovery Plan for Multi-Island Plants, FWS (1999). The proposed critical habitat consists of three islands that are part of the Hawaiian Island National Wildlife Refuge.

[9] *See, e.g.*, Conservation Counsel for Hawaii v. Babbitt, 24 F.Supp.2d 1074 (1998); *see also* statement of Jamie Rappaport, Director, Fish and Wildlife Services, before the Subcommittee on Fisheries, Wildlife, and Drinking Water, 106th Congress (henceforth statement of FWS Director).

[10] H.R. Rep. No. 95-1625 at 17, reprinted at U.S.C.C.A.N. 9453.

The proposed designation of critical habitat may benefit the species in question, but the uncertain benefit afforded by the designation has been bought at the cost of reassignment of limited FWS resources and loss of resources in defense against law suits. The critical question is who should decide how FWS resources are expended? Congress, through insufficient appropriations, has exposed the FWS to a flood of litigation, which currently has a significant effect on agency priorities. In response to litigation, the FWS diverted all available budget resources for 2001 to designation of critical habitat.[11] Also worthy of consideration: what was the intended purpose of critical habitat designation, and does the "jeopardy" prong of section 7 as defined by the FWS actually serve the function of both prongs, making designation of critical habitat a duplicative process? These are questions that have surfaced in courtrooms, journal articles and Congressional Hearings. Until they have been resolved, the designation of critical habitat will provide uncertain benefits at a significant cost.

III. Additional Comments

A. Designation of critical habitat should be primarily based on species biology.

PEER is concerned that the FWS may be limiting designation of critical habitat to lands within the National Wildlife Refuge as a response to public opposition to designation of private lands as critical habitat. The proposed designation includes only land that is within the Hawaiian Islands National Wildlife Refuge. Consideration of the recovery plans for the listed species suggests that designation of these areas alone may not provide sufficient protection. If the FWS determines critical habitat based on which lands are already under federal control, areas "essential to the conservation of the species" may be overlooked. According to the ESA definition of critical habitat, all such areas are to be designated as critical habitat, regardless of whether they are federally or privately controlled. See 16 USC § 1532(a)(2).

[11] J.E. Bradley, W.F. Fagan, and J.M. Hoekstra, *A Critical Role for Critical Habitat in the Recovery Planning Process? Not Yet*. 12 Ecological Applications 701 (2002).

Consider *Mariscus peenatisformis*, one of the species for which the proposed designation applies. There are currently only 1-2 known populations of *Mariscus pennatisformis*, and about 200 total known individuals.[12] The greatest threat to this species may be its small number of populations and individuals. *Mariscus pennatisformis* historically occupied Kauai, Maui, Nahiku, the island of Hawaii, and Laysan.[13] Currently, only one population of about 200 individuals remains on Laysan, and these individuals are threatened by the Laysan finch.[14] Recovery of species such as *Mariscus pennatisformis* may require reintroduction into areas of historical range. The ESA definition of critical habitat includes "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." 16 USC § 1532(a)(2). Designation may therefore include areas of historical range that are not currently occupied.

B. The proposed critical habitat designation may benefit the species

Few species have recovered as a result of the ESA,[15] but an analysis of the differences between recovering and declining species revealed that the percentage of recovery or management objectives completed is greater for recovering species.[16] Another study found that there is greater recovery plan task implementation for species that also have designated critical habitat.[17] As previously noted, designation of critical habitat also has advocacy value. Courts are more likely to find section 7 and section 9 violations for species that have designated critical habitat. In addition, during the consultation process, the FWS is more likely to recognize that federal activity may effect listed species when such activity occurs on habitat that has been designated as critical. These general benefits of critical habitat designation may benefit the

[12] *Recovery Plan for Multi-Island Plants* at iii, U.S. Fish and Wildlife Service (1999). Available at http://endangered.fws.gov/RECOVERY/RECPLANS/Index.htm (last visited July 2002).

[13] *Id*. at 101.

[14] *Id*. at 102.

[15] U.S. General Accounting Office Report (GAO/RCED-89-5, Washington, DC, 1988).

[16] *See generally*, R.J.F. Abbitt and J.M. Scott, *Examining Differences Between Recovering and Declining Species*, 15 Conservation Biology 1274 (2001).

[17] *See generally*, L.W. Botsford, J.M. Diehl, E. Harvey, and C.J. Lundquist, *Factors Effecting Implementation of Recovery Plans*, 12 Ecological Applications 713 (2002).

species in question, but task recovery plan task implementation for these plants will primarily depend on availability of funds.

The FWS frequently determines that critical habitat designation will not benefit a species because the FWS believes that the "jeopardize" prong of section 7 of the ESA already provides protections afforded by designation.[18] The overlap in protection provided by the "jeopardize" and "destruction of habitat" prongs of section 7 is a result of Department of the Interior Regulations that conflate the prongs into one standard, requiring only jeopardy before a consultation is triggered. 50 C.F.R. 402.02 (1986). As a result, FWS definitions include destruction of habitat in the definition of "jeopardize." This does not however, provide the full protection intended by Congress. The ESA definition of critical includes areas that are not currently occupied by the species, but are determined to be "essential for the conservation of the species," such as historical range. The jeopardize prong can only prevent destruction of habitat that is currently occupied by the species. The jeopardize prong therefore relates to survival, while the critical habitat prong relates to conservation or recovery. The 1986 DOI regulations therefore contradict the language and intent of the section 7.[19]

IV. Conclusion

The Endangered Species has failed to meet its objectives, in part because Congress has given implementing agencies insufficient appropriations. As a result, the FWS is unable to meet its statutory obligations. Resulting litigation currently has a significant effect on agency priorities. The FWS has only designated critical habitat for about 10% of listed species. In response to recent litigation, the FWS decided to divert all available resources for 2001 to address the backlog of designations. The protection afforded by critical habitat designation is, however, unclear. Illegal regulations and definitions used by the FWS have limited the substantive section 7 protections provided to critical habitat. Regardless, critical habitat

[18] *See* statement of FWS Director, *supra*, n. 8.

[19] For a full discussion *see* E. Perry Hicks, *Designation Without Conservation: The Conflict Between the Endangered Species Act and Its Implementing Regulations*, 19 Va. Envtl. L.J. 491 (2000).

designation has advocacy value, as courts are more likely to find ESA violations for species with critical habitat designations. One clear distinction between the jeopardy and critical habitat prongs of section 7 is the ability to designate critical habitat that is currently not occupied by the species. Such habitat is not subject to protection under the jeopardy prong. PEER recommends that the FWS service consider unoccupied historical habitat that falls outside of the National Wildlife Refuge for designation as critical, as some plants may need to be reintroduced into such habitat in order to avoid extinction.

Cordially,

Daniel P. Meyer, General Counsel
Public Employees for Environmental Responsibility
2001 S Street, N.W. – Suite 570
Washington, D.C. 20009

D.C. Bar No. 455369

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Naomi A. Lundberg, PEER Environmental Law Clerk ‘02
Georgetown University Law Center ‘04