S. HRG. 106–437

ENDANGERED SPECIES ACT RECOVERY PLANS: CRITICAL HABITAT DESIGNATIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON
FISHERIES, WILDLIFE, AND DRINKING WATER

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 1100, A BILL TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO PROVIDE THAT THE DESIGNATION OF CRITICAL HABITAT FOR ENDANGERED AND THREATENED SPECIES BE REQUIRED AS PART OF THE DEVELOPMENT OF RECOVERY PLANS FOR THOSE SPECIES

MAY 27, 1999

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C O N T E N T S

ENDANGERED SPECIES ACT RECOVERY PLANS: CRITICAL HABITAT DESIGNATIONS

THURSDAY, MAY 27, 1999

U.S. SENATE,
SUBCOMMITTEE ON FISHERIES, WILDLIFE,
AND DRINKING WATER,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:30 a.m. in room 406, Senate Dirksen Building, Hon. Michael D. Crapo (chairman of the subcommittee) presiding.

Present: Senators Crapo and Chafee [ex officio].

OPENING STATEMENT OF HON. MICHAEL D. CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. The hearing will come to order.

This is the hearing of the Subcommittee on Fisheries, Wildlife and Drinking Water on S. 1100, a bill to amend the Endangered Species Act of 1973 to provide the designation of critical habitat for endangered and threatened species be required as a part of the development of recovery lands for those species.

Good morning and welcome. This is the first subcommittee meeting of 1999 in which we will address the provisions of the Endangered Species Act. Those of you who are here today who are either participating in or attending the hearing are acutely aware of the contentious debate over the Endangered Species Act as well as the significant legal challenges and great difficulties with implementing the Act.

While written with the best of intentions, the Endangered Species Act simply doesn't work for species or people. Conserving our wildlife and fisheries resources to maintain diversity and ensure healthy populations of our indigenous species is a necessary and laudable goal. But I am particularly concerned by repeated reports that implementation efforts are not doing enough to recover species in decline, and at the same time are having significant negative impacts on the economic and social health of many communities.

Simply put, the Endangered Species Act is failing to meet its objectives to conserve, protect and recover species at the risk of becoming extinct.

In response to these concerns, legislative initiatives have been proposed in successive Congresses to address many of the issues raised by reform advocates. There are proposals from many different perspectives as to what can be done to improve the operation

of the Act. But attempts at comprehensive reform have been slowed by a polarizing debate from many perspectives. For the benefit of species and people, we have to move ahead to find solutions that protect our fisheries and wildlife resources, and at the same time, protect our communities.

Recognizing that comprehensive reform is still necessary, and also recognizing that comprehensive reform is an extremely difficult undertaking, Chairman Chafee and Senator Domenici and I have decided to take a focused approach to address an immediate and urgent problem regarding the implementation of the Act. This relatively minor fix is going to have a disproportionately beneficial effect on fish, wildlife and communities.

S. 1100 would do essentially two things. First, it would establish a deadline by which the recovery plans for listed species must be completed. Nothing in the current law requires that a recovery plan be completed in a specified timeframe. A recovery plan is the most critical element for the recovery of threatened or endangered species. It is the blueprint for increasing their numbers and maintaining healthy, viable populations.

There are many listed species for which no recovery plan exists, which is why we will establishing a deadline for completing the plan 2 ½ years after the species is listed.

Second, S. 1100 would shift the time of designating critical habitat. The current law requires that critical habitat be designated when species are listed, when they are determined to be threatened or endangered. It would be difficult at best to scientifically justify how fisheries and wildlife managers could make a determination about critical habitat of a species when so little is known at the time of the listing. The designation of critical habitat often has dire effects on the social and economic stability of communities.

During the critical habitat designation for the northern spotted owl, a major economic engine of the entire region of the country was the focus of a confrontational debate on the impact of a critical habitat designation.

In my own State of Idaho, we've seen farm loans disappear and economic hardship as a result of the focal point that critical habitat brings when it is designated. Currently, critical habitat is required to be designated when we know the least about a species. We know only that the patient is in the emergency room. We do not know enough about the prescription for recovery.

Because critical habitat designation can create such widespread impact, it is crucial that designations be undertaken at a time that maximizes our scientific understanding of the recovery needs of the species. This will ensure that these efforts are a productive and effective tool in the recovery of the species. For these reasons, S. 1100 would move critical habitat designation to the recovery planning phase of the Act. Critical habitat would be designated as an element of the recovery plan instead of the listing process. This measure would not make any other substantive changes to existing law, nor would it modify petitions or other procedural requirements to designate habitat.

I look forward to a productive and educational discussion of this legislation, and the possibilities of making the Endangered Species Act more effective in today's hearing.

That concludes my opening remarks. We have the chairman of the full committee with us, Senator Chafee.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Thank you very much, Mr. Chairman.

I want to express my thanks to you for holding this hearing and for all the work you've done on this measure. If I could, I would ask that my statement might be put in the record.

Senator CRAPO. Without objection, so ordered.

[The prepared statement of Senator Chafee follows:]

STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Good morning. I would first like to express my sincere gratitude to you, Mr. Chairman, for holding this hearing and for your cooperation on the legislation that we introduced last week with Senator Domenici. That bill, S. 1100, addresses one of the most problematic, controversial and misunderstood provisions of the Endangered Species Act—the provision relating to the designation of critical habitat for endangered species.

As I have often said, the key to protecting our nation's fish and wildlife is to protect the habitat on which those species depend. This is particularly true for endangered and threatened species, which often fall into such precarious condition precisely because of habitat loss and degradation. However, of almost 1,200 species listed by the Fish and Wildlife Service, only 113—9 percent—have critical habitat designated.

Landowners fear that critical habitat imposes severe restrictions on use of their lands; the Secretary frequently does not designate critical habitat; and environmental groups often bring lawsuits over this failure to designate.

The root of the problem lies in the fact that designation of critical habitat requires knowledge of the conservation needs of the species, as well as an assessment of the economic impacts of the designation, neither of which is generally known at the time of listing.

This bill would move the requirement to designate critical habitat from the time of listing to the time of recovery plan development. It would also provide a deadline for development of recovery plans, no later than 36 months after listing. In the event that the designation is necessary to avoid the imminent extinction of the species, the bill allows the Secretary to designate critical habitat concurrently with listing. In addition, the Secretary would be required to appoint a recovery team with limited exceptions. Other than these changes, the critical habitat provisions would remain virtually the same as in existing law.

I believe that this bill addresses a narrow fix in a way that answers the complaints of both environmental groups and the regulated community. Let me emphasize two points: first, I intend to work collaboratively with all interested parties in making further improvements to the legislation; and second, I do not intend to see this bill include other issues not related to critical habitat. As you mentioned, Mr. Chairman, there will be another time and opportunity for that.

Mr. Chairman, again, thank you for holding this hearing. I wish to welcome our distinguished panelists and look forward to their testimony.

Senator CHAFEE. Just a couple of points I'd like to accent which you have touched on in your opening statement. That is, I believe as you do that the key to protecting our nation's fish and wildlife is habitat. It all gets down to habitat, Mr. Chairman, as you've noted.

The root of the problem as I see it lies in the fact that, as you said, designation of critical habitat requires some knowledge of the needs of the species as well as an assessment of the economic impacts of the designation. This is not known when the listing is done.

This bill would move the requirement to designate critical habitat from the time of listing. When you list now, you designate criti-

cal habitat. We change that. We change that designation of critical habitat to when the recovery plan gets submitted.

The bill would also provide a deadline for development of the recover plan no later than 36 months after listing. Now there is an escape hatch there for the Secretary. In the event that the designation is necessary to avoid imminent extinction of the species, the bill does allow the Secretary to designate critical habitat concurrently with the listing. But we don't anticipate that that will occur very often.

I believe this bill addresses a narrow fix in a way that answers the complaints of both environmental groups and the regulated community. I intend to work collaboratively with you, Mr. Chairman, and with all interested parties in making further improvements to the legislation.

I don't intend to see this bill include other issues not related to critical habitat. In other words, when we get to the Floor with this legislation, I don't look on this as a Christmas tree to change everything in connection with endangered species. It's a narrow fix that we're doing, and I hope we can restrict it to that.

Thank you very much, Mr. Chairman.

Senator CRAPO. Thank you, Mr. Chairman. I think we both agree that a comprehensive reform of the Endangered Species Act is needed, but we don't want to avoid the opportunity that we have with this legislation for a narrow fix of a critical issue.

Senator CHAFEE. Thank you.

Senator CRAPO. Our plan today was that Senator Domenici, the other cosponsor of this legislation, would be the first witness, and would then be invited to participate in the hearing. Senator Domenici, however, is currently in an Appropriations Committee meeting on which the bill that he chairs is up. So we don't know exactly when he is going to be able to meet with us. When he does arrive, we will interrupt the hearing and allow Senator Domenici to make his remarks and then invite him to join us.

However, until he arrives, we will proceed with the hearing as indicated in the announcement of the hearing.

Our first panel will be Ms. Jamie Clark, the Director of the U.S. Fish and Wildlife Service. Ms. Clark, please come to the table. I know you understand this, but I'll state for you and all the other witnesses that the witnesses are allocated 5 minutes to give their opening statement. There is a set of lights here that will go on. The yellow light comes on at 1 minute, and then the red light indicates that the 5 minutes is up. Then following the oral testimony, we will have a found of questions and answers.

Without anything further, I believe, we are ready to proceed. Ms. Clark, you may proceed.

STATEMENT OF JAMIE RAPPAPORT CLARK, DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Ms. CLARK. Thank you, Mr. Chairman. Good morning to you and Senator Chafee.

I appreciate this opportunity to comment on S. 1100, a bill which attempts to improve the effectiveness of the critical habitat designation process.

Mr. Chairman, I would first like to begin by thanking you and Chairman Chafee of the full committee and Senator Domenici for your leadership in introducing S. 1100 and for taking on the complex and often controversial issue of critical habitat. I look forward to working very closely with you and the full Committee as S. 1100 moves through the legislative process.

To more effectively achieve the goals of the Endangered Species Act, the Service believes the process of designating critical habitat for listed species should be improved. Protection of habitat is paramount to successful conservation and recovery of listed species, however, in 25 years of implementing the Act, we have found that designation of official critical habitat provides little additional protection.

Because of our concern about the critical habitat designation process, we have prepared a notice of intent to clarify the role of habitat in endangered species conservation. Once published early next month, we look forward to engaging in a meaningful, collaborative dialog on this extremely complex issue.

We believe that the critical habitat designation process needs to be recast as the determination of habitat necessary for the recovery of listed species, or "recovery habitat." This recovery habitat should be described in recovery plans.

I'd like to talk briefly about what critical habitat is, what it is not, and why we think it needs to be improved.

The Endangered Species Act directs the Service to identify habitat essential to the conservation of species, and to designate it as critical habitat when prudent and determinable. We are required, as you mentioned, to do this at the time species are listed as endangered or threatened. At this early stage in the process, biological information regarding recovery goals and needs may be incomplete. Additionally, critical habitat designation currently competes with all other listing actions for limited resources. Unfortunately, this denies the Act's protection to imperiled species that have yet to be listed.

There exists a wide range of perceptions on the meaning, purpose and value of critical habitat. Contrary to popular understanding, critical habitat does not create a preserve and has no regulatory effect at all on private land when no Federal involvement is present. Once designated, critical habitat has only one regulatory impact: under Section 7 of the Endangered Species Act, Federal agencies must ensure that their actions are not likely to result in the destruction or adverse modification of critical habitat. However, under Section 7, Federal agencies already consult with the Service on activities affecting listed species. In essence, these two processes often are identical, making critical habitat designation a redundant expenditure of conservation resources.

I would like to make some comments on S. 1100; however, Mr. Chairman, since the bill was just recently introduced, I will respectfully ask that the subcommittee keep the record open in case further analysis yields additional comments.

Senator CRAPO. The record will be held open for that purpose.

Ms. CLARK. Thank you.

S. 1100 appropriately moves the process of critical habitat designation to the recovery stage of the process. During this stage, the

biological information needed to best determine habitat necessary to support species recovery is more readily available and scientifically sound.

The bill requires critical habitat to be designated by standalone regulation. The Service suggests instead integrating more fully the designation of recovery habitat into recovery plans. Recovery plans would still be subject to public review and statutory deadlines for the publication of the draft and final plans. The cooperative nature of the recovery planning process will give the experts and stakeholders comprising recovery teams flexibility and adequate time to determine the habitat necessary to support species recovery.

S. 1100 contains certain regulatory and statutory burdens, some of them new. Although we would always prefer that these burdens not be included in the legislation, if they are, we recommend that the bill include sufficient authorization for appropriations above current authorization levels to offset these requirements. Our success in carrying out these additional responsibilities will depend on the will of Congress to appropriate the necessary funds to actually accomplish the tasks required by the legislation.

The Service also suggests that S. 1100 include language to establish a priority ranking system similar to the language in S. 1180 that was favorably reported by this Committee in the 105th Congress. Such a system would allow the Service to address statutory requirements on a prioritized basis in the case that sufficient funds are not appropriated to carry out the requirements of the bill on time.

Without such a safety valve and without the needed additional appropriations, the Service would likely be subject to litigation which addresses special interest priorities instead of national species recovery priorities. Taxpayers will pick up the tab for the lawsuits which will be filed as a result of missed deadlines, and protection for listed and imperiled species will be diminished.

I would like to conclude by emphasizing that the Service continues to believe that the identification, protection, restoration and conservation of habitat are paramount to the successful recovery of endangered and threatened species. The scientific determination of habitat necessary for species recovery should be undertaken during the recovery planning process and not as a part of a duplicative regulatory process.

I again commend the subcommittee's efforts to address a complex, controversial and poorly understood issue of critical habitat. We look forward to working closely with the committee to improve S. 1100 as it moves through the legislative process.

Mr. Chairman, this concludes my testimony, and I would be pleased to respond to any questions.

Senator CRAPO. Thank you very much, Ms. Clark.

Let me start out by asking you, I take from your testimony that you agree with the general proposition that the designation of critical habitat is better done at the recovery stage rather than the designation stage or the listing stage, is that correct?

Ms. CLARK. Absolutely, yes, I do.

Senator CRAPO. You know what I think I'll do is stop my questions. Senator Domenici, would you like to take this time to make a statement?

Senator DOMENICI. I don't want to displace her. I'll just make it right here if that's all right.

Senator CRAPO. That's fine, please take a seat.

Senator DOMENICI. [sitting at the dais] Thank you very much.

Senator CRAPO. Ms. Clark has just finished her testimony and I was just starting questions. I would interrupt the questions and allow you to make any opening statement you want.

Senator DOMENICI. Thank you, I appreciate it. I am sorry to be late. I was supposed to testify sooner, but we were marking up.

Senator CRAPO. We got word of that.

Senator DOMENICI. And I happen to be the chairman of that one, and want to get it finished. In 28 minutes, we spent $22 billion.

Senator CHAFEE. That's pretty good, a billion a minute. That's a good morning's work.

[Laughter.]

Senator CRAPO. Senator Domenici, please make any statement you would like.

STATEMENT OF HON. PETE V. DOMENICI, A UNITED STATES SENATOR FROM THE STATE OF NEW MEXICO

Senator DOMENICI. Well, let me first say to Ms. Clark, I've been trying to meet with you and our schedules have not matched up. I am hopeful after this hearing we will be able to meet on this subject.

Ms. CLARK. I would be glad to, Senator.

Senator DOMENICI. Thank you very much.

First, thank you, Mr. Chairman, for allowing me the opportunity to talk a little bit about your bill, which I gladly cosponsor, S. 1100. I am very pleased to have joined you and Senator Chafee on this legislation, which I think when everybody begins to understand it, that it or something like it will be overwhelmingly adopted by the Congress and ultimately approved by the White House.

As you are well aware, I was involved in the Endangered Species Act when it was passed. I voted for it. I have not been one who has been an open, day-by-day critic of it, but I have observed, as is the case for many laws, that the interpretation of courts sometimes makes environmental laws unmanageable. In many instances, the courts make them so that common sense is absent from the implementation. To the extent that that happens, it's obvious that the Department of Interior is getting so used to lawsuits with reference to the Endangered Species Act that they probably have boilerplate responses that they just punch out of the computer.

Nonetheless, however well they do, they don't seem to win many of them. We have a very anomalous and strange situation that I want to talk about that your amendment addresses.

First, I am very hopeful that as this progresses that with reference to water that you, Senator Crapo, and others from the West will be able to enlighten our friends and Senators, like Senator Chafee, about the very big difference between water in our States and water in eastern America. There are two giant differences. Many of our streams are snow-fed, and snowpack-fed, and thus rely dramatically upon how much snow and moisture you get in the uplands as to how full or how long the stream will run.

That's very different from being alongside the Potomac River. There are times in my youth in Albuquerque, where I lived six to eight blocks from the Rio Grande River, Rio Grande means big river or mighty river, well, I can tell you many times while I was growing up, either in the immediate area that I lived or 15 miles south toward the little town of Los Lunas, you could go there many times in the summer in teenage groups and there was no water in the river. Period.

So the great river doesn't run all the time. That's one big difference. That not only is the case in New Mexico, but in many States. Very high mountains and much snowfall created these streams.

The other thing we have is a completely different set of water laws. We are built in many of our States around a system that is called the appropriation of water, or first person that takes water from the river and applies it to a beneficial use as described in law, beneficial use is defined, acquires ownership to that water as of that point in time. So there are water rights users from cities, water rights holders from cities to associations to individual farmers up and down the streams in a dry State like mine and yours, who own all the water that flows in that river, because we have a State law that says that's how it works.

Now, frankly, that does not mean that there is no room for an endangered species. But it does mean that over history, up to the current time, all of those appropriators of water, the saving of the minnow to the extent it requires new water, was not contemplated in the water rights acquisition and use that historically built up. So it comes along as perhaps a neighbor, perhaps a friend to the stream. But it comes along with a new water need that nobody was figuring on 10, 15 years ago, and certainly when most of this water was allocated.

So you know we are terribly worried about it. We have appropriated huge amounts of water through an intercontinental tunnel from the Colorado River system to the Rio Grande, in the days of Clinton P. Anderson. They built tunnels, and we acquired some water as our share of putting together the Colorado River project. It flows into this same stream, but it belongs to cities and communities. It flows in the river bed just like all the water I described heretofore.

But it's owned by somebody. They don't need it right now, but they bought it so they could plan to use it over time.

Well, they're not very interested in seeing a whole bunch of their water taken up by this newcomer, as I said, this minnow, be it friend or be it foe. Certainly, I am not against trying to preserve it. It's a hardy little rascal, because it still exists even though that river has been going dry almost 15 percent of the time for about a 25 year cycle in its southernmost region.

The Secretary of Interior testified before an Interior Appropriations Subcommittee that the endangered species law was not working. We have sent you his testimony in which he talked about having to fix this Act because the courts were interpreting it wrong and he was being forced to do some things. The cart was being put ahead of the horse.

So current implementation of this endangered species imposes a negative. The listing of the endangered species designating critical habitat and then simply stopping human activities without further solution. So less than 70 percent of the listed species are covered by recovery plans.

Let me move ahead, since I have given you the background. I just want to make sure that you know the Supreme Court, in a case which I have cited in more depth, Bennett v. Spear, which one of our great water lawyers will talk to you about, the Supreme Court has said that we should have the best scientific and commercial data available to be used to designate a critical habitat.

In the case of the river I mentioned earlier that I grew up by, the science is not there yet for the silver minnow. There exists no implementable plan for recovery. But as Secretary Babbitt said, he is being put in a straitjacket into permanently designating habitat by a court order.

It's abundantly clear that a complete environmental analysis of a critical habitat designation is an absolute necessity. We're trying to put into place the science first; that is, it doesn't make any sense to designate the habitat before you have the science and the plan put together. It causes great animosity, great fear, and trepidation, because nobody knows what it means. So you get huge opposition and people pulling in, saying, "they're taking my water." We really don't have a plan because we don't know how much the minnow and other endangered species would need.

I want to stop there, and tell you that you have called a renowned witness from New Mexico who represents many water issues in our State and around the nation. I think for the record he ought to tell this committee from the water law standpoint why it's very difficult to work the endangered species into a good habitat and a good ecosystem for a river when you have to designate it before you have the science and know what you're doing.

Thank you very much, and I hope the bill is reported out. I will pledge to you I will help as best I can getting it passed. Secretary of Interior and others say the bill in its current form may not be right, but certainly something like it, something has to be fixed. So I comment you and thank you very much.

Senator CRAPO. Thank you very much, Senator. We realize that you may have important responsibilities back in the Appropriations Committee, but we welcome you to join us.

Senator DOMENICI. I am going to stay a while. We've finished our work.

Senator CRAPO. Good.

Senator CHAFEE. I want to note that Senator Domenici was a member of this committee for a good number of years.

Senator DOMENICI. Yes, both through the first Clean Air Act and second Clean Air Act.

Senator CHAFEE. I remember when I came on this committee, you were here.

Senator CRAPO. Well, then, we'll resume the questions. Ms. Clark, we appreciate your working with us through these interruptions. But schedules here in the Senate don't always allow us to perfectly time things out.

I had just asked you whether you agree with the general proposition that the designation of critical habitat should occur in the recovery process rather than in the designation or listing process. You indicated your agreement with that.

You also stated in your testimony that there were several new statutory requirements included in this proposed legislation that you had some concern about. Could you identify those at this point in time?

Ms. CLARK. Sure. I could at least identify some of them and then we're still looking at it. But I really do, I am excited about the notion of this whole science process being part of a science-based recovery process. That overwhelmingly is quite positive.

Certainly, a concern is the notion that recovery plans will now have statutory timeframes. It's something we have tried to embrace in policy, because quite frankly, recovery is the key to solving the endangered species crisis nationwide. Recovery is really what the goals of the Endangered Species Act are all about.

But the frustration that Senator Domenici so aptly described, with the backlog of species without recovery plans, clearly typifies the need for appropriations. If we're going to have more statutory deadlines and more statutory requirements that are judicially reviewable, we would hope that that would come with available authorization and appropriation. So it very much dovetails with what we testified on in the bill last year, or in 1997.

There are some minor issues that we could talk about, the requirement to appoint a recovery team within 60 days. Oftentimes, it takes us a little bit longer than that. But it's primarily because we try to get the best of the best, and to get the correct mix of stakeholders, including scientists and land owners and economists and the right people to be able to describe and define what's needed for species recovery. It takes us a little bit longer than 60 days.

So it's things like that that we certainly can talk about.

Probably one of the largest issues, the most significant issue, has to do with the mechanism to describe this habitat, and the mechanism to describe habitat that's ultimately essential to the recovery of the species. We believe that the notion of a recovery team being identified and charged with articulating critical habitat, which is then conducted by regulation, ultimately is duplicative.

We have debated for years the notion of trying to have a big, open stakeholder-involved process to describe recovery habitat, or habitat that's necessary for the recovery of species—one that could evolve as science on the species and science of the surrounding areas evolves.

So we believe the notion of having to do two processes is duplicative. We'd like to have that discussion and see if we can work through some of that. I think that is certainly something that we can discuss.

The priority system—it was an issue that we discussed in S. 1180 back in the previous Congress to address national priorities. We have had to do that with the listing program, because we do indeed have a backlog of species that deserve protection. We have tried mightily to address biological priorities as opposed to priorities of individuals or special interests.

We'd like to be able to legislate or statutorily endorse a recovery priority program, so that in fact we have some biological mechanism to guide, given available appropriations, those species that will receive recovery planning process support in some kind of sequenced order, according to biological priorities. Determining whatever is first case into court becomes the priority for the Fish and Wildlife Service. I can tell you it is extremely difficult to rearrange resources, move people, and try to address those priorities, when in fact we're trying to deal with biological priorities.

So it's issues like that that would be of interest to us.

Senator CRAPO. Can you tell me how much time and effort the Fish and Wildlife Service puts in to defending citizen litigation on critical habitat designation?

Ms. CLARK. I can't give you a specific percentage. But I can tell you it is dominating increasingly the Section 4 listing and critical habitat designation priorities—a significant amount of time. I am certainly not debating whether or not it's appropriate litigation or not, because if we've missed a statutory deadline, we've missed a statutory deadline, and we're just as frustrated as anybody else by it.

But we can only work within the confines of our available appropriations and available resources. But the litigation surrounding critical habitat has risen exponentially over the last few years between our Solicitor's office and the Department of Justice, and our own biologists nationwide. We believe it's becoming an overwhelming part of our workload, which then means our biologists are not working on species recovery and species issues.

Senator CRAPO. Thank you very much. My time has expired.

Senator Chafee?

Senator CHAFEE. Thank you, Mr. Chairman.

Ms. Clark, you raised concerns over some of these deadlines that have to be met. We had all those deadlines in S. 1180 last year, which as you know we worked with you closely on. What's changed? In other words, you weren't so concerned. I don't mean to be difficult here, but last year, when we did S. 1180, you didn't seem to be concerned over these deadlines. Now you are. What's changed?

Ms. CLARK. Let me clarify my concerns, Senator, because we're actually not specifically concerned about the deadlines. But I actually went back to our testimony on S. 1180 to make sure I didn't doublespeak here. We indicated our concerns about appropriations, given the additional statutory deadlines, last year as well. I am all for recovery, and I am all for statutory mandates on recovery plans, because actually I think that's where the focus of the Endangered Species Act would be and should be if we're going to do what's needed for species and habitat conservation.

But that doesn't come with a flat budget. So, like we testified on S. 1180, these additional statutory deadlines really do need to come with additional Congressional support to get the job done. Because without that, it's just going to be a steady parade—a new scenario—of missed deadline cases in the courts that will be very justified.

Regarding the critical habitat part of S. 1180, we did testify last year, the fall of 1997, regarding the concern about the potential du-

plicative process. We were very pleased during the discussion about the placement of critical habitat, with the placement of identification of habitat into the recovery process. But we raised the concern then as well about whether or not the actual mechanics of the process were value-added or duplicative.

Senator CHAFEE. Let me see if I understand your position here, and you tell me if I am wrong. As I understand it, you are supportive of moving the designation of critical habitat from the listing time to the filing of the recovery plan. Is that a fair statement?

Ms. CLARK. With a minor edit, Senator.

Senator CHAFEE. OK, give us the minor edit.

Ms. CLARK. My minor edit would be, we are clearly supportive of moving the identification of habitat that is essential for the recovery of species into the recovery planning process. Absolutely.

Senator CHAFEE. OK. I'm not sure I get the difference.

Ms. CLARK. I think the subtle difference is, I believe that the whole notion of what critical habitat is, should be or people believe it to be has become so confused that I've never had the same conversation twice on what it is. People perceive it, want it to be and intend for it to be something that it isn't. But the notion of a science-based collaborative habitat identification regime is extremely important. So what you're hearing me doing is very subtly trying to shift the debate of habitat, and what habitat essential for recovery is, into the recovery planning process. But I don't think it's what a lot of people's perception of what critical habitat is.

Senator CHAFEE. In other words, you don't think critical habitat can be defined specifically, it's difficult to define what it is. Is that one of your points?

Ms. CLARK. I think over the years, it has become so confusing and so misintended and misused as a tool that some of us think it's better to redescribe what it should be and call it something else. Don't have to. We can certainly redefine critical habitat. This bill has it in the absolute correct place. But I do think it needs a little bit of refinement and description and expectation.

Senator CHAFEE. OK. Well, hopefully we can work with you in trying to come up with that.

Ms. CLARK. I think we can.

Senator CHAFEE. In other words, you don't see this as a hopeless cause that we're involved in?

Ms. CLARK. Absolutely not. No, I don't.

Senator CHAFEE. Good. Well, we obviously seek your cooperation, you're a very key player in this. You're out in the trenches there having to deal with all this. So we look forward to working with you.

Thank you very much, Mr. Chairman.

Senator CRAPO. Thank you. Senator Domenici.

Senator DOMENICI. I'd like to first address your concern about how much money you get to do this work. Frankly, I believe one of the reasons the appropriation process is not giving you sufficient money is because the way the law is being interpreted and implemented is scaring people, and scaring them so much that they're asking their legislators not to fund you. Legislators are responding quite readily to not putting in enough money, because the whole

thing is upside down. Once you name the species as endangered, you've done nothing, you've just named them.

For us to then start litigation and then you to start trying to put a habitat in place before you have an implementable plan, and the plan has to involve, under law, the economic, social and other impacts that that plan is going to have on everybody. In western America, most of the water has already been appropriated to other uses. So what happens, because we're moving too rapidly before we have scientific information, water information, stream flow information, everybody hunkers down to protect their interests. Frankly, what I am finding out now is that some people are beginning to meet and talk about it with the idea that nobody is going to be taking large quantities of water away from anybody, but we're just trying to figure out a habitat.

I suggest you read it our expert's testimony about the problem of allocated streams—and there are many such streams in the West. All the water is owned or supposed to be used by somebody. We have not yet litigated who owns the water—whether you own new water rights or not. Both sides are sitting there like big bears, and neither wants to take that issue to court. Everybody is hoping the issue will disappear before deciding ownership of water rights, and whether an endangered species law precedes other rights that have been there for a long time.

In the meantime, people are very concerned about what you're going to use. So I would say this issue of not moving so quickly with trying to use up people's water, or the river's water, the ecosystem, until you have a plan, is a very healthy part of maybe getting more support for what you're doing. I, for one, have already said that if we could get this straightened out where people were not filled with such up-front fears, that we probably would join some advocates in funding the implementation moneys.

Essentially, you do agree, however, with the premise of the legislation, that we ought to clarify the phasing of these two aspects of the endangered species law?

Ms. CLARK. Absolutely, Senator, I do. If I could respond to your comments for just a moment, prior to coming to Washington, I was in the Albuquerque regional office. So I know painfully the debates over western water issues and how important they are.

You are absolutely right, it is very disturbing that there continues to be a fear factor about conservation of biological diversity. We've worked really hard to try to create incentives, to try to clarify science and to try to be much more open and collaborative rather than secretive about decisionmaking processes under the Endangered Species Act. That's clearly the only way that we're going to be successful. Opening up a recovery process, engaging the affected stakeholders and founding it all on solid science in the right sequence is the only way that we're really going to achieve conservation of species and habitat.

So for that, we're thankful that this debate is occurring.

Senator DOMENICI. Thank you.

Senator CRAPO. Thank you, Senator Domenici.

Ms. Clark, we have been informed that there is going to be a vote some time in the next 45 minutes. So we've all got a long list of questions for you. But in an effort to try to resolve this before the

vote, that may or may not happen, we're going to forego any further questions. Is that agreeable with the panel?

I suspect that means that we are going to submit several lists of questions to you in writing and ask that you as promptly as possible respond to those question sin writing.

Ms. CLARK. We would be happy to.

Senator CRAPO. With that, you are excused. We appreciate your attendance today.

We will move to panel No. 2. Mr. William R. Murray, Natural Resources Council of the American Forest and Paper Association; Mr. Charles T. DuMars, Counsel for the Middle Rio Grande Conservancy District, from Albuquerque; and Mr. John Kostyack, Counsel for the National Wildlife Federation.

Now that we're looking at a vote situation, we're going to ask that you pay even more attention to the instruction and try to keep your remarks within the 5 minutes, so we have an opportunity for questions. We would like to begin immediately then with you, Mr. Murray.

STATEMENT OF WILLIAM R. MURRAY, NATURAL RESOURCES COUNSEL, AMERICAN FOREST AND PAPER ASSOCIATION

Mr. MURRAY. Thank you, Mr. Chairman, and good morning, Senator Chafee, Senator Domenici. Thank you for the opportunity to testify today on S. 1100 and the issues surrounding the designation of critical habitat under the Endangered Species Act.

My name is William Murray. I am the Natural Resources Counsel of the American Forest and Paper Association, the national trade association of the forest products and paper industry. I have submitted a written statement which I request be included in the record.

Senator CRAPO. Your written statements will be made a part of the full record.

Mr. MURRAY. Thank you, Senator.

Congress enacted the Endangered Species Act to protect endangered and threatened species, a goal which we fully support. Under Congress' own schedule, however, the law was due for review and update in 1992. That date has long since passed, and the need for action grows.

S. 1100 focuses on moving the designation of critical habitat from the listing process to the recovery planning process. Improving the recovery planning process is one of the six key areas in the law which the AF&PA has identified as needing particular attention. Moving critical habitat into the recovery planning effort is an important step in that process. But we have some suggestions which we believe will ensure that the change proposed in S. 1100 has the desired effect.

Critical habitat as currently provided in the law and implemented by the Fish and Wildlife Service and the National Marine Fisheries Service suffers from several problems. As we have heard today, the Fish and Wildlife Service believes that critical habitat is not an efficient or effective means of securing the conservation of species, particularly as compared to the controversy it causes and to the monetary, administrative and other resources it absorbs. The Act directs the Secretary to take into account economic im-

pacts before designating critical habitat and to exclude land if the benefits of exclusion outweigh the benefits of designation, provided extinction will not result.

However, in their economic analyses, the Services only consider the incremental effects above and beyond those caused by the actual listing. Since listing is only based on biological considerations, the Government rarely if ever considers the full economic effects of actions under the Endangered Species Act. Perhaps as a result this ability to exclude land has not been used extensively in the designation of critical habitat.

The only statutory role for designated critical habitat is provided by Section 7(a)(2) of the Endangered Species Act requiring Federal agencies to consult with the Secretary to ensure their activities are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.

However, as Director Clark testified, she believes that species are adequately protected by the jeopardy consultation without necessarily considering the designated critical habitat. The Service has acknowledged that critical habitat designation has no statutory effect on private land unless the landowner seeks an action from a Federal agency. Nonetheless, the 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.

Indeed, the National Marine Fisheries Service recently touted the lines as a benefit of designation, because it helps focus Federal, tribal, State and private conservation management efforts in such areas. While this statement carries no threat of regulatory action, it does exemplify the idea of targeting land which in turn causes controversy, fear, etc., among landowners.

Given the overall problems with this concept and the lack of support even from the expert agencies, we recommend that critical habitat be merged entirely into recovery planning. Many would say the Services have accomplished this in any event. However, the designation process, as Director Clark testified, continues to drain resources from the Services, and litigation mounts. Retaining critical habitat as a separate rulemaking makes no sense if the ultimate goal is recovery and that's where resources ought to be focused and spent.

S. 1100 makes only a tentative step in that direction. It does not sufficiently ensure that economic impacts are adequately addressed. Consideration of social and economic impacts are essential if conservation is to have any credibility to the public at large and to the particular members of the public affected by a specific listing.

S. 1100 contains no requirement that the Secretary appoint a balanced, multi-disciplined recovery team. Yet the bill gives the recovery team the first crack at not only drawing the lines on the map but at establishing the management and protection measures. If critical habitat is retained as a separate rulemaking, we recommend that the Secretary be given the full 18 months to prepare that initial proposal, rather than have the recovery team step out front.

Let me just conclude that we don't think critical habit is the only issue that needs to be addressed in the Endangered Species Act. My testimony submitted for the record outlines several other issues, particularly in the area of habitat conservation. Land stewardship is a particular concern and focus of our Association's Sustainable Forestry Initiative. We think the habitat conservation planning process is an important element of land stewardship, and that the committee ought to focus its attention on improving and making that a workable process.

Thank you, Senator, for the opportunity to testify this morning. I'd be happy to answer any questions.

Senator CRAPO. Thank you, Mr. Murray.

Mr. DUMARS.

STATEMENT OF CHARLES T. DU MARS, ESQUIRE, PROFESSOR OF LAW, UNIVERSITY OF NEW MEXICO SCHOOL OF LAW, ALBUQUERQUE, NEW MEXICO

Mr. DUMARS. Thank you, Mr. Chairman, Senator Chafee, for the opportunity to come and visit about this topic.

A little bit about my experience in this area very briefly. I've been on the Western States Water Council, which represents the western prior appropriation States under four Governors. I have been on the endangered species subcommittee during that entire time. I am currently a professor of law at the University of New Mexico Law School, where I teach constitutional law and water law among my courses.

I have served on two committees in the National Research Council and the National Academy of Science, both dealing with water quality directly or indirectly related to this topic, and consulted with a number of other countries about designing water law systems, including endangered species protection issues.

I am going to make four points very quickly. The first is that the Endangered Species Act, as others have said, absolutely requires that there not be an uncoupling of the concept of determining where the species must be protected and the concept of how you protect the species. It is vital that those two go hand in hand. That has not happened, not at least in the western United States, in my experience.

The consequence of that yields huge impacts on individual water users. One of the clients I represent includes four Indian Pueblos, about 50,000 small farm irrigators, and involves over 100 miles of river. All of these individuals are directly affected by the uncoupling of critical habitat from the process of protection. I will make the point that the critical habitat designation has huge impacts in the dry West prior appropriation States when it is made.

My third point is that the third thing critical habitat designation does is it creates the illusion that by stopping people from doing things, stopping farmers from farming, by stopping people from diverting water, you are somehow affirmatively protecting the species. That illusion is very harmful because it creates unneeded conflict between environmental groups and water users and it gives an explanation or at least a rationale for not going forward.

Finally, I will address in my view why specifically this particular amendment is an improvement. Turning first to the question of

how these two notions have been uncoupled, what has happened is, in the typical circumstance in the western United States, in my experience, there are different ways of addressing the problem. One is through the Section 7 consultation process with Federal agencies, which is not particularly collaborative, and involves neither, oftentimes, environmental groups or the individual water users. That alone is inadequate.

One would think that then, instead of going through that process, one would move toward recovery. Unfortunately, recovery is expensive, complex, requires a great deal of science and lags behind critical habitat. That means that the next thing that happens, and by statute, by timeframe, is that a decision is made as to what the habitat is in the western United States. That decision has a direct effect on individual water users.

Let me give you an example. Just 2 months ago, I met with approximately 35 ditch riders, men who turn the water on and off, of which 10 of them were Pueblo Indians. I had to tell them to their face, yes, you've been irrigating for 400 years, yes, you have done the same thing every year, yes, we know the river dries up. But if a critical habitat designation is made saying there must be continuous flow in the water bed, and if you divert water under the Sweet Home decision, you may be subject to civil and criminal penalties.

That is an incredibly significant deterrent to the behavior of these individuals who are simply trying to do what they normally do. They would ask me, well, how much water does the fish need? Well, we haven't decided that exactly yet, because we don't know how we're going to recover it.

Then they would say, well, if we don't know how much it needs, how do we know when we're causing damage? I have to tell them, it doesn't matter if the critical habitat designation has taken place, because in fact, you are subject to civil and criminal penalties.

Turning to my next point, exactly then what does one do to address that, and what is the analogous legal situation in the west? In the west, at least in the Tenth Circuit Court of Appeals, because of the magnitude of the critical habitat designation on the individuals and the stream system, you require an environmental impact statement (EIS) in order to evaluate the alternatives to the designation.

So on the one hand, we have the environmental groups suing to force the designation, and we have the farmers seeking just the opposite, saying you have to do an EIS. So the U.S. Fish and Wildlife Service and the environmental groups are basically opposing the EIS process. It's an incredible irony created by the absence of connection of recovery.

In summary, this amendment will merge those two processes. It will make is possible to have collaborative efforts that lead toward habitat conservation plans, wherein everybody looks at not only how to protect the species, but where do we protect the species and distinguish between the range, which is one point and that narrow question, what is the critical habitat that best fits on through the recovery plan.

Thank you.

Senator CRAPO. Thank you, Mr. DuMars.

Mr. Kostyack?

STATEMENT OF JOHN F. KOSTYACK, COUNSEL, OFFICE OF FEDERAL AND INTERNATIONAL AFFAIRS, NATIONAL WILDLIFE FEDERATION

Mr. KOSTYACK. Good morning, Mr. Chairman, Senator Chafee. My name is John Kostyack, I am here to testify on behalf of the National Wildlife Federation, which is the nation's largest member supported conservation advocacy and education organization.

I want to thank you for inviting me here to testify on S. 1100. The National Wildlife Federation considers the Endangered Species Act critical habitat provisions to be an extremely valuable tool for conserving imperiled species. We disagree with any suggestion that this provision is redundant with the other protections of the Endangered Species Act.

We have serious concerns with this bill, both substantively and also in the manner in which it is being approached outside the reauthorization process. I'd like to walk through each of those concerns.

We have just passed the 25th anniversary of the Endangered Species Act, and we really should be celebrating its crucial role in saving our nation's biological heritage. On the other hand, we do need to grapple with the fact that many species on the Endangered Species List are not yet on the path to recovery. Scientists tell us that we need to do a better job of protecting, managing and restoring habitat.

To achieve this task, the Endangered Species Act provides three enforceable safeguards, and the critical habitat protection is one of those three. It has a number of features that sets it apart from the other two safeguards in the Endangered Species Act.

One, critical habitat provisions provide the clearest direction to the Federal agencies about their obligation to protect and manage habitat for the purpose of species recovery. Second, the Endangered Species Act explicitly calls for the protection of unoccupied habitat in the context of critical habitat designations. For many listed species, this focus on unoccupied habitat is crucial if extinction is to be avoided and recovery made possible.

Third, critical habitat designation focuses the attention of Federal and State land managers on the special management efforts that need to take place to save species. Fourth, critical habitat designation draws clear lines on a map, giving land managers the direction they need to determine what habitat must be saved.

Finally, critical habitat designation provides that essential early warning signal, so agencies and people involved in these local land use planning processes have the information they need about areas that need special attention.

Let me give you two concrete examples about why the S. 1100 approach of delaying or avoiding critical habitat designation is problematic. First, a negative example. In the Natomas Basin outside of Sacramento, California, there are several species in the region that have been listed for well over 5 years, and yet no critical habitat has been designated. Meanwhile, the Fish and Wildlife Service has issued an incidental take permit that allows habitat

destruction throughout the Natomas Basin, so long as a mitigation fee for future habitat acquisition is paid.

But because no critical habitat has been designated, the development is taking place in areas that scientists believe are needed for species recovery.

Let me also give you a more positive example where critical habitat was designated, in unoccupied habitat as well as occupied, and contributed to the recovery of listed species. This example was discussed in the 1995 case known as Idaho Rivers United versus National Marine Fisheries Service. In that case, the United States Forest Service sought to allow a mine to be developed adjacent to what was then unoccupied habitat of a listed species, a listed salmon species.

The court relied on the fact that the habitat had been designated as critical habitat as a basis for rejecting the agency's proposal to move forward with this mine. It sought to protect the unoccupied habitat, because it was needed for the species to return in order to recover and rebound in number.

Now, the fact that there are only 9 percent of listed species that have received designated critical habitat suggests that serious attention to this issue is needed, and reforms are needed. However, the problems that have arisen in implementing critical habitat would not be solved by S. 1100. In fact, this bill would exacerbate some of those problems and leave many other challenges unaddressed. We recommend some alternative approaches that would ensure that critical habitat works for both species and land owners.

Walking through the major features of this bill, first, the bill adds new delays to the Act's requirements concerning designation of critical habitat. Second, it reopens a loophole that had previously been closed by Congress that enables the Services to avoid designating critical habitat altogether, based upon a scientifically unjustified, not determinable finding.

Third, the bill sets deadlines for completing recovery plans and adds new procedural burdens but does not provide for any new funding. The result of this will be either that the Services prepare shoddy recovery plans in their haste to meet statutory deadlines with inadequate resources, or they will fail to meet their statutory deadlines and end up in wasteful litigation.

Finally, the bill arbitrarily limits the ability of citizens to enforce the Endangered Species Act's requirements concerning the content of critical habitat designations.

Despite these flaws, S. 1100 does attempt to address a legitimate issue about the need for better information in designating critical habitat. It attempts to address this by postponing the designation until either a recovery plan has been completed or 3 years have passed since listing, whichever is sooner. But this 3 year delay is really arbitrary.

Regardless of which deadline for critical habitat designation is chosen, either the time of listing or 3 years later, the Endangered Species Act must be implemented in an arena where important data about conservation strategies will be missing.

The scientific community has provided a useful approach for addressing this issue. In a 1995 National Research Council report

called Science and the Endangered Species Act, a report that was requested by Congress, a panel of leading scientists convened from industry, government and academia, recommended that an interim designation of what they called "survival habitat" be used to protect a core amount of essential habitat during the period between listing and completion of the recovery plan.

It then suggested that once the recovery plan was adopted, the critical habitat designation, with its more sophisticated analysis of conservation needs and economic impacts, could replace a survival habitat designation.

This precautionary approach is much preferable to the approach of S. 1100. Because by the time a species becomes listed, there is little room for error. Species have usually declined to extremely low population numbers, and have typically lost significant percentages of their historical habitat, and by definition are in danger of extinction.

The precautionary approach also benefits land owners, because when you use the interim protection of survival habitat, you preserve the widest array of conservation strategies, so land owners and other stakeholders can sit down and devise a strategy that is tailored to the local economic and social objectives.

We are heartened by the news that the Fish and Wildlife Service wants to begin a dialog with the public on the future of critical habitat. We think that this will create a useful discussion about creative approaches that we can all develop about making critical habitat work for species and land owners. We have some ideas we have set forth in our written testimony about using some of the existing language in the Endangered Species Act for this purpose.

Finally, I would like to emphasize our strong concern about the fact that this bill is being considered outside of the Endangered Species Act reauthorization process. Because each of S. 1100's provisions depends on successful implementation of other provisions of the Endangered Species Act, we are concerned that the issues are not going to be addressed effectively or understood well enough.

I can give you one example. The deadlines that are imposed for completion of recovery plans, they will only further the Endangered Species Act conservation goals if we get into what makes a meaningful recovery plan, and if we get into the question of how the agency will mount the resources necessary to accomplish this task.

Senator CRAPO. If you could wrap up pretty quick, I'll be asking you some questions on that.

Mr. KOSTYACK. Sure.

Reauthorization is long overdue. The difficult task of completing it will be made more difficult if Members of Congress are allowed to resolve their individual grievances with the ESA through targeted amendments. If this subcommittee and the full committee move forward with S. 1100, every member with a desire to weaken the Endangered Species Act will sidestep the reauthorization debate and will instead come forward with his or her amendment.

Reauthorization is the only way to provide a comprehensive assessment and updating of the Endangered Species Act with a process that is fair to all sides.

Thank you again for the opportunity to testify. I would be happy to answer your questions.

Senator CRAPO. Thank you very much.

Let me start first with you, Mr. Murray. Could you tell me, just in your opinion, how important to the public is the economic analysis performed as a part of the critical habitat designation?

Mr. MURRAY. Economics gets small attention in the Endangered Species Act, although as the Supreme Court ruled in the Bennett case, there is sufficient recognition that there are economic interests involved to give them the ability to be within the zone of interest for purposes of filing litigation.

The critical habitat provision is one of the few sections that has an economic consideration in it. The recovery plan, for example, does not require consideration of economic impacts.

We think the way the Services have implemented it really guts what Congress intended for the critical habitat provision. I remember when the northern spotted owl critical habitat was proposed, being surprised that the economic analysis was so limited that it only looked at the incremental effect between listing a species and critical habitat designation. As Director Clark testified, designation provides little beyond the listing in terms of conservation benefit, which in turn would be little additional economic impact.

So we think it's an essential component and requires the committee's attention. We think if it is moved to the recovery planning process, it needs to be given a fuller scope than just that incremental analysis.

Senator CRAPO. Thank you. You have indicated in your written testimony, I believe, that critical habitat has no statutory effect on private land. Is that correct?

Mr. MURRAY. That's correct, Senator.

Senator CRAPO. The question I have is, the adverse modification of a species habitat is considered to be a take, which is prohibited by Section 9 of the Endangered Species Act. Wouldn't that have an impact on private land?

Mr. MURRAY. As Mr. DuMars testified, and he has been advising people in New Mexico that such an effect may well happen, it's not a certainty, Senator. We would like it not to be an effect.

The fact that a land use activity would adversely modify habitat suitable for listed wildlife, whether it's designated critical habitat or just habitat that's suitable for that species, does not make that activity unlawful. Instead, it provides one of the three elements of a take as defined by the Fish and Wildlife Service in their definition of harm. The text of the first sentence of that regulation says it has to be an activity which actually kills or injures wildlife.

In the Sweet Home case, the Supreme Court emphasized that take is an activity that kills or injures wildlife. The example of that which the regulation uses is an adverse habitat modification, which actually kills or injures wildlife through a significant modification of an essential behavioral pattern.

The problem is that when the courts get into that analysis, when the citizen suit is filed by the National Wildlife Federation or another environmental group, or if the Government itself brings an enforcement action, sometimes the distinctions between those three elements get blurred. No matter how much emphasis the Supreme Court may have put on the requirement for an actual death or injury in the Sweet Home decision, the fact that habitat has been

designated as critical can sometimes sway the court to give less emphasis to the other elements.

Senator CRAPO. I am shifting gears here a little bit, but I know that you also are suggested that Congress amend the Act by providing for the appointment of a balanced, multi-disciplinary recovery team. Could you expand a little bit on your thought there?

Mr. MURRAY. Yes, Senator. In the last Congress, S. 1180 recommended such a direction to the agency. The agency does not always do that now. A lot of times, they place specialists on the particular species on their recovery teams. Of course, there's a lot of species that are listed that have a small impact and perhaps don't need the full attention of a multi-disciplined team.

We believe that for any kind of a species that is going to have the kind of effects that Senator Domenici is concerned with or the kind of effects that our industry is faced with, there needs to be a variety of disciplines on the recovery team. The importance of the economic considerations that we think ought to be examined at some point in the process, we think adds to the need for land owners, stakeholders, people with other scientific knowledge, and economists, to take part in the recovery analysis.

If the recovery plan is to be the focus of the effort under the Endangered Species Act, it needs to have the full input from a variety of disciplines to make sure that all the impacts, both biologic, social and economic, are considered. We think that Congress ought to make sure that happens by requiring that there be some balance in the approach on the recovery team.

Senator CRAPO. Did you hear when Jamie Clark testified, she indicated that there was some concern on the part of the Fish and Wildlife that these time limits for the appointment of the recovery team would be too strict, or too restrictive. Do you have a thought about that?

Mr. MURRAY. I appreciated her concerns, but the species has been proposed for over a year prior to the deadline for appointment of the team under S. 1100. The species is proposed, then you take a year to get it finally listed. Then they have 60 days to appoint the recovery team.

I am certainly not saying that 60 days is a magic number, Senator, but I think that given the fact they have been looking at the species for at least a year and probably longer, since I am sure they were looking at it before they proposed it, they have had time to consider who would be effective on the recovery team, and who might be appointed.

Certainly finding the best people is a consideration, and the agency must have the necessary time to do that. Whether 60 days is unreasonable I can't say, but I certainly think the agency would have longer than 60 days since they've been looking at the species for quite some time.

Senator CRAPO. Would there be a negative impact to delays in appointing the recovery team, do you believe?

Mr. MURRAY. They have 18 months under the bill to draft a recovery plan. I think that there well could be some impact on that schedule, if you delay the appointment of the recovery team significantly beyond 60 days. But whether again, 60 days or 90 days, I can't say what is better.

We shouldn't lose sight of the fact they've had over a year to consider the species.

Senator CRAPO. Thank you.

Let me move to you for a moment, Mr. DuMars. In your testimony, you indicated something that I think is very relevant to the entire debate over how to manage the reauthorization of the Endangered Species Act. That is, you identified one of the problems that we face is the conflict that is generated as we approach the listing and then the designation of habitat. It seems to me that one of the objectives that we ought to seek as we move forward in either this type of narrow focused legislation, or in terms of broader Endangered Species Act reauthorization, is to find a way to build the collaborative process more effectively into the process of decisionmaking, and to reduce the level of conflict.

Now, you indicated that you felt there was, and I hadn't actually looked at this legislation in that context, but you had indicated you felt there might be a benefit in terms of developing collaboration and reducing conflict in S. 1100. Could you expand on that a little bit?

Mr. DUMARS. Surely. First, I do agree with you that that is the heart of the matter. To the degree we could engage in collaborative efforts before the species was even in the position of needing to be listed at the State level, we would all be better off. That's the approach that I took with the Western Governors Association when I was on the drafting committee. I continue to believe that's true.

But with this legislation, to the degree you could get the environmental groups and the users and the Fish and Wildlife all together, looking at problem solving rather than worrying about how the designation causes them injury, then we are in a different direction. The reason that would work is that there is a huge difference between affirmatively trying to solve the problem and deciding how and when these particular lines on this map are drawn. Because they are not just lines on a map, they define the contours of activity in the whole stream system.

It's a mind set, but it's really more than that. It's everybody realistically trying to work, understanding what in our case for example, this particular minnow needs, and then deciding what habitat is critical, what could sustain it in the short term, and finally, how do we get long term adjustments to water allocation which are inevitable.

Senator CRAPO. Do you believe that there is a particularly unique problem in the West relating to aquatic species that heightens this problem with regard to habitat designations? If so, elaborate on that for a moment.

Mr. DUMARS. There is a particular problem, Mr. Chairman. The problem is that our stream systems are so incredibly erratic. A few years back, when I was testifying on the Clean Water Act, they said, well, we need fishable and swimmable streams. I said, well, in New Mexico, we have three kinds: fishable, swimmable and driveable. In certain times of the year when the snow pack is gone, even with reservoirs, they're dry. Stream beds are incredibly porous.

So how the rates of flow that you put into that stream system, when you release them, have tremendous consequences for the in-

dividual. So if you draw these lines on the map and say, these lines mean there will be a continuous rate of flow through July, August and September, that may mean the loss of hundreds of thousands of acre feet through carriage loss into the stream bed.

It is really an incredibly sensitive and delicate and complicated hydrologic balance that might not exist if you're simply drawing lines around the forest or around the stream and the Chattahoochee River system, for example, that never goes dry.

Senator CRAPO. I am going to ask another question of you, which is related to the conflict and collaboration issue, but a little bit distant from this specific legislation. One of my concerns has also been, as we try to find a mechanism to increase collaboration and reduce conflict, one of my concerns is that the current procedural process for public input often becomes a battle ground, the creation of a battle ground rather than the creation of a collaboration.

We need to find a new procedure for allowing the various interested parties to sit down around a table rather than to participate in warfare from a table in front of a hearing officer.

Could you comment on that thought?

Mr. DUMARS. I agree with you. If people could be brought to the table, not to articulate what they want, but to determine what is the science—the hydrologic changes that happen in the river system—and what are the needs of the species. If everybody comes forward and addresses that question first, you will have a lot less argument than if people are brought before a hearing officer, offering only vituperative rhetoric or comments about each other—describing what they want, not what is. That's why the recovery plan might move us in that direction, by merging those two issues together.

Senator CRAPO. Thank you very much.

Mr. Kostyack, I'll move to you. One of the benefits of being the one who chairs the committee on a busy day like this when other Senators are called away to other hearings, this is the last day, hopefully, that we'll be in session before break when we can get to go out to our States. A lot of the committees are doing the same thing we are, trying to get business taken care of.

A number of the Senators have expressed their apologies for not being here. Some have asked me to ask questions for them. I won't get to all of those questions, but the chairman has asked me to ask a question for him, since he had to leave. I am going to do that right now.

Mr. Kostyack, one of his questions was, do you support the Administration's proposal that critical habitat be nonregulatory in nature?

Mr. KOSTYACK. Well, we just recently heard about that proposal. It's a new thing, we really haven't had an opportunity to study it. We do have potential concerns about it. As I alluded to in my testimony, there are only three enforceable safeguards that in fact protect habitat in the Endangered Species Act. So if you move the critical habitat designation into the recovery plan and make it non-regulatory, it raises at least a question, and I am not sure if I know the answer to it right now, as to whether this would affect the protection against adverse modification of critical habitat, and whether we would lose its enforceability. We think that is one of the

strengths of the Endangered Species Act, that it does provide bottom line safeguards.

On the other hand, it does make a lot of sense to our organization to merge critical habitat with the recovery planning process. We are very interested in making critical habitat work for species and land owners. Creating a collaborative process around recovery planning where the critical habitat issue is addressed is something we wholeheartedly support.

Senator CRAPO. I have some other questions I've been asked to ask, but I want to followup on that. You obviously just heard the question I asked Mr. DuMars about collaboration, and trying to find a way to sit around the table and work things out, rather than to combat from a table. Would you give your thoughts about that in a little more detail.

Mr. KOSTYACK. Yes, thank you, I've actually done quite a good deal of thinking about that. The National Wildlife Federation commissioned a report by the University of Michigan on that very subject in the context of habitat conservation planning. One of the key findings of this report is the fact that when you do habitat conservation plans, when you set up this dynamic where you have essentially a comment period, where information is basically laid out in the form of a proposal and the public comes back and gives their reaction at the end of some kind of process, it simply does not work.

You need to have a continual process as a decision is being developed where stakeholders can sit around the table in what we refer to as an iterative process, where there is a true exchange of information, of ideas, as opposed to laying out a proposal and letting the public vent.

So we very much support the gradual shift in that direction we're beginning to see. We think there are many more opportunities for developing that kind of concept. We'd be very interested in working with you on that.

Senator CRAPO. I'd be very interested in seeing a copy of that report, if you could provide one.

Mr. KOSTYACK. I'd be happy to do that.

Senator CRAPO. I appreciate that. I would love to work with you and any others who are interested in trying to find, as you indicate a radical shift in procedural approach to the decisionmaking process, so that we can achieve reduction of conflict and an increase in the collaboration, which I think is going to expand the common ground for solutions that work. So I am glad to hear you discuss that in that context.

Those bells, by the way, don't yet mean that there's a vote. We'll find out what this one means.

Mr. Kostyack, another question I've been asked to raise to you is, you mentioned that critical habitat plays a vital role in species protection. But Director Clark indicated that it adds very little in additional protection.

That was a 15 minute bell, so I have about 5 or 6 more minutes before I am going to have to resolve this.

Except in the rare instance where critical habitat is designated for areas unoccupied by the species, how do you explain this difference?

Mr. KOSTYACK. In my testimony, I did lay out five ways that the critical habitat creates added value. So I would rely upon that testimony.

But let me elaborate further. First of all, it should not be the rare instance where unoccupied habitat is addressed in critical habitat designations. Unoccupied habitat is essential to the recovery of many endangered species.

More importantly, the record we have seen so far on critical habitat is very much undeveloped. Less than 10 percent of endangered species have critical habitat designations, and most of those designations were created under duress, as a result of pressure from environmentalists. There has not been a commitment from the agency to working with critical habitat designations to make it work, to make it work for both species and land owners.

We need to move forward with a more proactive and creative approach so that critical habitat can realize its true potential. It's very difficult to sit here and say, critical habitat has no value, when there has been very little attempt to put it on the ground and make it work. So we are critical of the Fish and Wildlife Service for essentially taking this approach to critical habitat, we're only going to designate it if somebody sues us and even then, after we designate, there's no discussion of what to do next.

Senator CRAPO. Thank you.

I'd like to move on with you to another area. At the end of your testimony, you indicated that the focused approach of this legislation is objectionable because it really separates from the broader issue of complete reauthorization of the Endangered Species Act and the complete reform process. We are evaluating right now very carefully the proper approach to Endangered Species Act reform in the political environment that exists in the country, and how this committee should proceed in that context.

I take it from your testimony that you believe we should try to focus on developing a comprehensive reform package rather than specific targeted reforms, where solutions can be found where there is the common ground. Am I correct in that?

Mr. KOSTYACK. That's correct. As one noted ecologist said, everything is hitched to everything else.

Senator CRAPO. And I, too, would love to achieve that. And in fact we will. I don't believe the two are mutually exclusive, necessarily. But in one context or another, we will be seeking to find the way, the path forward for a comprehensive Endangered Species Act reform bill. So I want to be sure that you understand my question in that context.

The question is, however, if we are able to develop a collaborative process or to identify areas such as what we thought and still think we have here, where in a focused area we've identified a clear, needed reform where there's a lot of consensus on it, what would be the harm in moving forward in those areas and making the necessary corrections now while we are underway in the broader process of reform?

Mr. KOSTYACK. There are two main concerns. One is the fact that every specific section of Endangered Species Act essentially relies upon successful performance of the other sections of the Endan-

gered Species Act. So if you shunt all the other issues aside, you essentially could be undermining that very narrow reform effort.

The other concern is that even if a consensus were achieved among key players in the endangered species debate, there are always going to be outliers who believe, and indeed have individual grievances about the Endangered Species Act that they want to have resolved. If a bill is put forward that is not a comprehensive reauthorization, that does not attempt to address the full range of issues, then we expect to see amendments. It will be difficult to fend off those amendments. We are concerned that a lack of orderly process, that kind of attack from the side without any thoughtful hearing and debate, would be a major setback for the Endangered Species Act.

Senator CRAPO. I share with you your last concern there, very strongly. I know that Chairman Chafee also shares that concern. This could be noticed, that we are going to try to very rigorously oppose that type of development if we do have, on this bill as well as others, if we do have very targeted reforms that we are hopeful of moving forward, and we don't want them to get caught up in the process of trying to write a broader reform bill through the amendment process on the Floor. So I agree with that.

I know my staff is probably getting nervous about this vote. We'll call and tell them we're on our way in a few minutes here.

The information that I have is that we will probably have a series of stacked votes, which means that we could be delayed by up to an hour or more, and because of that, I think what I am going to do is ask a couple more questions and then terminate the hearing, but submit the rest of the questions that I have and that other Senators will want to submit to you in writing.

So at this point, I would ask if any of you have any objection to responding in writing to further questions. I think that's probably what will happen.

But I do have a few more minutes, so I want to go on a little bit further. Mr. Murray, you didn't get in on the question of collaboration and conflict resolution, but I would love to have your thoughts on that. Do you agree that we currently have a process which is too conflict-ridden and does not have enough collaboration? And if you agree with that, do you have any ideas about how we could solve it?

Mr. MURRAY. Senator, I think that conflict is a problem with endangered species in general, just the idea of drawing lines on maps in Texas created a huge furor over the golden cheeked warbler a few years ago. The fact that this law generates this kind of fear and controversy I think is extremely troubling, and certainly does not do anything for the conservation of species.

So in answer to your question, I think yes, we would definitely support the idea of increased collaboration. I think the recovery plan is the one place in the statute that cries out for that kind of collaboration. I am not sure. however, that all habitat conservation plans necessarily require the same type of collaboration.

But certainly the recovery planning process, which is far different than a single land owner proposing a management plan for their activities, is one. That's one of the reasons why we recommended the multi-disciplined recovery team, because that would

be a collaborative effort, by bringing in stakeholders and land owners and interest groups of various kinds in the development of that recovery plan.

Senator CRAPO. Thank you.

I've just been given a note on the time, and I have time for about one more question. I am going to give it to you, Mr. Kostyack.

I took your previous answer to mean that you would at least in principle be supportive of a very significant change in process. What I took from that was that you would be supportive, and I am not trying to commit you to something that's not in fine print yet, but supportive of moving away from a system in which we hold hearings and people, the public is allowed to come in and register their feelings about whatever the topic of the hearing is, to some type of a process in which we encourage that type of public input, but we either in addition or in replacement have a process by which people are brought in to discuss the facts, the science, the potential solutions and to seek to find the common ground in a more discussion-oriented type setting.

Is that correct?

Mr. KOSTYACK. That is essentially correct, yes. The only caveat I would provide, and I think you alluded to this, is that these stakeholder processes can be extremely time consuming and involve a lot of resources. So there will always be certain individuals who have a serious interest in the outcome of a process and a decision, who are going to want to have input at some point who will not necessarily be able to sit at the table during those lengthy meetings. So you have to keep that additional feature available.

Senator CRAPO. That's true. I don't think we could ever or should ever try to create a system in which the public in general, any person or group in the public, loses an opportunity to give input on the issue. But I think that we need to supplement, at least, the process.

I know 5 years ago, I'll give you just a little background on some of my personal experience with this, I tried to do something similar with regard to the wilderness issue in Idaho. I found just trying to identify all the necessary interested parties to invite to the room to have the collaborative discussion with was a very challenging undertaking. We had seven or eight different meetings on this in different places. We found out each time that no matter how hard we tried, we left somebody out. And they let us know.

So I understand very clearly the challenges in trying to make sure you have an inclusive but yet effective collaborative process. But I also found in those meetings that we made a tremendous amount of progress. We found a lot of common ground that would help us in making decisions.

So I am convinced that something like that will work, and I look forward to working on those types of issues.

Mr. KOSTYACK. Likewise, thank you.

Senator CRAPO. I apologize for the fact that we have not been able to spend as much time today in the questioning or your oral testimonies as we would have liked. But we do have your written testimony. There is a tremendous amount of interest in this issue by the members of the committee. Virtually every one who could not be here today had a very compelling reason not to be able to,

and expressed their personal regrets to me and have asked me to submit questions and so forth.

So I suspect you will get a list of questions that will be very helpful to us if you will respond to them.

With that, this hearing is officially closed. We will continue the deliberations following this. Thank you.

[Whereupon, at 12:01 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Additional statement submitted for the record follow:]

STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Thank you, Mr. Chairman, for holding a hearing on the designation of critical habitat under the Endangered Species Act.

Mr. Chairman, I am deeply concerned over the elimination of wildlife habitat in this country. Each year we lose 300,000 acres of wetlands and 95,000 acres of National Forest in this country. It's not surprising that species are in trouble.

We have 1183 species on our list of endangered and threatened species, and around 150 more that are officially considered to be candidates for that list. I am told we would find hundreds more of such species, if we had the resources to look for them. Worse yet, the stresses on these species only seem to be increasing, whether in the form of sprawl, drastic manipulation of our water resources, or change in the Earth's climate. Standing against this daunting tide is a tiny underfunded group of public servants forced to decide which species will receive protection under the law this year and which won't.

Mr. Chairman, I am pro-growth. But I believe, like all things, there's a right way to grow and a more harmful way. I believe we can grow our economy, provide more and better jobs for our people, and increase our standard of living while shrinking our footprint on this Earth. Our obligation as stewards of the Earth requires us to find that approach.

Protecting habitat, which we will discuss today, is an essential part of that approach. For that reason, it is troubling to me that we have designated critical habitat for less than 10 percent of our endangered and threatened species. Whether due to the allocation of too few resources, the concern that such designation will actually put species at risk, and even the desire to avoid controversy, the apparent shortfall is deeply troubling.

Mr. Chairman, I believe your bill, with some improvements, might move us forward on this important issue. However, I am concerned that it will be difficult to move the bill, especially through the House, without drawing in other controversial ESA issues. We might end up with a comprehensive ESA bill assembled bit-by-bit, which would be the wrong approach. Nevertheless, I look forward to what our expert witnesses have to say, and I look forward to working on this issue with you and the members of this committee.

Thank you.

STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM THE STATE OF NEW MEXICO

Thank you, Mr. Chairman, for allowing me the opportunity to testify on S. 1100 before the Subcommittee today. I am very pleased to have cosponsored, along with you, Senator Chafee's fine legislation. As you are well aware, a crisis in New Mexico has developed, based on a court decision, regarding critical habitat designation for a fish. This situation started me down the path to try to find a solution, and subsequent discussion with Senator Chafee opened up the possibility to fix an ongoing, inherent problem with the Endangered Species Act. I look forward to the chance S. 1100 provides to make moderate, narrow, and extremely logical reform to the Endangered Species Act that will help nationwide.

I would also encourage the Committee pay particular attention to the testimony of Mr. DuMars, a professor at the University of New Mexico's School of Law and widely regarded as a preeminent expert on water issues. I think he will point out the disconnect that currently exists in the Endangered Species Act, and the unnecessary adverse impact critical habitat designation has on water users in dry states like New Mexico.

I have spoken in recent weeks regarding my exchange with Interior Secretary Babbitt during the April Interior Appropriations subcommittee hearing, when we both agreed the Act was not working as it should. I was a Senator in 1973 and voted for the Endangered Species Act. However, I have been around long enough to see the problems with the Act's implementation since, and the courts' interpretation of it in a manner never contemplated by Congress. The goal of government has been to protect and recover endangered species in concert with human development, but it has failed in its mission.

The Secretary of Interior is required to base critical habitat designation on the best scientific data available, after taking into consideration the economic impact of that designation. I asked Secretary Babbitt whether the Interior Department had sufficient data to determine the true water needs to sustain the silvery minnow in the Rio Grande, and to make an accurate economic and social assessment of what a critical habitat designation would mean to existing water rights owners. Babbitt testified that his department does not have sufficient information, but that it has no choice but to act because of Federal court orders.

The focus of saving species should be on planning recovery, not using premature habitat designation to unnecessarily hurt people. Tying critical habitat designation to recovery plan implementation is logical, defensible, and the right thing to do. S. 1100 goes directly to the heart of this issue.

Current implementation of the Endangered Species Act imposes a negative: listing endangered species, designating critical habitat, and then simply stopping human activities without further solution. Less than 70 percent of listed species are covered by recovery plans. Establishing plans to save species is an affirmative choice that should be the goal of everyone.

The beauty of S. 1100 is that it solves a major problem in the Act. It ties critical habitat designation to recovery planning. And who can be against recovery of species? This modest and logical amendment to the Act will impose reasonable deadlines for the recovery process and take it out of the courts. Once the problem has been identified by way of listing an endangered species, the government must move to the where and how of solving the problem.

The U.S. Supreme Court has unanimously agreed that the best scientific and commercial data available must be used to designate a critical habitat. (Bennett v. Spear) Designation of critical habitat is more appropriate in the context of a final recovery plan for an endangered species, because that plan must specifically address conservation needs and costs of recovery. That is when you have the data, rather than front-ending the process.

In the case of the Middle Rio Grande silvery minnow, the science isn't there, there exists no implementable plan for recovery, but as Secretary Babbit put it, he is being "straight-jacketed" into prematurely designating habitat by a court order. I cannot emphasize enough to my Eastern colleagues, that water is the most precious resource in the West. Unlike big rivers such as the Potomac, many southwestern rivers and streams change from roaring torrents to bare trickles over the year. The Rio Grande, despite its "big river" title, is no exception to this cyclical flow. As a child, I often walked across the dry riverbed in Albuquerque. Historically, through weather variations and changing populations, the Rio Grande was dry 20 percent of the time in points.

The quantity of water needed by the Rio Grande silvery minnow is unknown, as is admitted the draft recovery plan. Water amounts needed under critical habitat designation must be tied to recovery planning. The Fish and Wildlife Service has also conceded that there has never been a thorough study of the economic consequences of providing water as a critical habitat for the minnow.

While we all want the silvery minnow and other endangered species to have their critical habitat, the Fish and Wildlife Service and the Bureau of Reclamation acknowledge that they do not know what the "critical habitat" is or should be. Gentlemen, this river NEVER flowed to the ocean; it dried up somewhere south of El Paso from time immemorial. And the fish lived. Pueblo Indians, Hispanic irrigators, and city dwellers have all shared with the silvery minnow the water they rely on, and they have all shared the wet and dry times.

It is abundantly clear that a complete environmental analysis of a critical habitat designation is an absolute necessity. Federal agencies should not have their hands tied by premature designation, forced by litigation. If we want to save species, as was and is the intent of the Endangered Species Act, then we have to plan how to recover them.

Recovery plans require objective and measurable criteria for saving species, specific descriptions of management actions, and cost estimates for those actions. This bill will create a mandatory deadline for developing final, comprehensive recovery plans. Critical habitat will now be designated in conjunction with those plans.

I am very proud to be a part of this historic legislation. However, some have asked "Pete, why are you doing this? It won't solve all the problems on the Rio Grande." I recognize that. But this is the right thing to do. It will help people AND endangered species. You cannot save a species by pitting people against fish.

A key aspect of this legislation is the recovery team, where interested parties who have to live with the consequences of an endangered species in their midst are integral to plan development. The role of the Federal Government is, of course, crucial too. I have noticed how many people involved in the situation on the Rio Grande point the finger of blame at others. Secretary Babbitt called the water users and environmentalists the most "intransigent" he had ever encountered. But I would note that the government can be intransigent, too.

The Rio Grande isn't the only river in New Mexico with endangered species impacts. I have a copy of a letter sent yesterday to the President, Secretary Babbitt and Director Clark by the Pecos River Commission. The Commission recently held a multi-state meeting to discuss an endangered fish on the Pecos river. The Fish and Wildlife Service effectively did not participate. To find solutions to these problems, the Federal Government needs to be an active partner.

The Department of Interior needs to consider impacts to human users before critical habitat is designated. Farmers should not face civil and criminal penalties for doing the same thing they have always done, before a way to save the fish is established. Right now, critical habitat for the silvery minnow must be designated by June 23, unless an Environmental Impact Statement is required. Considering the fact that the 10th circuit Court of Appeals has stated that designations requires full review of effects on humans, and that Interior has admitted via affidavit in court and testimony to Congress that they do not know the environmental or impact of critical habitat designation for the silvery minnow, an EIS is likely. However, obviously tying the recovery planning process to that of critical habitat designation is logical. Secretary Babbitt has admitted he needs more time to understand the impacts of critical habitat designation for this species, and I am sure this is true for other species as well.

LETTER SUBMITTED WITH SENATOR DOMENICI'S TESTIMONY

PECOS RIVER COMMISSION,
May 24, 1999,

THE HONORABLE WILLIAM JEFFERSON CLINTON,
President of the United States,
The White House,
Washington, DC 20505.

THE HONORABLE BRUCE BABBITT, *Secretary,*
Department of the Interior,
1849 C. Street, NW,
Washington, DC 20240.

THE HONORABLE JAMIE RAPPAPORT CLARK, *Director,*
Fish and Wildlife Service,
1849 C. Street NW,
Washington, DC 20240.

DEAR PRESIDENT CLINTON, SECRETARY BABBITT AND DIRECTOR CLARK: We are the three members of the Pecos River Commission. The Commission was formed in 1948 pursuant to the Pecos River Compact, an interstate compact ratified by Congress and the legislatures of New Mexico and Texas. The Compact apportions the waters of the Pecos River between the two States and provides a forum to address interstate water issues. The Pecos River Commission consists of a chamnan appointed by the President and one representative from each member State, appointed by their respective governors.

We request that you address an issue of grave concern to us and to our constituents regarding the Fish and Wildlife Service. This Commission placed issues on the agenda for its April 15, 1999 meeting in El Paso, Texas, which are very important to people in our region. We wanted the Bureau of Reclamation and the Fish and Wildlife Service to address these issues at our meeting—a gathering that knowledgeable representatives from these agencies have traditionally attended—and the Service effectively did not show up.

Goverrunent teams are conducting NEPA and Endangered Species Act studies in the Pecos Valley of New Mexico. The Bureau of Reclamation has also been in Section 7 consultation with the Service for several years following the listing of the

Pecos Bluntnose Shiner under the Endangered Species Act. (The Carlsbad Project in New Mexico, one of the West's oldest Federal reclamation projects, is operated under the auspices of the Bureau). The Service's Albuquerque Office is well aware that New Mexico has voiced serious concerns about the quality and adequacy of the scientific and technical worl: going into the decision-making process. The Service's Albuquerque Office is also well aware that New Mexico has registered complaints about delays in receiving responses to Freedom of Information Act requests that New Mexico has made on the Service.

Based on the data that New Mexico has received, New Mexico did make a presentation to the Pecos River Commission at its April 15 meeting. New Mexico has concluded that the changes in River operations are based on the Service's unsupported determination of Pecos Blunblose Shiner habitat refinements. To illustrate its concerns, the State of New Mexico cited problems connected with four goverrunent conclusions regarding Shiner habitat:

1. Conclusion that there has been a decline in Shiner population: no population estimates have ever been calculated for the Pecos Bluntnose Shiner. New Mexico informs the Pecos River Commission that there has been a decline in the abundance of Shiner in fish collections comparing pre-190 data to the present, but there was actually an increase in the abundance of the Shiner in collections taken between 1991 and 1997 in at least two sections of the Pecos River.

2. Conclusion that the range of the Shiner is reduced: the range of the Shiner has not changed since 1973.

3. Conclusion regarding loss of habitat: no estimate of the quantity of Shiner habitat throughout its range has ever been calculated, however there has been an actual increase in Me amount of habitat in the upper end of the Shiner's range between 1991 and 1997.

4. Conclusion regarding threats to the Shiner: no conclusive data were found to show that on-going dam and reservoir operations threaten the continued existence of the Shiner, although it is unclear exactly what the Service means by "on-going operations."

Further, New Mexico reported to the Pecos River Commission that there has not been a firm and consistent designation of critical habitat for the Pecos Bluntnose Shiner. Given that several years have passed since the listing of the species, the ruling of the Tenth Circuit Court of Appeals in Forest Guardians v. Babbitt. 164 F.3d 1261 (lOth Cir., 1998) seems to apply here and the Service should designate critical habitat for the Shiner. When the Fish and Wildlife Service designates critical habitat, it must consider the "economic impact. and any other relevant: impact of specifying any particular areas as critical habitat."

Had the Service sent any one of its staff members who have knowledge of Pecos issues to the Commission's April 15 meeting, we would have been able to engage them on the issues New Mexico has raised. Instead, the Fish and Wildlife Service sent an employee with no more than 5 weeks total tenure with the Service to our meeting. None of her experience involved the programs critical to the Pecos River Commission. The representative did offer to "take back" the Commission's questions to her supervisors, but she was totally unfamiliar with the Pecos River operations and with the Compact and could answer none of our inquiries.

Were this failure to send an informed representative a failure of the first instance, we may not have registered this complaint with you. However, we must also consider the difficulties and delays New Mexico experienced when, pursuant to the Freedom of Information Act, New Mexico requested the Fish and Wildlife Service to provide the scientific data used in Endangered Species Act and NEPA analyses of the Bluntnose Shiner. We are left to conclude that the Service's Albuquerque Office is reluctant to be forthcoming with, or to engage the Pecos River Commission on the issues in a public forum when facts exist in the record which do not support the policy positions ofthe Albuquerque Office.

The Commnission meets every spring around mid-April. The Bureau of Reclamation, the U.S Geological Survey, the Army Corps of Engineers, and (in the past) the Fish and Wildlife Service love traditionally sent: knowledgeable representatives to the Commission's annual meetings. These agency representatives regularly report on their activities over the previous year, on upcoming activities, and they answer questions from the Commission and the public. So regular is the Commission's meeting schedule that the location of the next year's meeting is oDen announced at the close of the culTent year's meeting. In fact, the Fish and Wildlife Albuquerque Field Supervisor was present at last yearts meeting held in Carlsbad, Steal Mexico when the location of this year's meeting in El Paso, Texas was announced. The agendas for the meeting are distributed to the Federal agencies (including the Service) well in advance. We can think of no reason that the Service would not Mow

that a meeting was coming up in April or that it should send adequately prepared representatives to it.

We hasten to add that we do commend the Bureau of Reclamation, the Geological Survey, and the Corps of Engineers for consistently sending experienced staff to our meetings and for responding in a timely manner to our inquiries. We especially thank the Bureau, because they knew that the Commission would have questions of them as well. Much to their credit, representatives of the Bureau of Reclamation, including, the Albuquerque area manager, attended our 1999 meeting in El Paso. They were prepared to field our questions and respond to our comments.

The Service's failure to make an effective appearance at this meeting is an insult and affront to the Pecos River Commission. More importantly, this failure by public servants to face up to public scrutiny on an issue of public policy is not acceptable. We are not in a position to attribute any motive to the Service's effective failure to show up, but that is immaterial: there is no excuse for not sending a knowledgeable representative to a meeting under the circumstances that eve have described to you.

The Pecos River Commission respectfully requests that you consider the matters we have raised and censure and instruct the appropriate Service officials to have knowledgeable personnel in attendance at our meetings. We thank you for your consideration of this matter.

Sincerely,

W. THRASHER, JR.,
Comissioner for Texas.

COLIN R. MCMILLAN,
Commissioner for New Mexico.

HECTOR VILLA III,
Chairman and Commissioner Representing the United States.

STATEMENT OF JAMIE RAPPAPORT CLARK, DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Mr. Chairman, I appreciate this opportunity to comment on S. 1100 and issues relating to critical habitat, an aspect of the Endangered Species Act which the U.S. Fish and Wildlife Service believes needs to be amended.

Mr. Chairman, I would like to thank you and Chairman Chafee, of the full Committee, and Senator Domenici for your leadership in introducing S. 1100, a bill which attempts to improve the effectiveness of the critical habitat designation process. The Service worked extensively with the full Committee in the last Congress on legislation to reauthorize the ESA (S. 1180). We were able to come to agreement on many complicated aspects of the legislation. Although the bill was never enacted, the process of its development demonstrated that we can work together effectively on complex and difficult issues. We hope to work similarly with this Committee to produce even more effective results.

The U.S. Fish and Wildlife Service (Service) is committed to improving the efficiency and effectiveness of the Endangered Species Act (ESA) in order to achieve its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend.

The Service believes the process under the ESA of designating critical habitat for listed species should be improved in order to more effectively achieve the goals of the ESA. We firmly believe that attention to, and protection of habitat is paramount to successful conservation actions and to the ultimate recovery and delisting of listed species. However, in 25 years of implementing the ESA, we have found that designation of "official" critical habitat provides little additional protection to most listed species, while it consumes significant amounts of scarce conservation resources. We believe that the critical habitat designation process needs to be recast as the determination of habitat necessary for the recovery of listed species. This "recovery habitat" should be described in recovery plans.

Because of our concerns about the critical habitat designation process, the Service has prepared a notice of our intent to clarify the role of habitat in endangered species conservation. In the notice we will solicit public comments on how the critical habitat provisions of the ESA should be administered. We intend to take a wide-ranging look at our current interpretation of critical habitat and at our methods for determining and designating it. We will request comments from interested parties on ways to improve the overall process. We look forward to engaging in a meaningful dialogue on this complex issue. It is our intent to publish a notice in the Federal Register next month to begin this process.

S. 1100 addresses some of the Service's criticisms of the current process. We believe that the protective purposes of the ESA would be better served if habitat necessary for the conservation of species were identified and protected primarily through the development and implementation of recovery plans. S. 1100 accomplishes this. However, the Service has concerns with certain aspects of S. 1100. We believe that critical habitat designation should not be accomplished through a redundant regulatory process and S. 1100 does not remove the redundant process. S. 1100 also places additional deadline requirements on the Service without including authorization for appropriations to help meet these deadlines. The bill does not provide a priority ranking system to act as a "safety valve" in the case that insufficient funds to meet the new responsibilities are appropriated.

I will comment more extensively on S. 1100 and will provide the Subcommittee with suggestions we believe will improve the bill. To begin, I will provide background on the existing critical habitat process to give an understanding of why the Service believes it needs to be amended.

Habitat Considerations in the Endangered Species Act

Habitat considerations are a key part of virtually every process called for in the ESA. For most species, threats to habitat are the primary consideration in determining whether a species qualifies for protection under the ESA. When species are listed as threatened or endangered, the habitats or ecosystems upon which they depend are recognized and protected. The first factor of every listing rule discusses "The Present or Threatened Destruction, Modification, or Curtailment of the Habitat or Range" of the species. Once listed, conservation and recovery actions are directed to the species as well as their habitats. In addition, habitat considerations are prominent in all recovery plans, and recovery plans include maps and descriptions of the habitat needed to recover the species. Finally, the analysis of habitat alteration and/or destruction is the cornerstone of the ESA's section 7 consultation process and the section 10 habitat conservation planning process. The preceding is true for all species regardless of whether or not critical habitat has been designated.

Effects of Critical Habitat Designation

There exists a wide range of perceptions on the meaning, purpose, and value of critical habitat. Contrary to popular understanding, critical habitat does not create a "park" or a "reserve" and has no regulatory effect at all on private land when no Federal involvement is present; it rarely affords additional protections to species listed under the ESA; and it does not require economic analyses of the impact of species listings.

As defined in the ESA, critical habitat is:

> (i) the specific areas within the geographical area currently occupied by a species, at the time it is listed in accordance with section 4 of the ESA, 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 a species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species.

Once designated, critical habitat has only one regulatory impact: under section 7(a)(2), Federal agencies must, in consultation with the Service, insure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat.

Thus, critical habitat is linked only to the section 7 process and is only enforceable when a Federal nexus, meaning some sort of Federal involvement, exists sufficient to trigger a section 7 consultation.

The Service believes that the protection conveyed by designation of critical habitat is duplicative of the prohibition against jeopardy for most species. Section 7 prohibits Federal agencies from taking actions that jeopardize the continued existence of a listed species or actions that adversely modify critical habitat. In our implementing regulation, jeopardy is defined as engaging 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 species. These effects are caused, almost without exception, by impacts to habitat. Destruction or adverse modification of critical habitat is defined as a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. For almost all Federal actions, the adverse modification of critical habitat and jeopardy to the species standards are the same, resulting in critical habitat designation being no more than regulatory process that duplicates the protection already provided by the jeopardy standard.

Because the complex biological needs of many species are not well documented at the time of listing, the importance of unoccupied habitat for population expansion, species introductions, or out plantings/seeding of rare plants becomes known during the recovery phase of the conservation process.

A major misconception of critical habitat designation is that it calls for examining the economic impacts of listing. This is not the case. The economic analysis that is required for a critical habitat designation examines the economic impacts of the designation only. For almost all species, there are no significant economic impacts associated with a designation of critical habitat because there are usually no additional restrictions on activities beyond those resulting from listing of the species.

Critical Habitat Litigation

Some parties view critical habitat as providing additional regulatory protection. One result of this view is that we are experiencing an increasing number of lawsuits designed to compel critical habitat designations. These lawsuits necessitate the diversion of scarce Federal resources from imperiled, but unlisted species which do not yet benefit from the protections of the ESA.

All of the critical habitat lawsuits with which we are burdened concern species that are already listed and are receiving the full protection of the ESA. There are currently 15 active lawsuits involving critical habitat designations. In addition, there are currently six critical habitat lawsuits that have been resolved by a court order requiring the Service to reconsider earlier critical habitat decisions or to designate critical habitat. Lastly, we currently have 12 Notices of Intent to sue for alleged violations regarding critical habitat; some of the Notices of Intent cover more than 30 species.

The litigation burden placed on the Service is causing serious delays in our ability to protect the many highly endangered species which are not listed, and are therefore not afforded any of the ESA's protections. For example, in Hawaii, a single court order remanded 245 "not prudent" critical habitat determinations for Hawaiian plants. There are other species in Hawaii that are not yet listed and are facing severe conservation risks while precious resources are being depleted on critical habitat litigation support and the reexaminations of critical habitat prudency determinations for species already listed.

This situation is causing the delay of listing actions of all types, including final determinations, new proposed rules, resolution of candidate's conservation status, and even the processing of petitions from members of the public who have specific listing and delisting actions they want the Service to consider. Additionally, the administrative burdens associated with litigation on a regular basis are taking their toll on staff at all levels of the Service. Many listing program duties are not being completed because of the demand of staff attention to the preparation of responses to a steady stream of complaints, the compilation and certification of species' administrative records, and the necessity for declarations and affidavits.

Critical Habitat Designation Process

I would like to describe for the Subcommittee the steps involved in designating critical habitat under current law. The Service believes that this process needs to be recast, and included in recovery plans, as the determination of habitat necessary for the recovery of listed species (or more succinctly stated, "recovery habitat").

Designation of critical habitat is a complex, science-based task. First, information on population locations, ecological needs, and habitat use of the species must be compiled and analyzed to determine what areas meet the definition of critical habitat as specified in the ESA. These areas must be delineated on a map. Land ownership must be researched and identified. We must then complete an analysis of the economic impacts of critical habitat designation, and determine if such impacts indicate that the benefits of exclusion of a particular area outweigh the benefits of its inclusion. The economic analysis is usually contracted to a third party which prepares a draft report for review. The draft is usually made available for public comment, and once all comments are analyzed, a final economic analysis is completed, printed, and distributed. A proposed critical habitat designation is published as a proposed rule in the Federal Register, and a comment period is opened. During this time, public hearings and/or public meetings are held. Written and oral testimony may be entered into the record at these meetings. Lastly, the Service compiles all comments (both written and oral) and data received during the comment period and analyzes them for use in the final decision making process.

The Service believes that conducting this analysis in an open, collaborative environment, at the appropriate time (the recovery planning phase) is a more efficient way to conserve and recover species.

Comments on S. 1100

I would like to make some comments on S. 1100, however, given that the bill was just recently introduced, it is possible that further analysis will yield additional comments. I ask that the Subcommittee accept any additional comments we may provide in writing for inclusion in the record.

Section 1 of S. 1100 requires a recovery team to be appointed by the Secretary within 60 days of the publication of a final listing regulation. This is not a realistic deadline. Listing regulations are not effective until 30 days after publication in the Federal Register. This is required by the Administrative Procedures Act, and is only excepted when an emergency listing is necessary or in the rare case that necessitates immediate effectiveness of the listing for biological timing purposes (e.g., imminent nesting or spawning).

The Service suggests that at least 120 days be allowed for the formulation of recovery teams. Recovery teams are comprised of species experts and interested parties who often have very busy and conflicting schedules. Identifying, contacting, and formally appointing appropriate people willing to participate in the recovery planning process can be logistically difficult. A greater allowance of time will result in more stable and effective recovery teams.

S. 1100 moves the designation of critical habitat from the listing phase to the recovery phase of the ESA. The Service believes this shift is highly appropriate. Because listing focuses on threats to a species, there are many instances where the biological elements necessary for the conservation and eventual recovery of the species are not known until later in the conservation process, namely during the recovery phase. Also, the recovery phase is the appropriate time for analyzing the economic effects of designation of critical habitat because recovery planning inherently involves consideration of economic feasibility.

Once a species is listed, a recovery team comprising scientific experts on the species is identified and convened. The team identifies conservation measures that will facilitate the recovery of the species. The more that is known about a species' needs, the easier it is to address those needs through on-the-ground conservation and recovery measures. If areas of unoccupied habitat are required for a particular species to recover, that information will become available through the recovery team and the recovery implementation process and critical habitat can be specified accordingly.

Section 2(a) of S. 1100 requires publication in the Federal Register of a proposed regulation designating critical habitat concurrent with the publication of a draft recovery plan. The Service strongly suggests adopting a much more collaborative approach that fully integrates the identification of recovery habitat into the recovery planning process. This will allow recovery teams to identify and determine habitat essential to listed species' conservation during the recovery planning process. This is more effective than requiring recovery plan development and the redundant designation of critical habitat by separate regulation. Recovery plans would still be subject to public review and statutory deadlines for the publication of draft and final plans. This cooperative process will give the experts and stakeholders comprising recovery teams flexibility and adequate time to determine the habitat necessary for recovery. These parties, working together, are best suited to describing species' habitat needs and determining and implementing the recovery actions necessary for the conservation of listed species and eventual delisting. The product of this collaborative process would be published in draft and final recovery plans, which could then be appropriately revised as new information becomes available.

The Service is concerned that passage of S. 1100 as now written will result in litigation which could delay or halt the implementation of actions necessary for the eventual recovery and delisting of species. The well-intentioned parties that now sue the Service over perceived critical habitat requirements currently linked to listing regulations, may refocus their efforts on litigation involving critical habitat regulations linked to the recovery planning process. Instead of crippling the listing process and delaying the ESA's protection, such litigation would affect the recovery planning process, and on-the-ground recovery actions could be delayed for species only a few short steps away from downlisting and eventual delisting.

In advocating the revision of the critical habitat designation to a more collaborative, science-based recovery habitat determination, the Services' intent is not to circumvent our legal responsibilities to protect listed species and their habitat. Rather, our intent is to better uphold our responsibility to protect and restore declining species in the most efficient and effective manner possible. The protection, conservation, and recovery of endangered and threatened species is what matters most in the entire ESA process. We believe that this new process will better serve this goal.

The recovery planning requirements included in S. 1100 will impose additional workload burdens on the Service. S. 1100 requires completion of a draft recovery plan within 18 months and a final recovery plan within 3 years of a listing regulation. To accomplish these tasks, many additional Service biologists will need to participate as recovery team members or facilitators. Without additional appropriations, other recovery duties could be delayed. The Service recommends S. 1100 include sufficient authorization for appropriations above current ESA authorization levels to offset these burdens, and our success in carrying out these additional responsibilities will depend upon the will of Congress to appropriate the necessary funds.

The Service further recommends including language to establish a priority ranking system, similar to language in S. 1180 (105th Congress), for certain requirements in the bill. Such a system would allow the Service to address situations on a prioritized basis in the case that sufficient funds are not appropriated to carry out the requirements of the bill on time. Without such a "safety valve," and without the needed appropriations, the Service would likely be subject to even more litigation. Taxpayers will pick up the tab for the lawsuits which will be filed as a result of missed deadlines, and protection for listed and imperiled species will be diminished.

I want to conclude by emphasizing that the Service continues to believe that identification, protection, restoration, and conservation of habitat are paramount to the successful recovery of endangered and threatened species. The scientific determination of habitat necessary for species recovery should be undertaken during the recovery planning process and not as part of a duplicative regulatory process. I again commend the Subcommittee's efforts to address the complex, controversial, and poorly understood issue of critical habitat. We look forward to working with the Committee on critical habitat issues.

Mr. Chairman, this concludes my prepared testimony. I would be pleased to respond to any questions you and other members of the Subcommittee might have.

RESPONSES OF JAMIE CLARK TO ADDITIONAL QUESTIONS FROM SENATOR BAUCUS

Question 1. What is the Administration's view of the citizen suit provision of S. 1100 (page 8, line 19—page 9, line 8)?

Response. If appropriate amendments are added to S. 1100 to conform the determination of critical habitat to the recovery planning process, then we would support the extension of citizen suit jurisdiction in Section 11(g) of the Endangered Species Act to recovery planning deadline cases and to merit claims brought under proposed Section 4A. We oppose any amendments to Section 11(g) that would confine or restrict the ability of interested persons to challenge violations of the procedures or substantive requirements of the Endangered Species Act.

Question 2. In your testimony, you recommend that S. 1100 include sufficient authorization for appropriations above current ESA authorization levels to offset the workload burdens imposed on the Service by the changes that S. 1100 would make to the recovery planning process. What additional authorization would be sufficient?

Response. Assuming 5-year authorization, an additional authorization of $42 million per year will be needed in the Recovery Program to meet the new requirements in S. 1100. This recommended additional authorization addresses the increased funding needs necessary to ensure that we can develop recovery plans within 5 years for all species currently listed but without recovery plans, and can complete recovery planning within 30 months for all species listed from the date of enactment.

Question 3. The 1995 National Research Council report, "Science and the Endangered Species Act" recommends that the designation of critical habitat be deferred from the time a species is listed to the time that a recovery plan is issued. In addition, the report recommends that "survival habitat" be designated at the time a species is listed. What is your response to the latter recommendation?

Response. As I stated in my testimony before the Subcommittee, habitat considerations are a key part of every process called for in the ESA. Threats to habitats are identified in every regulation to list a species and the section 7 consultation requirements, which protect a species' habitat, begin immediately upon listing. An interim designation of survival habitat would not, in our view, add to those mechanisms to protect the habitat that are already in place. This designation of "survival habitat" at the time of listing would be burdened by the same lack of complete information that is common to critical habitat designations. In addition, its more limited scope would likely ensure near total overlap with the protections provided by the section 7 jeopardy standard.

RESPONSES OF JAMIE CLARK TO ADDITIONAL QUESTIONS FROM SENATOR KAY BAILEY HUTCHISON

Question 1. As you know, the Barton Springs Salamander was listed as endangered under the ESA on May 30, 1997, almost 2 years ago. When the Salamander was listed, the Service announced that compliance with state and local laws was sufficient to conserve the species. What is FWS position now?

Response. The Service has not changed its position since the final listing of the Barton Springs salamander (April 30, 1997 (62 FR 23377)). We still believe that protecting water quality through compliance with State and local laws is key to reducing the threats to the species and ensuring eventual recovery.

Question 2. As you are aware, since 1994, USFWS, the Texas Parks and Wildlife Department and a coalition of landowners have been working to develop a conservation agreement that would conserve nine species of cave invertebrates in Bexar County, Texas. I fully support this type of effort and believe this is the right way to protect species. If USFWS can encourage private efforts to ensure the conservation of species, then we will be able-to achieve more conservation with our limited resources and at the same time develop cooperative relationships with the private sector.

Can you tell me the status of this conservation agreement?

Response. In our February 4, 1999, letter to you, the Service discussed the conservation efforts for nine Bexar County invertebrates. After a 4-year concerted effort working on a conservation agreement for the nine invertebrates, we determined that the lack of commitment of funds to carry out on-the-ground conservation implementation weakened the conservation agreement's ability to reduce the threats to the species and preclude the need to list. Given the precedent set by the District Court in 1997 (Barton Springs salamander litigation), the Service determined that proposing the species for listing was the most prudent course of action. We continue to work with our partners in the conservation of the imperiled Bexar County invertebrates in order to ensure long-term conservation of the species. If the conservation agreement progresses to the point where funding is provided to carry out the necessary conservation measures and threats to the species are removed or reduced to the point where listing is no longer warranted, the Service would consider withdrawing the proposal to list the species. We will continue to work with the coalition (landowners and the State of Texas) in all efforts to conserve the Bexar County invertebrates. We met with the coalition on January 21, 1999, to discuss the conservation agreement and the necessary steps that will need to take place to provide for the long-term conservation of the species. The statutory deadline to complete a final determination for the nine Bexar County invertebrates proposed as endangered is December 30, 1999.

Question 3. What priority does FWS place on critical habitat designations versus other listing/delisting activities? What is the current litigation burden with respect to critical habitat designations?

Response. The current Listing Priority Guidance for fiscal year 1998–1999 (May 8, 1998 (63 FR 25502)) prioritizes listing actions to be undertaken by the Service. The current guidance is a three-tiered system. Emergency listing actions are the highest priority (Tier 1); final determinations, new proposals (or candidate removals), petition findings, and reclassifications/delistings (moved to a recovery function with the fiscal year 1999 appropriation) are the next priority (Tier 2); and critical habitat actions are the lowest priority (Tier 3). The Service considers obtaining the ESA's protections for imperiled species to be the most important actions to be completed with our limited resources. Critical habitat is the lowest listing program activity because the species considered for critical habitat designation already receive section 7 (consultation requirement) and section 9 (take provision) protective measures.

As stated in my written testimony, as of April 30, 1999, the Service has received 12 Notices of Intent to Sue (some covering more than 30 species) and is involved in over 15 active lawsuits regarding critical habitat designations. Additionally, we are working to comply with six court orders, all involving critical habitat actions.

RESPONSES OF JAMIE CLARK TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

Question 1(a). The FWS testimony on S. 1100 states that the designation of "official" critical habitat under the ESA"provides little additional protection to most listed species."

Is this the case solely because ESA implementing regulations define the standard which governs the jeopardy determination and adverse modification of critical habitat determination as essentially the same?

Response. The similarity in definition and ultimate effect of the "jeopardy" and "destruction and adverse modification" standards do contribute substantially to our conclusion that designation of critical habitat generally provides little additional protection to most listed species. However, in addition, we have found that critical habitat designation can also put species at greater risk of vandalism, collection, or harmful harassment, and the public controversy often associated with critical habitat designation works to the detriment of listed species by making recovery efforts more difficult and contentious.

Question 1(b). In the rulemaking defining those standards, what was the FWS' legal justification, if any for defining these two distinct statutory commands in 16 U.S.C. § 1536(a)(2) as having essentially an identical meaning?

Response. The substance of these two regulatory definitions has remained unchanged since consultation regulations were first promulgated in final form in January 1978. Both terms were defined in teens that focused upon survival and recovery of the species, and with sufficient flexibility to encompass the multitude of circumstances associated with every possible consultation situation. The Service and the National Marine Fisheries Service specifically concluded at the time of final rulemaking that the definitions "contain adequate criteria and guidelines to be utilized by the FWS and NMFS and provide a rational basis for the two Services to implement section 7" (43 FR 873, January 4, 1978).

Question 2. In the 1995 report "Science and the Endangered Species Act," the National Research Council (NRC) articulated the advantages of early designation of critical habitat in this way:

> "The advantages of early designation include the provision of some 'early warning' to all parties, and in particular, the affected Federal agencies, that such areas are to be treated with particular caution. Designated habitat is protected by a more objective standard ("no adverse modification") than that provided for threats to species ("no likelihood of jeopardy") in that adverse habitat modifications are more amenable to objective measurement and quantification than are the many factors that might contribute to jeopardizing the survival of species. The standard of habitat protection provides an important point of focus for those outside of government, including the scientific community, to help protect areas at least until recovery plans are developed that will clarify the needs of endangered species and provide more fully for their recovery." NRC Report at 76.

Does the FWS agree with the NRC recitation of the benefits that would attend the early designation of critical habitat? If not, why not?

Response. The Service already notifies landowners and land managers when a species is proposed to be listed. We undertake an extensive outreach effort to inform the public, State agencies, County and local governments, other Federal agencies, Members of Congress, and other interested parties when a species is listed. Additionally, the section 7 consultation requirement begins upon listing. Our Ecological Services Field Offices and our seven Regional Offices work with Federal agencies and the landowners involved to ensure that actions involving a Federal nexus do not harm the species or its habitat. We believe that, in most cases, critical habitat designation provides little additional "early warning" beyond that already exercised.

We also believe that both the "jeopardy" and "adverse modification" standards are equally amenable to objective measurement. One cannot assess the significance of habitat modifications in isolation of the ecology of the species. Application of both standards must necessarily consider the many factors affecting the survival of the species.

Question 3. While the NRC finds benefit in designating critical habitat at the time of recovery planning, it also recommends the designation of so-called "survival habitat" (defined as "habitat necessary to support either current populations of a species or populations that are necessary to ensure short-term (25–50 years) survival, whichever is larger") at the time of listing:

> "Because critical habitat plays such an important biological role in endangered species survival, we believe that some core amount of essential habitat should be designated at the time of listing and should be identified without reference to economic impact." NRC at 77.

Does the FWS agree with the NRC that the designation of such survival habitat at the time of listing would be beneficial to listed species?

Response. We certainly agree that habitat protection is important to the conservation of threatened or endangered species. In some cases, critical habitat designation

can provide some benefits to the species, although in most cases the habitat protection benefits of critical habitat designation are duplicative of that provided through the Section 7 protections provided by listing alone. With regard to the advisability of designating survival habitat, one must also look at the detriments, such as increased risk of vandalism, collection, or purposeful take, and loss of landowner support for conservation efforts. It is in that larger picture of conservation benefits that the Service has generally found critical habitat designation not prudent. The same would apply, as a general rule, to survival habitat.

Question 4. In the designation of critical habitat for the northern spotted owl, what benefits did the FWS rely upon in the rulemaking for that designation?

Response. The concluding remarks of the northern spotted owl critical habitat designation states that "critical habitat may contribute to regional biodiversity by protecting natural ecosystems of sufficient size and quality to support native species, as well as protecting listed, proposed, and candidate species. Critical habitat may also help in retaining ecosystem values through a combination of preservation, conservation, and compatible management of forest habitat with an emphasis given to older forest values and characteristics. However, these are dynamic and complex issues that include both spatial and temporal components that are not addressed by the designation of critical habitat alone."

Question 5. While the FWS rarely performs critical habitat designations, the National Marine Fisheries Service (NMFS) frequently does designate critical habitat.

Question 5(a). What accounts for the different track records of the two agencies in this regard?

Response. We continue to maintain that there is little added protection afforded to species by the designation of critical habitat. Our experience in designating critical habitat has also shown that it is very expensive and resource intensive when weighed against the benefits derived. We cannot speak to the specific circumstances of NMFS' critical habitat designations, or to NMFS' views or record on designating critical habitat.

Question 5(b). If the difference relates to the larger number of species under FWS jurisdiction relative to NMFS, how do the congressional appropriations for critical habitat designations for the two agencies compare?

Response. In fiscal year 1999, the Service was appropriated $5,756,000 for listing. Although no specific figure was specified to be applied to critical habitat designations, the Service allocated $979,000 of this amount to the Regions for work related to critical habitat designations.

It is our understanding that NMFS' Endangered Species program appropriations are organized by species or species groups and that appropriations for critical habitat designations cannot be separately identified.

Question 6. How many legal challenges to ESA recovery plans have been brought against the Interior Department? What were the basic allegations in those challenges, and how were the challenges resolved?

Response. Our litigation data base includes 6 lawsuits challenging recovery plans. We also have received 5 notices of intent to sue regarding recovery plans. Three of the lawsuits have been resolved either by agreement or court order and three remain active.

Question 7. Has lack of information ever been cited by the FWS as a reason for not designating critical habitat? If so, have the courts supported this rationale in claims challenging FWS' determinations not to designate?

Response. The ESA allows for a critical habitat determination of "not determinable." When a not determinable finding is made, an additional year is granted to obtain the information necessary for the determination. Critical habitat is not determinable when one or both of the following situations exist: (I) information sufficient to perform required analyses of the impacts of the designation is lacking, or (ii) the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat (50 CFR §424.12(a)(2)). While lack of information may be a basis for extending the deadline for making a critical habitat determination, the Service has not used lack of information as a reason for not designating critical habitat.

RESPONSES OF JAMIE CLARK TO ADDITIONAL QUESTIONS FROM SENATOR CRAPO

Question 1. The ESA allows designation of habitat that the Secretary deems to be critical. Do you believe that the ESA provides legal authority for the Secretary to designate areas that a species does not use, at the time of designation, as habi-

tat? For example, can land that might, some day, be useful to a species be designated as critical now?

Response. Yes, the ESA does provide the Secretary the authority to designate suitable but unoccupied habitat as critical habitat. In fact, the definition of critical habitat from section 3 of the ESA defines critical habitat as—(i) the specific areas within the geographical area currently occupied by a species, at the time it is listed in accordance with section 4 of the 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 a species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species. Those areas outside the geographical area occupied by a species may be important for the species' conservation at a later date, however, they could be designated as critical habitat while the areas are still not occupied by the species.

Question 2. At the time of listing of a threatened or endangered species, are you able, as a matter of biological certainty, to predict how much, or how little, habitat is necessary for the species? Are you better able to predict, when you enter into a recovery plan, how much or how little habitat is necessary for the conservation of threatened or endangered species?

Response. It is very difficult to predict how much or how little habitat is necessary for a species to recover. Those types of analyses are more properly conducted during the recovery planning phase than at the time of listing. Generally, more biological information about a species, including its habitat requirements, becomes known during the recovery planning phase. Because of the collaborative nature of the recovery planning process, information is not only obtained, but disseminated and analyzed, and disseminated again. Additionally, it is often easier for researchers to obtain funding to conduct research on the species after it has been listed, therefore, more information is usually published or available during the recovery planning phase.

Question 3. S. 1100 refers to the appointment of a recovery team. How inclusive should the recovery team be—do you believe that a recovery team should include those who may suffer economically as a result of ESA regulation?

Response. We believe a recovery team should include individuals who have knowledge of the species or expertise in elements of the recovery plan or its implementation, and who can also represent constituencies with an interest in the economic or social impacts of recovery.

Question 4. Current law and S. 1100 allow areas to be excluded from critical habitat, if the benefit of exclusion exceeds the benefit of inclusion. In my view, this language allows, and perhaps requires, a cost-benefit analysis. For example, the Service could exclude an area that is marginal to the conservation of a species, if the Service found that inclusion of that area would result in, say, severe economic impacts? What is your interpretation of this language?

Response. Under current critical habitat designation regulations, exclusions are possible due to severe economic consequences. S. 1100 retains that provision.

Question 5. One of the only places where economic effects have to be considered is at the critical habitat designation phase. Some Members are concerned that the effect of this legislation will be to delay implementation of the economic effects analysis required by current law. How effective is the economic effects analysis under current law? How would you answer these concerns?

Response. The examination of economic effects of critical habitat designation is required under the current regulations. An economic analysis must be prepared for all areas designated as critical habitat. We believe that economic effects have been properly considered in previous critical habitat designations and the exclusionary provisions have been utilized when appropriate. The preparation of an economic analysis during recovery planning would work to enhance the quality of the information available for analysis.

Question 6. What is the cost of a critical habitat designation for both the scientific and economic evaluation? What is the regulatory process cost of designating critical habitat?

Response. We can only estimate the overall costs of a critical habitat designation. Each species for which critical habitat is designated may be different because of the species' range, biological needs, nesting/breeding requirements, etc. For example, we estimate that the critical habitat designation for the Mexican spotted owl cost over $500,000. Costs associated with economic analyses range from $41,000 to $270,000. As far as the costs of the regulatory process of designating critical, staff time is the major expense. Staff time cannot be estimated for most actions. Finally, the Federal

Register publication page costs ($300-$375 per printed page) add to the overall cost of designation of critical habitat.

STATEMENT OF WILLIAM R. MURRAY, NATURAL RESOURCES COUNSEL, ON BEHALF OF THE AMERICAN FOREST & PAPER ASSOCIATION

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify today on S. 1100 and the issues surrounding the designation of critical habitat under the Endangered Species Act (ESA).

I am William Murray, Natural Resources Counsel of the American Forest & Paper Association (AF&PA). AF&PA is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. We represent approximately 130 member companies which grow, harvest and process wood and wood fiber; manufacture pulp, paper and paperboard products from both virgin and recovered fiber; and produce solid wood products. The association is also the umbrella for more than 60 affiliate member associations that reach out to more than 10,000 companies. AF&PA represents an industry which accounts for more than 8 percent of total U.S. manufacturing output. It directly employs about 1.4 million people and ranks among the top 10 manufacturing employers in 46 states. AF&PA member companies, as a condition of membership, must also commit to conduct their business in accordance with the principles and objectives of the Sustainable Forestry Initiative (SFI) program.

The SFI program is a comprehensive system of principles, objectives and performance measures that integrates the perpetual growing and harvesting of trees with the protection of wildlife, plants, soil and water quality. It is based on the premise that responsible environmental practices and sound business practices can be integrated to the benefit of landowners, shareholders, customers and the people they serve. Professional foresters, conservationists and scientists developed the SFI program. These men and women were inspired by the concept of sustainability that evolved from the 1987 report of the World Commission on Environment and Development and was subsequently adopted by the 1992 Earth Summit in Rio de Janeiro. The SFI program participants support sustainable forestry practices on the lands they manage and actively promote such practices on other forestlands. This commitment to sustainable forestry stems from the participants' convictions that forest landowners have a critical stewardship responsibility to current and future generations of Americans.

Congress enacted the ESA to protect endangered and threatened species, a goal which we support. We believe the principles behind the ESA represent those qualities which make our society the finest in the world. However, support of that goal does not mean that the resulting law is perfect and immune from review. The ESA has been updated periodically since its enactment in 1973, most recently in 1988. Under Congress' own schedule, the law was due for review and updating in 1992. That date has long since past and the need for action grows each year.

S. 1100 focuses on moving the designation of critical habitat from the listing process to the recovery planning process. As outlined below, improving the recovery planning process is one the six key areas in the ESA which AF&PA has identified as needing attention. Moving critical habitat into the recovery planning process is an important step, but we have some suggestions which we believe will ensure that this change has the desired effect.

I.

The ESA, often called the "pit bull" of environmental laws, grants sweeping powers and authority to Federal agencies for endangered species protection. It is weighted heavily in favor of species protection at the expense of all other considerations. AF&PA's goal is to make the ESA work for species and people. AF&PA believes that any amendment of the ESA must be based on the valuable lessons gained from 26 years of experience with the Act. Congress should update the Endangered Species Act in six key areas:

- ensure that the best science is used, including peer review and quality control processes;
- consultation on Federal actions must be prompt and accurate and, when conducted over a Federal permit required for a private activity, must have a limited scope;
- private landowners must be given reasonable compliance and relief procedures that do not impose an unfair burden for protection of a public resource;

- the recovery plan must be the focus of all management and regulatory efforts on behalf of a species, including consideration of social and economic impacts, relative risks, costs and alternative recovery strategies;
- prohibited activities must be defined in a way that avoids speculative enforcement;
- private landowners must be provided incentives to work cooperatively with the government to protect listed species.

II.

Critical habitat, as currently provided in the ESA and implemented by the U.S. Fish and Wildlife service ("FWS") and the National Marine Fisheries Service ("NMFS")(together, the "Services"), suffers from several problems. FWS believes that critical habitat "is not an efficient or effective means of securing the conservation of a species," particularly as compared to the controversy it causes and to the "monetary,. administrative, and other resources it absorbs." Final Determination of Critical Habitat for the Southwestern Willow Flycatcher, 62 Fed. Reg. 39129, 39131 (July 22, 1997). The agency does not even include critical habitat designations on its "Box Score" on the back cover of its Endangered Species Bulletin and on its web site. In its annual Listing Priority Guidance, FWS has ranked critical habitat designation as the lowest priority. Indeed, the Services have designated critical habitat for less than 20 percent of listed species, despite decisions from the U.S. Courts of Appeal for the 9th and 10th Circuits curtailing their ability to find designation is not prudent. Natural Resources Defense Council v. U.S. Department of the Interior, 113 F.3d 1121 (9th Cir. 1997); Forest Guardians v. Babbitt, 164 F.3d 1261 (10th Cir. 1999).

The ESA directs the Secretary to take into account the economic impact before designating critical habitat and to exclude land if the benefits of exclusion outweigh the benfits of designation, provided extinction will not result. However, in their economic analyses, the Services only consider the "incremental" impacts over and above those caused by the actual listing. Since listing must be based solely on biologic factors, the government rarely, if ever, considers the full economic effects of actions under the ESA. Perhaps as a result, there has not been extensive use of the authority to exclude land. Indeed, the Service's joint regulations only provide for preparation of the economic analysis after issuance of the proposed designation. 50 C.F.R. 424.19. This would preclude public review and comment on the analysis, except the Services now ignore their rule and provide an opportunity for comment on the analysis when they propose the designation.

The only statutory role for designated critical habitat is provided by ESA section 7(a)(2). This paragraph requires Federal agencies, in consultation with the Secretary, to ensure that their activities are not likely to jeopardize the continued existence of a listed species "or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, as critical." The Services have defined "destruction or adverse modification" and "jeopardize" in substantially the same terms, thus combining the consultation criteria into one. 50 C.F.R. 402.02. As noted above, FWS believes that critical habitat adds little to the conservation of the species beyond that achieved when the species was listed. NMFS, on the other hand, finds some benefit in providing Federal agencies an early alert in their planning processes. Designated Critical Habitat: Central California Coast and Southern Oregon/Northern California Coasts Coho Salmon, 64 Fed, Reg. 24049, 24050 (May 5, 1999).

Since the consultation on jeopardy and critical habitat occurs at the same time, the existence of critical habitat does not normally cause any additional delay. However, if the species is listed first and critical habitat designated at a later time, problems can arise. For example, there were instances in the Pacific Northwest where proposed Federal actions underwent consultation on the listing of the northern spotted owl, a second consultation after the designation of critical habitat for the owl, a third consultation after the listing of the marbled murrelet, and a fourth consultation after designation of critical habitat for the murrelet. Admittedly, serial consultation to this extent rarely happens anymore because the timber sale program in the Northwest has come to a virtual halt.

The Services acknowledge that designation of critical habitat has no statutory effect on private land, unless the landowner seeks an action from a Federal agency, such as a permit or funding. (As the Services insinuate themselves into the permitting programs delegated to the States, such as the National Pollution Discharge Elimination System under the Clean Water Act, the number of permits for activities on private land resulting in some form of consultation may well increase.) Nonetheless, 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. Indeed, NMFS recently touted the lines as a benefit of designation because it helps "focus Federal. tribal, state and private conservation and management efforts in such areas." Id. While this statement carries no threat of regulatory action, it exemplifies "targeting" the land which in turn generates the controversy. (In a new approach to critical habitat, NMFS only drew lines in the regulation for the water portion of coho salmon critical habitat. For the dry land portion, the agency merely designated the "adjcent riparian zone." In the premable to the rulemaking, NMFS described these zones as any area adjacent to designated riverine critical habitat which contains certain functional qualities, leaving landowners guessing as to the location and extent of qualifying zones.)

Given the overall disarray of the critical habitat concept and the lack of support from the expert agencies, we recommend that it be merged entirely into the recovery plan. Many would say that the Services have effectively accomplished this in any event. However, it continues to drain resources from the Services as litigation mounts. Retaining critical habitat as a separate rulemaking process makes no sense if the ultimate goal is recovery. S. 1100 makes only a tentative step in this direction.

First, S. 1100 only changes the timing of designation by moving it from the listing process to the recovery process. The Subcommittee should be aware that there are some who value the opportunity to submit economic information at the time a species is proposed. Since listing may only be based on biologic considerations, such comments will only be taken by the Services if critical habitat is also proposed. This opportunity could be preserved by retaining proposal of habitat and potential impact in the proposed rulemaking for listing, with comments to be considered during development of the recovery plan. (If a separate rulemaking for critical habitat is eliminated, a discussion and comment opportunity could still occur in the proposed listing rule.)

Second, S. 1100 does not sufficiently ensure that economic impacts are adequately addressed. Consideration of social and economic impacts is essential if conservation is to have any credibility to the public at large, and to the particular members of the public affected. If the bill does not require consideration of these impacts in the recovery planning process, then the Services will likely retain their current practice of analyzing only "incremental" economic impacts. It might also revive the balancing process if the Secretary were required to exclude areas from critical habitat when the benefits outweigh those of designation, unless extinction would result, rather than given the discretion to do so as in the current law.

Third, S. 1100 contains no requirement that the Secretary appoint a balanced, multi-disciplined Recovery Team. Yet the bill gives the Recovery Team the first crack at not only drawing lines on the map, but also at establishing management and protection measures. Even if the bill assured a balanced Recovery Team, requiring these recommendations only 9 months after the listing, and only 7 months after appointment of the Team, does not provide sugfficient time for data collection and analysis. If critical habitat is retained as a separate rulemaking, the Services should be provided the full 18 months to develop the necessary data, in consultation with the Recovery Team, without being influenced by public preliminary recommendations.

III.

AF&PA seeks balance and common sense in endangered species protection. Our members are united in their belief that the national interest is best served by policies that protect wildlife along with jobs and the economy. Objective 4 of the SFI program requires AF&PA members to: "Enhance the quality of wildlife habitat by developing and implementing measures that promote habitat diversity and the conservation of plant and animal populations found in forest communities."

With AF&PA members' emphasis on stewardship through the SFI program, we urge the Subcommittee to consider amendments to the ESA which would address stewardship issues as well. The Endangered Species Act regulates activities of private parties and states which do not require a Federal permit or funding by prohibiting any action which would "take" listed species. The law provides, in section 10, an incidental take permit process which requires the landowner to prepare a habitat conservation plan (HCP) focusing on mitigation of the take to be caused to the listed species by the applicant's activities.

Unfortunately, the HCP process generally is expensive, lengthy, and complex. Many land owners simply cannot afford to pursue it. For example, the government considers an HCP to be subject to consultation as a proposed Federal action under ESA section 7, a process which is redundant and which creates several difficulties

for the landowner, such as ongoing second-guessing by the agency and application of the irreversible commitment of resources prohibition. Also, the authority to require mitigation in the HCP and permit is relatively unqualified and has resulted in requirements which exceed by several degrees the effect of the activity which would be allowed under the permit.

Given the expense and commitment inherent in an HCP, landowners understandably are often willing to address more species than merely those listed. The government must recognize the benefit of addressing a number of species when the landowner chooses to do so. Current policies tend to create impediments to multi-species HCPs. Moreover, the Services have not applied HCP policies in a consistent manner, causing considerable delay and frustration among HCP applicants.

While Secretary of the Interior Bruce Babbitt has instituted various policies which improve the HCP process, legislative changes are necessary to guarantee those improvements. For example, Secretary Babbitt has issued a "No Surprises" regulation which provides landowners, particularly those who depend on continuing access to natural resources on their land, certainty when agreeing to conditions in an HCP, but it is now subject to a challenge in Federal court. We, therefore, also suggest the Committee consider amendments to the Endangered Species Act in the following areas:

- provide statutory authority for the "No Surprises" policy;
- authorize the Secretary to issue rules providing incidental take relief for categories of actions which would have little effect on listed species;
- recognize that since an HCP provides analyses equivalent to a biological opinion and since the agencies are consulting with themselves, consultation on an HCP is redundant and unnecessary;
- clarify that mitigation in an HCP be proportionate to the effect on the species of the take authorized by the HCP and permit;
- authorize recognition that the HCP will provide benefits for unlisted species and provide assurance that the permit will cover those species in the event they are later listed without additional mitigation and without the imposition of excessive assessment procedures on the applicant; and
- authority should be consolidated in the Secretary of the Interior, at least with respect to implementation of the ESA in non-ocean areas, regardless of the species involved to ensure consistent application of policies.

On behalf of the American Forest & Paper Association, I appreciate the opportunity to offer our views on H.R. 1100. I would be happy to answer any questions you may have.

RESPONSES OF WILLIAM R. MURRAY TO ADDITIONAL QUESTIONS FROM SENATOR CRAPO

Question 1. Do you agree with the assessment of the Fish and Wildlife Service that critical habitat is an inefficient of resources and provides little additional benefit to species conservation?

Response. We agree with statements made in the past by the Fish and Wildlife Service to this effect. We do not believe it is possible for the agency to administratively change the designation of"critical habitat" into habitat which is identified to achieve recovery, as suggested in Director Clark's testimony. We will carefully review any proposal to do so and to add "efficiency" to a process which the agency has held in little regard for a number of years. .

Question 2. How would you merge critical habitat into the recovery planning process?

Response. As I suggested in my prepared statement, an option the Subcommittee might explore is the elimination of critical habitat as a separate process under the Endangered Species Act (ESA). Given the generally accepted view that designation of critical habitat provides little additional benefit to a species, it makes no sense to cause controversy and expend resources on a rulemaking to designate the habitat or on consultation under section 7. The Fish and Wildlife Service clearly feels that consultation on the likelihood of jeopardy provides sufficient protection. Therefore, the habitat needs of the species should be addressed in the recovery plan, with statutory direction (1) to address the social and economic consequences, both to society and to affected individuals, of recovery in general and of protection of needed habitat and (2) to publish a reasoned response to the comments.

To the extent the designation process is merely moved back in time, it should be kept as a separate rulemaking which is coordinated with development of the recovery plan. However, its focus should remain on "critical" habitat as opposed to "recov-

ery" habitat. We believe it would be exceedingly difficult to for a Federal agency to engage in meaningful consultation on such a broad concept as recovery habitat.

Question 3. You have stated that Congress should amend the Endangered Species Act by requiring analysis of the social and economic impacts in the recovery plan. If we move critical habitat to the recovery plan stage, why wouldn't the economic analysis conducted for the designation of the habitat satisfy your concern?

Response. The Services' expertise lies in fish and wildlife management. They have demonstrated over the years an extreme reluctance to engage in any analysis of the economic impacts of their activities. A prime example is their interpretation of the ESA that the economic analysis of critical habitat under section 4(b)(2) is limited to the incremental impacts above those caused by the actual listing. If they are not directed by law to consider social and economic impacts of recovery, they will likely retain this incremental approach and will not take advantage of the outside expertise by including an economist on the Recovery Team.

Question 4. Don't the Services have the authority now to conduct a social and economic impact analysis as part of a recovery plan?

Response. We believe that the Services do have the discretionary authority to conduct these analyses in the recovery plan. However, whether it is from the lack of resources or fear of criticism, they do not do so. Moreover, since the Services do not generally respond to comments on draft plans, even unsolicited comments on economic impacts will have no effect. The fact that the Senate defeated an amendment by Sen. James McClure (R-ID) to provide such an analysis in the recovery plan during the debate on the last reauthorization of the ESA in 1988 should prevent the agency from examining these impacts in appropriate circumstances.

Question 5. Is changing the critical habitat process important to the forest products industry? If not, what changes to the Endangered Species Act are important?

Response. We do not believe that changing the critical habitat process will address the most significant issues facing the forest products industry. I outlined six areas in my prepared statement and emphasized the particular importance of making some adjustments to the habitat conservation plan process. Of particular concern is the need to establish the Administration's "No Surprises" policy in the statute. Forest landowners, of necessity, must consider the long term when making decisions affecting the management of their land. The absence of any assurance that the terms and conditions of the HCP will remain in effect 10, 20 or even 50 years from now creates a powerful disincentive. The Administration's policy has created the necessary confidence among landowners that the government will allow them to continue appropriate management of their land for the life of the agreement. This policy is now under attack in court. While we are confident that the Administration will prevail, it is nonetheless important for Congress to ratify such an essential incentive for participation by private landowners in species conservation.

Unfortunately, the incentive provided by the "No Surprises" assurance is in danger of being lost as a result of a misguided decision by a Federal court in California in Environmental Protection Information Center v. Pacific Lumber Co. Under this court's interpretation of the interaction between the consultation provisions of section 7 and the HCP process of section 10, landowners face loss of access to their land merely because they have voluntarily stepped forward and submitted an HCP for approval. The court ruled that once this happens, the agency, whether the Fish and Wildlife Service or the National Marine Fisheries Service, is immediately subject to a requirement to consult with itself on the proposed Federal action of approving the HCP, notwithstanding the fact that the same agency is subject to the detailed review requirements of section 10. the court then ruled that, because "consultation" has commenced, section 7(d) requires the landowner to cease activity on the land. The Subcommittee should consider correcting this unnecessary complication.

STATEMENT OF CHARLES T. DUMARS, ESQ., PROFESSOR OF LAW, UNIVERSITY OF NEW MEXICO SCHOOL OF LAW

I. The listing of a species and the designation of critical habitat serve two entirely different purposes. The former is a process designed to alert all parties that action must be taken to prevent the extirpation of a species; the latter is a logical part of the plans for recovery of the species.

A cursory reading of the Endangered Species Act [hereinafter ESA] demonstrates that it establishes a process consisting of numerous steps, each of which serve different functions. For example, the listing process has as its essential goal the identification of species that require protection. The recovery plan and critical habitat

process begins where the listing process ends, having as its essential goal, removal of the species from the list through execution of a plan that ensures the species' survival.

a. Establishing the Species as Endangered—the Listing Process

The first step taken under the ESA is the listing process—a process whereby species are identified and nominated for listing because of their precarious position in the current world environment. After consideration of only the best scientific data available, correctly identified species are "listed". This listing process does not allow any consideration of economic or other evidence because it is simply a determination of the current precarious circumstance of the species. A finding is made that a species is in so dangerous a circumstance that without further protective action it will become extinct. No functional decision is made in this process as to how the species will be protected, therefore, no economic analysis is required since no specific action is being proposed. The specific actions occur only after the listing process.

b. The Recovery Plan and the Critical Habitat Designation—the Operational Tools of the ESA

Once the species is listed, the United States Fish and Wildlife Service [hereinafter USFWS] is obligated to embark upon a series of steps to ensure the species' survival. These implementation steps often involve modification of the environment where the species resides, and therefore, impact the future development in the region. These protective steps include consultation with all relevant Federal agencies under Section 7 of the ESA to determine whether the actions of the Federal agencies are placing the species in jeopardy. If it is determined that the agencies' actions are placing the species in jeopardy, then the ESA requires that the actions be altered or ceased or that reasonable and prudent alternatives be developed to the actions of the Federal agencies that will allow the agencies to continue their activities without causing damage to the species.

A second, and surely the most important part of the species protection process, is the development of a recovery plan. It is of no value under the ESA to simply list a species to watch it continue to fail. Rather, the obligation under the ESA is to develop a plan for its recovery and carry out that process. Conversely, if it cannot be recovered, then the species must be de-listed. In the case of aquatic species, generally the most significant piece of information in the recovery plan is a finding as to the flow regime necessary to ensure the survival of the species. This essential flow regime in various parts of the stream system, forms the basis for designation of critical habitat. Unfortunately, the designation of a critical habitat flow regime has been uncoupled from the recovery plan. This is undoubtedly a function of the language of the ESA as currently operative, whereby short timelines are given that require critical habitat designations often before a "plan for recovery" is either understood or finalized. Thus, a decision is made that the for x miles of river y quantity of water is required even though there is no biological data to support the conclusion that these quantities are needed to recover the species.

Simply put, how can one know a habitat is critical to the recovery of the species before one understands how to recover the species? The answer is one cannot know this, but as currently structured, the Secretary of Interior is mandated to decide irrespective of his absence of knowledge. Were these decisions made in a vacuum, then guessing at the necessary flow regime would perhaps be appropriate. However, in the Western United States, where all streams are fully appropriated, virtually all changes in flow regimes visit significant costs on other water users in the stream system. Moreover, once the designation has been made, the individual water users face serious civil and criminal penalties should they alter the critical habitat, even though there has been no demonstrable case that their alteration would in fact cause the species harm.

Not only does the critical habitat designation place individual water users at risk for civil and criminal penalties if they alter critical habitat, it has become one of the most fundamental levers in the arsenal of the USFWS because it governs all future operations of all Federal agencies operating within the region. As stated eloquently by the 10th Circuit Court of Appeals in Catron County Board of Commissioners, New Mexico v. United States Fish and Wildlife Service, et al., 75 F.3d 1429, 1437 (10th Cir. 1996):

> "The designation of critical habitat effectively prohibits all subsequent Federal or federally funded or directed actions likely to affect the habitat" See 16 U.S.C. 1536(a)(2)."

Again, major Federal choices are controlled by a designation that may not be in any way logically connected to the methods for recovering the species because the recovery plan has not been completed.

While it seems somewhat tenuous to subject individuals to criminal and civil penalties for alteration of habitat that may not have been connected to a recovery of the species, any doubt as to the potential liability of individual water users was put to rest by the U.S. Supreme Court's decision in Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687,115 S.Ct. 2407 (1995). In that case, a group of individuals sought to invalidate a regulation of the USFWS that would make them liable for a "taking" of the species under Section 9 of the ESA even if they took no direct action directed at harming the species. They argued that they were not directly trying to injure the species, there, the red-cockaded woodpecker. Rather, they were simply engaging in what they had always done—cutting timber. In their view, simply because their actions might modify the critical habitat in some way, this should not be considered a "take" of the species. The Supreme Court squarely rejected their argument and found that a modification of critical habitat was a "take" of the species that could result in civil and criminal penalties. The Court stated:

> "First, we assume respondents have no desire to harm either the red-cockaded woodpecker or the spotted owl; they merely wish to continue logging activities that would be entirely proper if not prohibited by the ESA. On the other hand, we must assume, arguendo, that those activities will have the effect, even though unintended of detrimentally changing the natural habitat, of both the listed species and that as a consequence, members of those species will be killed or injured." Id. at 2412.

The Court specifically held that the USFWS had the legal authority to promulgate a regulation which provided that modification of a species habitat, even though unintended, and even though not aimed at a particular member of the species, would subject the individuals to civil and criminal penalties if any injury to a species proximately resulted.

Justice O'Connor went further and concluded that even a habitat modification that affected breeding would be a "take". Justice Scalia pointed out in dissent that a large number of routine private activities, for example, ". . . farming are subjected to strict-liability penalties. . . ." Id. at 2424. He provides another example: ". . . a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby impairs the breeding of protected fish has "taken" or attempted to "take" the fish." Id. at 2423.

Thus, under Sweet Home, supra, once a critical habitat flow regime designation is made, Federal agencies must alter their activities to protect the critical habitat under Section 7, and private entities face severe civil and criminal sanctions should they cause an alteration of that flow regime.

The USFWS has specifically and consistently acknowledged that the designation has far reaching effects, even if not connected to any plan of recovery:

> "The requirement to consider adverse modification of critical habitat is an incremental Section 7 consideration above and beyond Section 7 review necessary to evaluate jeopardy and incidental take."

Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796 at 1823.

That critical habitat designation even though not demonstrably aimed at recovery of the species affects all entities that might alter that habitat is summarized well by a scholar in the field:

> "At bottom, what the case law illustrates beyond question is that the ESA's prohibition on modification of critical habitat is interpreted by the courts as strong and unyielding without critical habitat, Federal agency actions are largely shielded from judicial review."

Houck, Oliver A., "The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce," 64 U. Colo. L. Rev. 277 (1993).

A concrete example can be found in numerous lawsuits filed by environmental groups to force designation, even when the USFWS concedes it does not have adequate data to complete the designation. The Forest Guardians and Defenders of Wildlife, seeking an order compelling critical habitat designation in Federal court in Albuquerque, New Mexico, make it clear beyond peradventure that their goal is to designate the entire Rio Grande river as critical habitat and use this designation to prevent any person from reducing the flow of the river below some unspecified minimum amount. If they are successful, then any farmer or other person using the waters of the Rio Grande may be subject to civil and criminal penalties because they unlawfully "modified" the critical habitat by reducing the flow even though there is no minimum flow amount specified in any recovery plan. They state unequivocally:

"Without designation of critical habitat, this crucial area for the silvery minnow could be adversely modified to the point where it no longer supports the elements needed for the minnows survival. Designation is especially needed before the summer season, when water demands on the Rio Grande increase and frequently result in little or no flow downstream from major diversion facilities."

Forest Guardians and Defenders of Wildlife's Brief in Chief in Support of Motion for Review of Agency Decision at 14.

Unfortunately, if these groups are successful, any person altering the habitat is at great risk of criminal and civil penalties even though the responsible Federal agency is conceding it has no data to prove the designation is either correct or needed.

It is precisely because the critical habitat designation can potentially subject individuals to far reaching penalties. See Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154 (1997) that individuals affected have been granted broad standing to sue. See also, Catron County, supra. And it is for this same reason that prior to the designation the USFWS is obligated to consider, in addition to the scientific efficacy of the designation, the "economic impact and any other relevant impact" of designating the habitat and weigh the benefits of exclusion against those of inclusion of particular areas within the designated habitat" 16 U.S.C. 1533(b)(2). It is also for this reason that public comment is required and notice must be given and judicial review is available from an erroneous decision. Id. at 1533 (b)(4)(6).

Finally, because the critical habitat decision so dramatically affects the behavior of all persons and all agencies—Federal and non-Federal within the stream system, within the area of the Tenth Circuit Court of Appeals, an Environmental Impact Statement is required prior to the critical habitat designation. The 10th Circuit Court of Appeals made it clear that government action in designation of critical habitat is precisely the kind of Federal action significantly affecting the human environment that requires detailed scrutiny prior to taking final action.

> "The short and long-term effects of the proposed governmental action (and even the governmental action prohibited under the ESA designation) are often unknown or, more importantly, initially thought to be beneficial, but after closer analysis determined to be environmentally harmful. Furthermore, the fact that a Secretary believes the effects of a particular designation to be beneficial is equally immaterial to his responsibility to comply with NEPA."

Catron County Board of Commissioners, New Mexico v. United States Fish and Wildlife Service, et al., 75 F.3d 1429, 1443 (10th Cir. 1996):

Thus, the critical habitat designation is so significant a Federal action that it requires an Environmental Impact Statement, yet, under current law, it can be made without any demonstration that it is tied to any plan for recovery of the species. This can hardly be the intent of the framers of the ESA.

The situation in which the USFWS finds itself when forced to make a designation of critical habitat without ensuring that the designation is tied to the actual needs of the species was summed up well in a recent statement under oath made by Jamie Rappaport Clark, Director of USFWS: "It will be to no one's advantage if the Service spends its limited resources designating critical habitat for the minnow if that designation is invalidated in subsequent litigation for failure to allow public comment or other legal deficiency. If this happens, the designation will provide no protection to the minnow and it will delay protections for other species. Giving the Service adequate time now will minimize the likelihood of such an unfortunate result." Declaration of Jamie Rappaport Clark at pg. 12 (March 3, 1999).

It must be remembered that it is not a victory in the battle of species protection to simply enjoin others from continuing their use of water under the threat of criminal prosecution. Rather, victory, if it can be had, only comes when affirmative steps are taken based upon the best scientific, economic and social data available. None of us should be fooled by the illusion that a species is rescued from extinction simply because others have been forced to forego their use of water at great cost. Species are only on the road to being recovered when the USFWS has developed and finalized a recovery plan for their survival. Thus, contrary to current practice wherein critical habitat designation is distinct from the recovery process, steps must be taken to bring these two processes together, so that the end result of the drafting of the recovery plan is the determination as to where that recovery is to take place. Only when we understand how we are to recover the species can we accurately decide the precise nature of the habitat that is critical for the species' survival.

The ESA Amendment introduced May 20, 1999 [Senate Bill 1100] refocuses the mission of the USFWS on its ultimate goal of recovering species and away from altering behavior for alterations sake. This refocus is accomplished by ensuring that

the USFWS makes the decision as to the scope of habitat critical to the survival of the species as an integral part of the recovery plan itself.

Without this Amendment, in the water short West, the designation of critical habitat will continue to be nothing more than an abstract Federal mandate. The designations will continue to cause great economic and social dislocation without any evidence that these designations actually result in recovery of the species. Water users cannot bear the costs associated with these social and economic dislocations and the species cannot bear the consequences of hasty habitat designations that may be under inclusive in scope while expending needed resources that could have been used for species' recovery. For these reasons, the ESA should be amended as proposed by Senate Bill 1100.

RESPONSES OF CHARLES DUMARS TO ADDITIONAL QUESTIONS FROM SENATOR CRAPO

Question 1. Is there a problem in the West with respect to aquatic species that heightens this problem with critical habitat designations?

Response. Yes. There are inherently unique characteristics of aquatic species in the West that need to be addressed when critical habitat designations for aquatic species are contemplated.

It would not he difficult to imagine that a fish species native to a river located in a moist environment typical of the Western United States might have difficulty surviving in a typical Western United States river due to the vast differences in stream flow. Likewise, many western fishes would soon perish in the full running streams of the East. Recovery plans designed to ensure the conservation of species in these very different aquatic environments would need to address the aspects unique to each. Any critical habitat designation only benefits a river species, especially in the arid West, when it is based, at a minimum, on a complete understanding of what the river provides to the species in terms of water quality, quantity, rates of flow, temperature and turbidity.

A river is perhaps best described biologically in tempts of a "fluvial hydrosystem"' concept.[1] This concept looks at a river as a holistic entity containing the river channel, riparian zone, floodplain, and the alluvial aquifer.[2] All these are viewed as being part of a four dimensional system.[3] Biologically speaking flowing seater presents many advantages over still water. While the flow of a river puts stress on the organisms that live within it, this flow also provides nutrients, respiratory gases and removal of wastes. It would be correct to say that the organisms that live within a river benefit from the river in the same ways that humans do living along its banks. Where water is of short supply, as in the West, and where all organisms, human and non-human living off what the river provides have adapted to a seasonally fluctuating pattern, human and non-human species can exist in harmony. However, when there is drought, conflict will naturally result.

Typical critical habitat designations by simple geographic area, rather than as a fate of flow, heighten this natural conflict by not defining the parts of the habitat that are in fact critical to the species while unduly restricting the access of others.[4] It is clear that the survival of aquatic organisms is directly tied to the hydraulic and hydrological conditions which define their physical habitat.[5] Unfortunately, in the West, this relationship is obscured by the typical blanket geographic designation of critical habitat made under the ESA.

To a Western aquatic organism, the interaction of velocity depth and substrate of a given river develop the hydrologic integrity of its habitat. These factors are generally more important to these species than simple geographic location and must be recognized as critical for both the conservation of the species and the workability of any plan to recover it. Absent inclusion of these complex factors, a geographic designation can have a less than fully effective impact on the conservation of the species and unduly negative impact on the humans relying on the water source.

Indeed, in the West, a simple geographic designation can often be over inclusive and cause damage to water uses while giving no benefit to the species. If habitat is designated by simple geography of location of the western aquatic species and that species requires a hydraulic integrity of a specific rate of flow, it may not be

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[1] G.E. Petts, I. Maddock, Flow Allocation for In-river Needs in River Restoration, 60–79) (Petts & Calow eds.) (1996).

[2] Id.

[3] Id.

[4] 16 U.S.C.A. § 1532(5) and 1533(b)(West 1985).

[5] Geoffrey Petts, and Peter Calow, eds. River Biota, 224 (1996).

possible for such a designation to conserve the "biological features essential to the conservation of the species."[6]

Moreover the designation of critical habitat in aquatic environments has a heavy impact on the socio-economic aspects of the human culture in the area designated. If the designation is not tailored to the aquatic needs of the target species, and yet alienates the people living in the area, a chance for cooperative management is lost. If an accurate picture of the three dimensional needs of the aquatic organism is recognized as the goal of the conservation efforts, only then can any resource management techniques be developed to allow land use while protecting the species. Without this cooperative approach then the scarcity of water in the West presents a heightening of problems for all involved whenever the critical habitat designation process is applied to western aquatic species. This is the case because water is in short supply. Competition for it is fierce and the key issues are almost always what rate of flow is needed and whom should have to bear the pain of providing it.

Question 2. To what extent would recovery plans be challenged by citizens under the proposed Senate Bill 1100? How would this change affect the Middle Rio Grande Conservancy District?

Response. Senate Bill 1100 would expand the scrutiny applied to development of a Recovery Plan under the Endangered Species Act (ESA). It would also place clear errors in Recovery Plan development under the Citizen Suit provision of the ESA (16 U.S.C. § 1540(g)).

Senate Bill 1100 would combine a challenge to the Recovery Plan with a challenge to designation of critical habitat because Senate Bill 1100 merges these two processes The amendment to the Citizen Suit provision, if enacted, would most likely result in more comprehensive challenges to Recovery Plans and the processes by which they are implemented. In this way, Senate Bill 1100 would allow challenges to critical habitat designations to address the purposes behind the designation and force the Secretary to defend the designation as essential to the recovery process.

Under the current law, the Secretary of the Interior is required to prepare a Recovery Plan for species listed under the Endangered Species Act unless the Secretary concludes the plan will not promote the conservation of the species.[7] Where such a Recovery Plan is determined by the Secretary to be appropriate, there is no mandated time-table to be followed in preparing the Plan. It is unclear whether under the current law a citizen suit could directly challenge the Secretary on the preparation of a Recovery Plan.

Under the Citizen Suit provision of the ESA any person may bring three different legal actions. First, to enjoin an any person alleged to be acting in a manner that violates any regulation or provision of the ESA.[8] Second, to compel the Secretary to apply emergency regulations and prohibitions to protect a given species.[9] Finally a citizen may bring suit against the Secretary for failure to perform an act or duty that is nondiscretionary under the ESA.[10] Under the current law the Secretary's decision to adopt or not adopt a Recovery Plan has faced no direct challenge to date because the adoption of a plan is discretionary under the ESA.[11]

Under the citizen suit: provision as amended by S.B. 1100, Recovery Plans would be more readily the subject of citizen suits once the Secretary determines that such a plan is required for the conservation and survival of a listed species. Under Senate Bill 1100 the Secretary would be required to meet a series of mandated deadlines in preparing the Recovery Plan for any listed species where the Secretary believes a Recovery Plan is needed. By making the Recovery Plans subject to a non-discretionary timetable, Section 1540(g)(1)(C) would likely encourage citizens to bring suit against the Secretary for failure to timely prepare Recovery Plans.

The merger of Recovery Plans and critical habitat designations by Senate Bill 1100 would have two major effects on the ability of citizens to challenge a Recovery Plan. First it would have the practical effect of keeping the designation of critical habitat "in context" as part of a plan of recovery of the species in question. Second,

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[6] 16 U.S.C.A § 1532(5)(A)(1) (West 1985).

[7] ESA § 4, 16 U.S.C.A. § 1533(f) (This duty on the part of the Secretary would remain under S. 1100 but become § (a) of ESA § 4A).

[8] 16 U.S.C.A. § 1540(g)(1)(A) (West 1985).

[9] 16 U.S.C.A. § 1540(g)(1)(B).

[10] 16 U.S.C.A. § 1540(g)(1)(C).

[11] See United States v. McKittrick, 142 F.3d 1170, 1176 (9th Cir. 1998) (Defendant convicted under the ESA of an illegal take of a Gray Wolf that was brought into to U.S. from Canada by the FWS challenged the Secretary's decision to adopt a Recovery Plan for the Gray Wolf because the wolf in Canada is plentiful and not "most likely to benefit from such a plan." The court dismissed this argument by stating that the decision to adopt a Recovery Plan at all is within the Secretary's "broad discretion to determine what methods to use in species conservation.")

it would procedurally lick the non-discretionary act of critical habitat with the discretionary act of adopting a Recovery Plan under the citizen suit provision. This would cause challenges brought under the citizen suit provision to be concerned with the holistic reasoning being applied to achieve the goal of the ESA rather than focusing on the designation of a particular area as critical habitat divorced from the reasons underlying the ESA.

A Recovery Plan is described in the ESA as a "plan for the conservation and survival of endangered and threatened species."[12] Critical habitat is defined in the ESA as "such areas [that] are essential to the conservation of a [endanger and threatened] species."[13] By requiring ally challenge to critical habitat designation to also challenge the process of preparation of a Recovery Plan, Senate Bill 1100 focuses citizen challenges brought under the USA toward the original purpose of the ESA, "to provide a means whereby the ecosystems upon which endangered species and species depend may be conserved.[14]

Under the ESA as amended by Senate Bill 1100 a stakeholder such as the Middle Rio Grande Conservancy District would be better informed about just how their actions might be in conflict with plans to conserve and protect a species such as the Rio Grands Slivery Minnow. Also, a stake holder such as MRGCD would be afforded a greater opportunity to have meaningful input in developing any plan to work toward species conservation with the possibility of developing least restrictive measures to achieve such species protection. (currently a final Recovery Plan for the Rio Grande Slivery Minnow has not been published. Yet the Tenth Circuit has ordered the Secretary to designate critical habitat. The proposed habitat to be designated clearly implicates the actions and the livelihood of stake-holders such am MRGCD. Yet these stakeholders have no information as to the role this habitat plays in the plan to conserve the Minnow.

Without this information the stakeholders are incapable of developing any modification of their use of that habitat to maintain their own farms while limiting any negative impact on the species.

Question 3. Is an Environmental Impact Statement necessary when a critical habitat designation is made?

Response. Yes, The Tenth Circuit Court of Appeals, squarely addressed this issue in Catron County Board of Commissioners v. New Mexico v. United States Fish and Wildlife Service. et al., 75 F.3d 1429 (1Oth Cir. 1996). The Court required an Environmental Impact Statement because "The designation of critical habitat effectively prohibits all subsequent Federal or federally funded or directed actions likely to affect the habitat." Id. at 1437.

The need for the impact statement is obvious when one considers that the critical habitat designation must consider the economic, social and other consequences to society from the designation itself and plainly the designation must be narrowly tailored to meet the needs of the species while causing the minimum amount of damage to society. When a Federal agency chooses among alternatives, NEPA is invoked since the heart of the matter under NEPA is rational analysis of alternatives and wise decisionmaking based upon this analysis of alternatives. As the Tenth Circuit Court of Appeals observed:

The short and long-term effects of the proposed governmental action (and even the governmental action prohibited under ESA designation) are often unknown or, more importantly, initially thought to be beneficial, but after closer analysis determined to be environmentally harmful. Furthermore, the fact that a Secretary believes the effects of a particular designation to be beneficial is equally immaterial to his responsibility to comply with NEPA. Catron County Board of Commissioners New Mexico v. United States Fish and Wildlife Service, et al. 75 F3d. 1429, 1443 (10th Cir. 1996)

This requirement of development of an Environmental Impact Statement would be strengthened and enriched by SB 1100, because the EIS analysis would force a consideration and evaluation of which alternative could best protect the species and at the same time minimize the impact on the human environment in the area.

Question 4. Do you believe that a majority of the irrigation water users in the West would concur with this amendment?

Response. Yes. I believe that the majority of the irrigation water users in the West would concur with this amendment. First, virtually all irrigation systems in the Western United States are water short, are at the mercy of both dry years and reservoir management policies and continually face the challenge of increasing Fed-

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[12] 16 U.S.C.A. § 1533(f)(West 1985).
[13] 16 U.S.C.A. § 1532(5)(A) (West 1985).
[14] ESA § 2(b); 16 U.S.C.A. § 1531(b) (West 1985).

eral regulation. The Endangered Species Act, while promoting the laudable and critical goal protecting species is at the same time, both vague and rigid. It is rigid because it places artificial deadline on the development of unavailable scientific data and it is vague because it contains language that is subject to greatly varying interpretations.

Thus, in my experience in numerous Western States, I have seen that there is in fact no resistance to the concept that endangered species should be "recovered". Rather, the debate turns on the question whether the proposed measures are narrowly tailored to in fact "recover" the species or whether the species is simply a vehicle for altering the hydrograph of river systems to meet environmental ends. Under current law, the critical habitat designation can serve to completely alter behavior within a river system and access to water without any real scientific proof that the designation and isolation of this river system or guarantee of a rate of flow will in fact lead to the species' recovery.

And, under current law, an alteration of habitat can result in criminal and civil penalties to the individual without any proof by the United States Fish and Wildlife Service that this individual has impeded the species' recovery or endangered its existence.

First we assume respondents have no desire to harm either the red-cockaded woodpecker or the spotted owl; they merely wish to continue logging activities that would be entirely proper if not prohibited by the ESA. On the other hand, we must assume, arguendo, that those activities will have the effect, even though unintended of detrimentally changing the natural habitat, of both the listed species and that as a consequence, members of those species will be killed or injured. Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon 115 5.ct. 2407, 2412 (1995).

Starting from the premise that habitat can only be designated if it is "critical" to the species survival, one would logically ask, when must the United States Fish and Wildlife Service meet its burden of proof to demonstrate habitat it has chosen is in fact "critical" to the recovery of the species. Under current law, the answer is at no definite time, because the critical habitat can be designated even though there is no plan for the recovery of the species. Thus, when asked whether the habitat designation is required to recover the species, the United States Fish and Wildlife Service can simply answer they are not yet prepared to answer this question because they have not completed the recovery plan.

In effect, they have prescribed the medicine before they have decided exactly what the disease is and how it is to be treated. This approach is both illogical and costly to the persons affected by the critical habitat designation. It is illogical because it places the cart before the horse, it is costly because it requires persons under pain of criminal prosecution to forgo economic activity that is their livelihood.

The United States Fish and Wildlife Service argues that the critical habitat designation has no real effect on private entities because these persons will only be prosecuted if their alteration of habitat actually causes a harm to the species. This abstract assertion provides very little assurance to the average person diverting water from a stream system. It is nothing more than the empty assertion that if these individuals are prosecuted for alteration, they may have a defense of a lack of proximate causation between their actions and the death of a species. Outside the theoretical world of lethal experts, people fully understand that to tell a small farmer, "go ahead and divert water, if you are prosecuted we might have a defense" is no answer at all. The farmer's only real choice is to stop farming and bend to the critical habitat designation or face prosecution. This is no choice at all.

Therefore, merging critical habitat designations with recovery plans will put the United States Fish and Wildlife Service to its burden of proof under the ESA that the designation protects the species. It will also avoid criminal prosecution of water users until that burden of proof has been met. This outcome should be readily welcomed by irrigators in the West.

STATEMENT OF JOHN KOSTYACK, COUNSEL, OFFICE OF FEDERAL AND INTERNATIONAL AFFAIRS, NATIONAL WILDLIFE FEDERATION

Good morning Mr. Chairman and Members of the Subcommittee. My name is John Kostyack, and I am here to testify on behalf of the National Wildlife Federation, the nation's largest member-supported conservation advocacy and education organization. I thank you for inviting me here to share my organization's views concerning S. 1100, a bill to amend the critical habitat provisions of the Endangered Species Act of 1973.

The National Wildlife Federation considers the ESA's critical habitat protection to be an extremely valuable tool for conserving imperiled species, and therefore we are concerned that this bill would worsen rather than solve the problems that we are seeing with critical habitat implementation today. We also believe that it is a mistake to respond to the individual grievances of Members of Congress through piecemeal amendments to the ESA. This gradual chipping away at the ESA will not only weaken the Act's ability to protect species; it will also supplant the much-needed effort to update and strengthen the Act with a comprehensive reauthorization bill.

I. THE IMPORTANCE OF THE ESA AND CRITICAL HABITAT PROTECTION

The ESA recently reached its 25th anniversary, and there is much to celebrate. Hundreds of species that were once heading toward extinction are now either recovering or at least stabilized. The bald eagle, our nation's symbol, is at or near the point of total recovery, and the gray wolf has been successfully restored to the Yellowstone ecosystem and the wilderness of central Idaho. In the Pacific Northwest, we are witnessing an amazing groundswell of public support for the listing of salmon species and for the use of the ESA to recover this cultural icon. Across the country, the public is increasingly recognizing the ESA as a vitally important law for protecting the nation's precious biological heritage.

Despite the successes, there is still much work to do. Many of the species on the ESA list of threatened and endangered species are not yet on the path to recovery. Scientists tell us that the leading reason why so many of our animal and plant species are declining toward extinction is habitat loss and degradation. In other words, we need to do a better job protecting, managing and restoring habitats.

In enacting the ESA, Congress recognized the vital importance of protecting habitats. The first stated purpose of the ESA is to "provide a means by which the ecosystems upon which threatened species and endangered species depend may be conserved."

To achieve this purpose, Congress created three bottom-line safeguards: Section 9's prohibition against taking endangered species in the absence of a permit, Section 7's prohibition against Federal actions jeopardizing the existence of any listed species, and Section 7's prohibition against Federal actions resulting in "destruction or adverse modification" of critical habitat.

This last safeguard, the critical habitat protection, has a number of features that make it a vital tool for protecting, managing and restoring habitats of listed species. First, of all of the ESA's provisions, the critical habitat provisions provide the clearest direction to the Federal agencies about their obligation to protect and manage habitat for the purpose of species recovery. The ESA requires critical habitat to be designated and protected in any areas with physical or biological features that are "essential to the conservation of the species" in other words, in areas needed for recovery and delisting. The other two safeguards of the ESA, the takings and jeopardy prohibitions, lack this clear and unambiguous directive to promote recovery.

Second, the definition of critical habitat explicitly calls for protection of areas "outside the geographical area occupied by the species at the time it is listed" if such areas are essential for the conservation of the species. For many listed species, this focus on unoccupied habitat is crucial if extinction is to be avoided and recovery made possible. Many listed species are migratory or otherwise highly mobile, and thus cannot survive without the habitat they sometimes use and otherwise leave unoccupied. In addition, many listed species occupy only the remnants of their former habitats, and thus are not likely to survive unless we develop a strategy to restore habitats that are degraded and no longer occupied.

To date, neither the taking prohibition nor the jeopardy prohibition has been interpreted by the agencies or the courts as providing the necessary protection of unoccupied habitats; only critical habitat has served this purpose. The importance of this role in saving unoccupied habitats was highlighted in Idaho Rivers United v. National Marine Fisheries Service, 1995 WL 877502 (W.D. Wa. 1995), where the U.S. Forest Service sought to allow a mine to be developed adjacent to the unoccupied habitat of a listed salmon species. The court relied on the fact that the habitat was designated as critical habitat as the basis for rejecting the agency's proposal. According to the court, if agencies were allowed to cite the temporary absence of a species from its native habitat as a reason for allowing further habitat degradation, they would effectively prevent the habitat from being restored and the species from ever being recovered.

Third, critical habitat designation helps focus the attention of federal, state and private conservation agencies on special management efforts that a species may require. For example, in designating critical habitat for the green sea turtle and

hawksbill sea turtle, the National Marine Fisheries Service explained that one of the benefits of this designation was that it provided an opportunity to alert federal, state and private agencies about affirmative management steps needed in the designated areas. Among other things, the critical habitat designation highlighted the need for habitat restoration in sea grass beds destroyed by boat propellers and coastal development.

Fourth, a critical habitat designation draws clear lines on a map so that land managers have the direction they need about what habitat is needed to save species. An example of the problems that arise when the Services fail to designate critical habitat is found in the Natomas Basin, an agricultural region outside of Sacramento, California. Despite the fact that the giant garter snake (a species that relies heavily on Natomas Basin habitats for its survival) has been listed for over 5 years, no critical habitat has been designated. Meanwhile, urban development is proceeding apace in and around Fisherman's Lake, an area of the Natomas Basin that has long been identified as key nursery habitat for the species. The ESA's taking prohibition is of no avail because the Fish and Wildlife Service has approved a Habitat Conservation Plan (HCP) that allows habitat destruction throughout the Natomas Basin. In return for permission to destroy habitat, developers must pay a mitigation fee that ultimately will be used to acquire habitat but no effort has been made to identify and protect those areas needed for species recovery. If employed, the critical habitat tool would provide those implementing the HCP with the direction they need to ensure that Fisherman's Lake and other key habitat areas are acquired and protected.

Fifth, and finally, critical habitat designation provides an essential "early warning signal" to agencies and others involved in land use planning that certain areas deserve special attention. As stated by the National Marine Fisheries Service in designating critical habitat for the Umpqua cutthroat trout, "[w]ith a designation of critical habitat, potential conflicts between Federal actions and endangered or threatened species can be identified and possibly avoided early in the agency's planning process." Thus, if designated in a timely manner, critical habitat can provide a useful mechanism for minimizing the social and economic costs of habitat protection.

II. S. 1100 WOULD WEAKEN THE ESA'S SPECIES SAFETY NET—A DIFFERENT APPROACH IS NEEDED TO ENSURE THAT CRITICAL HABITAT WORKS FOR SPECIES AND LANDOWNERS

The above discussion about the benefits of critical habitat is not meant to obscure the fact that we have had serious problems with implementation of this safeguard. The fact that only 9 percent of listed species have received designations of critical habitat suggests that serious attention to critical habitat is needed. However, the problems that have arisen in implementing critical habitat would not be solved by S. 1100; in fact, this bill would exacerbate some problems and leave many other challenges unaddressed. Alternative approaches ought to be considered to help ensure that the critical habitat safeguard is better implemented—for the benefit of both imperiled species and landowners.

A. S. 1100 Would Exacerbate Problems with Critical Habitat and Other Aspects of ESA Implementation

S. 1100 has four key provisions, each of which contains flaws that could make species recovery more difficult. First, the bill adds new delays to the Act's requirements concerning designation of critical habitat. Under the current ESA, critical habitat must be designated at the time of listing, subject to a possible one-year extension. Under S. 1100, critical habitat designation is postponed until after a recovery plan has been completed or until 3 years have passed after listing, whichever comes sooner. Although the bill sets a timetable for completing recovery plans and for designating critical habitats for species lacking recovery plans, the bill does not specify when the Services are required to designate critical habitat for species that currently have recovery plans. Unless the bill is amended to set a timetable for such designations, it will leave open the possibility that the Services will continue to neglect the major backlog of species awaiting critical habitat designations.

Second, the bill would reopen a loophole, previously closed by Congress, that would expand the ability of the Services to avoid designating critical habitat altogether. Under the current ESA, critical habitat designation can be avoided altogether if one of the Services determines that such designation would be "not prudent" (e.g., if it finds that designation would make a plant species susceptible to illegal collection). If one of the Services makes a finding that critical habitat is "not determinable," this merely entitles it to postpone designation for 1 year after listing. Under S. 1100, designation can be avoided altogether if one of the Services determines that it would either be "not prudent" or "not determinable." There is no sci-

entific justification for allowing the Services to avoid designations altogether based on a "not determinable" finding. In fact, Congress recognized this absence of a legitimate need in 1982 when it amended the ESA to eliminate the "determinable" loophole. Reinstating this loophole now would only invite further politically-motivated refusals to designate.

Third, the bill requires completion of recovery plans 3 years after listing. For species that have already been listed but lack recovery plans at the time the bill would become law, the bill imposes a deadline of 5 years for completing recovery plans. These new deadlines would be a useful step toward cleaning up the backlog of species without recovery plans—if they were accompanied by substantial increases in funding. Because S. 1100 does not provide for such funding, but instead adds new unfunded procedural burdens to the recovery planning process, it essentially sets up the Services for failure. The result could be that the Services prepare shoddy recovery plans in their haste to meet statutory deadlines with inadequate resources, or that they simply fail to meet the statutory deadlines. The bill specifies no remedy for the Services' failure to meet deadlines, thus forcing the courts to determine when to order completion of specific recovery plans and how to prioritize among recovery plans.

Fourth, and finally, the bill precludes citizens from enforcing the ESA's requirements concerning the content of critical habitat designations unless they simultaneously file claims concerning the timing or content of recovery plans. The intended purpose of this limitation is unclear, but the outcomes are likely to be arbitrary and unfair. Under this limitation, citizens would be denied the ability to challenge improper designations whenever designation is required in advance of the completed recovery plan. In other cases where a recovery plan has been completed, citizens could be forced into adding claims concerning the timing or content of recovery plans even when no legitimate dispute exists on those issues.

B. Postponing Critical Habitat Designations So That They Can Be Timed With Recovery Planning Makes Sense—But Only If Core Habitats Are Protected During the Period of Delay

Despite its serious flaws, S. 1100 does attempt to address a legitimate concern about the need for better information in designating critical habitat. In introducing S. 1100, Senator Chafee stated that designations require "knowledge of the conservation needs of the species as well as an assessment of economic impacts of the designation, neither of which is generally known, or can be determined, at the time of listing." The bill attempts to address this problem by postponing critical habitat designations until either a recovery plan has been completed or 3 years have passed since listing, whichever is sooner.

Senator Chafee is legitimately concerned about the absence of complete information about the needs of species and economic impacts of habitat protections at the time of listing. However, although we are likely to have a better understanding of these issues when S. 1100's three-year deadline for critical habitat designation is reached, our knowledge will still likely be far from complete. Regardless of which deadline for critical habitat designation is chosen, the ESA must be implemented in an arena where important data about conservation strategies is missing. The real issue facing Congress is what kind of risks should we be taking with the fate of endangered species during the continual processes of data-gathering and recovery planning?

The scientific community has answered this question unambiguously. In the 1995 report Science and the Endangered Species Act, an esteemed panel of scientists from government, academia and private industry convened by the National Research Council (NRC) explicitly addressed the question of whether critical habitat ought to be designated at the time of listing or whether it should be deferred to the time of recovery planning. According to the NRC panel, the importance of an "early warning" system was too great to defer habitat protection until recovery planning. On the other hand, it recognized the complexities of the critical habitat analysis and difficulties of completing it by the time of listing. The panel therefore recommended an interim designation of what it called "survival" habitat to protect a core amount of essential habitat during the period between listing and completion of the recovery plan. It suggested that once a recovery plan is adopted, the critical habitat designation (with its more sophisticated analyses of conservation needs and economic impacts) could replace the "survival" habitat designation.

This precautionary approach is preferable to the approach of S. 1100 because it recognizes that habitats, once lost, are often irreplaceable. The need for such a precautionary approach is particularly appropriate in implementing the ESA because, by the time species are listed, they have usually declined to extremely small population numbers, have typically lost significant percentages of their historic ranges,

and are by definition in danger of extinction. In light of the substantial declines that many species face in the lengthy process of attaining the ESA list, it is essential that Congress require protection of their core habitats upon listing.

This precautionary approach to critical habitat designations, which has been incorporated into H.R. 960, the Endangered Species Recovery Act of 1999, would provide benefits to landowners as well as imperiled species. By ensuring that a core of essential habitat is protected from the moment of listing, it would maximize the chances of successful recovery and delisting. It also would preserve the widest array of conservation strategies, so that landowners and other stakeholders can help devise a strategy that it is tailored to local economic and social objectives.

C. Congress Should Encourage Creative Uses of Critical Habitat Designations To Ensure That This Safeguard Works for Both Imperiled Species and Landowners

Perhaps the most serious problem with S. 1100 is that it purports to address the critical habitat issue without grappling with the real obstacles to successful implementation. The main problem with critical habitat implementation is not (as suggested by S. 1100) because more time is needed after listing for information-gathering and recovery planning. Roughly 85 percent of listed species have been listed for over a year and are covered by finalized recovery plans, and yet the vast majority of these species still lack critical habitat designations.

The main problem with critical habitat implementation is that, due to fierce resistance from certain developers and the lack of any champions in the Administration, no one has tried to make it work. Enormous resources have been squandered by the Fish and Wildlife Service battling environmentalists in court over its repeated refusals to designate, with the courts uniformly siding with the environmentalists and holding that the Service's excuses lack merit.

It is time for developers, the Fish and Wildlife Service and environmentalists to call a truce on critical habitat and for all sides to come together to find a way to make these provisions work for both imperiled species and landowners. FWS is reportedly contemplating a dialogue with the public about the future of critical habitat. We fully support this idea and hope that it can provide a forum for developing these kinds of solutions.

The current ESA itself provides a number of ideas that could be pursued. For example, the concept of "special management considerations or protection" found in the ESA's definition of critical habitat could be the focus of a multi-stakeholder discussion about how critical habitat might be managed once it is designated. Contrary to prevailing myths, a critical habitat designation does not lead to a suspension of all economic activities in the designated area. Serious work needs to be done in resolving how designated areas could be managed for the benefit of imperiled species and landowners.

Another idea found in the current ESA that has never been seriously pursued is the Section 4(b)(2) provision calling for the exclusion of certain areas from critical habitat if the benefits of such an exclusion outweighs the benefits of specifying those areas as part of critical habitat. This provision could potentially provide the impetus for a carefully-structured planning process in which economic needs are balanced with the recovery needs of imperiled species.

These are simply initial thoughts. For critical habitat to succeed, the Services will ultimately need to develop and articulate their own positive vision for critical habitat designation. With the leadership of the Services, we can take the critical habitat issue out of the courtrooms and into the realm of effective conservation planning. In the meantime, Congress should reject S. 1180 and any other proposals that would promote postponement and avoidance of critical habitat decisions.

III. S. 1100 SHOULD BE REJECTED AS AN INAPPROPRIATE ATTEMPT TO AMEND THE ESA ON A PIECEMEAL BASIS

In addition to the substantive problems with S. 1100, the National Wildlife Federation is also concerned that the bill is being considered outside the ESA reauthorization process. S. 1100 raises a host of ESA issues that can only be addressed effectively in a full reauthorization debate. This is because each of S. 1100's provisions depends on the successful implementation of other provisions of the ESA not dealt with in the bill. For example, the deadlines imposed for completion of recovery plans will not further the ESA's conservation goals unless they are accompanied by ESA amendments to ensure that recovery plans are meaningful and to ensure that the recovery planning process is properly funded.

To successfully amend the ESA, Congress needs to take a holistic view of the Act and ensure that it understands the potential effects of each proposed change on the ability of the rest of the Act to function. For example, before establishing recovery teams (as proposed by S. 1100), Congress must consider how their memberships will

be determined, and such decisions will affect the formation of the advisory committees that the Services are promoting for HCPs and the peer review panels that the Services are promoting for listing decisions.

Reauthorization is long overdue and the difficult task of completing it is only made more difficult if Members of Congress are allowed to resolve their individual grievances with the ESA through targeted amendments. If this Subcommittee and the full Committee move forward with S. 1100, every member with a desire to weaken the ESA will sidestep the reauthorization debate and will instead come forward with his or her amendment. Considering that the issues raised in S. 1100 have no priority claim over other issues that have long been debated, it may be difficult to fend off those amendments. At the very least, those members will demand a hearing and markup in the Senate Committee on Environment and Public Works and, like S. 1100, these proposals too will be considered without an understanding of how they inter-relate with the rest of the ESA. The only way to provide a comprehensive assessment of the ESA with a process that is fair to all sides of the debate is to reject the piecemeal approach altogether and to move forward on a full ESA reauthorization.

V. CONCLUSION

The National Wildlife Federation urges this Subcommittee to reject S. 1100. Although the bill could conceivably be improved to ensure that endangered species and their habitats are adequately protected, such an effort would not make sense—and in fact would likely be unfair and counterproductive—outside the context of a broader discussion of ESA reauthorization.

Thank you again for the opportunity to testify.

[Report submitted by John Kostyak for the Record]

BALANCING PUBLIC TRUST AND PRIVATE INTEREST PUBLIC PARTICIPATION IN HABITAT CONSERVATION PLANNING: SUMMARY REPORT

(By the University of Michigan School of Natural Resources and Environment; Study Commissioned by the National Wildlife Federation)

ABOUT THE STUDY

Under the Clinton Administration, the number of landowners preparing Habitat Conservation Plans (HCPs) to protect themselves from liability under the Endangered Species Act (ESA) has skyrocketed. The number of approved plans has grown from 20 in 1994 to 225 today.[1] The U.S. Department of Interior expects that by the year 2002 more than 27 million acres of land and more than 300 species will be covered by HCPs.[2] The growing scope of HCPs has made them one of the more celebrated yet controversial aspects of the ESA.

HCP applicants, the U.S. Fish and Wildlife Service (FWS), and, sometimes, outside stakeholders negotiate the provisions of an HCP. Once the parties have reached an agreement and the FWS has formally approved the plan, applicants receive an incidental take permit that protects them from liability if they unintentionally harm endangered species or their habitat in the course of completing proposed projects. Without a permit such activities would violate the ESA. In exchange for the permit, applicants agree to pursue specific mitigation strategies. These strategies may include avoiding endangered species habitat during development, creating habitat reserves, instituting an active management program such as prescribed burns, paying a development fee, or translocating affected species to public lands.

HCPs raise a number of important biological, social, and political issues that have yet to be answered. Of these issues, the role of public participation in habitat conservation planning is particularly controversial. As the number and scope of HCPs has grown, so has the public's desire and need to be involved. While the character of the HCP decisionmaking process has a considerable effect on the shape of final HCPs and the adequacy of wildlife protections, there has not been extensive research on this process and the public's role in it. How does the public participate in these processes? Are applicants, the FWS, and outside stakeholders satisfied with current approaches? How can policies and procedures be changed to improve habitat conservation planning?

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[1] L. Hood, Frayed Safety Nets: Conservation Planning Under the Endangered Species Act, Defenders of Wildlife, Washington, DC, 1998, p. vl.

[2] FWS, Strategic Plan for 9/30/97–9/30/00, p. 20.

To answer these questions, we conducted an 18-month study of public participation in HCPs. The study included:

- A written survey of FWS contacts for the 55 large HCPs approved after 1991 or likely to be approved by the end of 1997 (data is included from 45 responding HCPs);
- Fourteen in-depth case studies selected from these large HCPs that included more than 75 interviews with a wide variety of HCP stakeholders; and
- Thirteen case studies of public participation in other environmental contexts in the United States, Canada, and Europe.

We focused on large HCPs (greater than 500 acres) because they tend to have greater environmental, economic, and political implications and more extensive public participation than smaller HCPs. The survey was conducted between dune and September 1997 and all case-study interviews took place between November 1997 and January 1998.

This publication summarizes a longer report prepared by the University of Michigan on the role of public participation in the HCP process. The summary captures the major themes of the full report and provides policymakers with recommendations for improving the HCP program. The full report provides a more extensive analysis of stakeholders' roles in the planning process and presents detailed survey and case study results.

The full and summary reports were commissioned by the National Wildlife Federation, which continues to have a strong interest in endangered species policy and HCP management. We would like to thank John Kostyack and Sara Barth for their support of the study. However, these reports solely represent the work of the University of Michigan research team and do not necessarily reflect the views of the National Wildlife Federation.

Preface

The National Wildlife Federation (NWF) commissioned this study of public participation in the Habitat Conservation Planning (HCP) process for two reasons.

First, as the study explains, HCPs have rapidly become a popular tool for many state and local governments and private landowners seeking to ensure that their economic activities are consistent with the Endangered Species Act (ESA). Considering the potentially enormous impacts (either positive or negative) that these plans have on the long-term survival of endangered species, we wanted to learn how NWF, its affiliates, and other activists could play a meaningful role in shaping these plans.

Second, policymakers in Congress and the Federal wildlife agencies ultimately decide when and how the public is allowed to participate in HOP development.

We wanted to learn if current policies are adequate to ensure meaningful involvement and, if not, what policy changes are needed to achieve this important objective.

This policy objective is a top priority for NWP because broad public participation helps ensure that HCPs truly protect endangered species and helps build the political support that ESA programs need for successful implementation.

The resulting report, summarized here, reflects an outstanding effort by the University of Michigan team to investigate NWF's questions. We intend to make full use of the report's findings and recommendations, and we encourage you to do the same.

JOHN KOSTYACK, COUNSEL,
Office of Federal and International Affairs,
National Wildlife Federation.

MAJOR FINDINGS

A well-managed public participation process has the potential to provide significant benefits to Habitat Conservation Plan (HCP) applicants, U.S. Fish and Wildlife Service (FWS) staff, outside stakeholders and affected species. These benefits include:

- Enhancing HCP quality,
- Improving communication and building new relationships,
- Increasing public understanding of and political support for an HCP, and
- Reducing the likelihood of approval and implementation delays.

With a few exceptions, applicants and the FWS are neither capturing the lull benefits of public participation nor providing meaningful opportunities for public involvement in the HCP process. In particular, we found that:

- Interest groups and independent scientists are not involved in a large number of HCPs.

- In the HCPs in which outside stakeholders do participate, the FWS and applicants rarely make significant changes to HCPs based on their input. In general, outside stakeholder input typically comes too late in the process to maximize its usefulness.
- FWS staff have low expectations for making changes to HCPs based on public concerns.
- Many outside stakeholders remain dissatisfied with HCPs, which suggests that significant problems exist in the HCP program.

There are four key obstacles to meaningful public participation:

- FWS priorities and policies.

The FWS has higher priorities than public participation, including streamlining the HCP planning process, maintaining congressional support for the Endangered Species Act (ESA), providing flexibility to landowners, and enticing landowners to pursue HCP agreements.

- NEPA as a public participation process.

The National Environmental Policy Act does not do enough to facilitate an effective public participation process. For example, landowners and the FWS typically negotiate HCP provisions well before comment periods on NEPA and ESA documents. There are also few incentives for the Service or applicant to renegotiate these provisions and incorporate changes based on public participation, even if the public provides significant new information.

- Ineffective management of HCP negotiations.

HCP applicants and FWS staff often poorly define the roles of outside stakeholders and the FWS in the HCP process, leave outside stakeholders with false expectations, and exclude key stakeholders from the process. They also fail to ensure that participants central to the process, including Federal agencies! have adequate resources to participate.

- Fear of public participation.

HCP applicants, the FWS, and outside stakeholders fear that public participation places too great a burden on them. In fact, public participation likely increases the cost and length of HCP planning processes and requires participants to expend significant resources. Still, the FWS, HCP applicants, and outside stakeholders stand to gain significant benefits if they learn to manage public participation effectively.

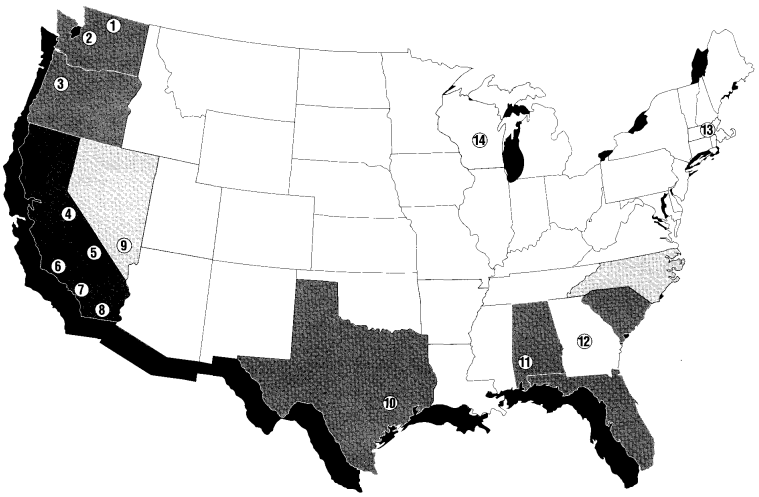
To strengthen the HCP program, we recommend a number of policy changes aimed improving the timing and effectiveness of public participation. These recommendations include that:

- The FWS require all HCPs with major effects to have some form of public advisory committee.
- The FWS build new disclosure and comment periods into the planning process to help applicants and the outside stakeholders communicate about HCP provisions before a plan is set in stone.
- The FWS concentrate its efforts on programmatic HCPs developed by local governments rather than on a large number of small private landowner HCPs.
- The FWS involve independent scientists in HCPs with major effects.
- Congress and the FWS encourage public participation by requiring that HCP agreements allow for citizen enforcement and developing a grant program that rewards innovative approaches to public participation.

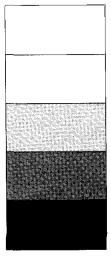
To make public participation in individual HCPs more elective, we recommend that:

- Congress and the FWS enable the FWS staff to involve the public more effectively in HCPs by hiring more field-level staff and providing all HCP staff with public participation and negotiation training.
- FWS staff make NEPA documents and other HCP information more readily accessible.
- Applicants and FWS staff involve outside stakeholders, including independent scientists, early and consistently throughout HCP planning processes. They should use a variety of different outreach methods, including field trips, workshops, and steering committees.
- Applicants and FWS staff communicate clearly with outside stakeholders about their input and expectations of the planning process in order to avoid creating unmet expectations and consequent dissatisfaction.

Location of HCPs and Case Studies

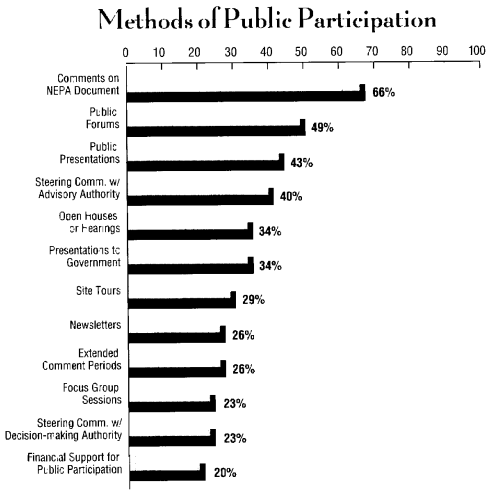


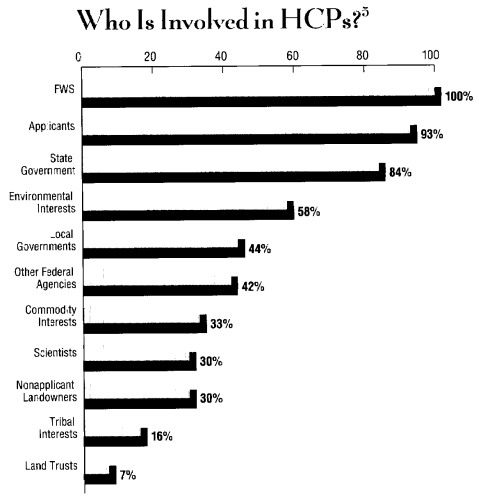
Number of Surveyed HCPs Per State



Location of HCP Case Studies

1 Plum Creek I-90 HCP
2 Washington Department of Natural Resources HCP
3 Weyerhaeuser Willamette HCP
4 California Department of Water Resources HCP
5 Kern Water Bank HCP
6 Western Riverside County HCPs
7 Orange County Central–Coastal NCCP/HCP
8 San Diego Multiple Species Conservation Plan
9 Clark County HCP
10 Balcones Canyonlands HCP
11 International Paper Co. Red Hills Salamander HCP
12 Georgia Safe Harbors HCP
13 Massachusetts Piping Plover HCP
14 Wisconsin Karner Blue Butterfly HCP





INTRODUCTION

Public Participation In Habitat Conservation Planning

In theory, Habitat Conservation Plans (HCPs) are designed to balance the needs of endangered species with the needs of private and other nonFederal landowners. But do HCP agreements live up to this promise and promote the public interest?

The effectiveness of public participation in the HCP decisionmaking process provides critical insights for answering this question. As a negotiation process that seeks to balance private and public interests, habitat conservation planning must find ways to deal effectively with the concerns of HCP applicants; public agencies; and outside stakeholders, such as independent scientists, interest groups, Native American tribes, local governments, state and other Federal agencies, nonapplicant landowners, and the public.

HCPs that incorporate the ideas and concerns of affected parties while meeting the biological requirements of the Endangered Species Act (ESA) may successfully balance the needs of species and ecosystems with the need for of economic develop-

ment. However, HCPs that lack the involvement of key outside stakeholders risk undermining their scientific credibility and public support.

Indeed, we found that meaningful public participation in the HCP process has the potential to provide significant benefits to the U.S. Fish and Wildlife Service (FWS), the lead Federal agency in most HCPs, as well as to HCP applicants, affected species, and the public. Specifically, public participation can enhance the information on which HCP decisions are based, improve understanding and relationships among HCP stakeholders, increase public and political support for HCPs, and provide applicants with greater certainty about the long-term viability of HCPs.

However, many of these potential benefits are not being fully realized. Our research indicates, with several important exceptions, that outside stakeholders have a limited ability to change the substantive provisions of HCPs and arc unsatisfied with HCP processes and outcomes.

The benefits of public participation are not being achieved for several reasons. The FWS's policies and attitudes suggest that public participation is not a high priority within the Service. In addition, public comment periods on documents created under the National Environmental Policy Act (NEPA) and ESA—the most typical form of HCP public participation—come too late in the HCP development process to provide meaningful opportunities for public involvement in HCP decisions. In many HCPs, FWS staff and HCP applicants also ineffectively manage the negotiation process leading to HCP agreements.

This report outlines the potential benefits of public participation and then analyzes why the benefits of public participation are not being fully realized. It concludes with a series of recommendations for better involving the public in the HCP planning process. Our recommendations do not deal with all of the problems facing those engaged in habitat conservation planning. For example, other recent reports provide important lessons for improving the scientific basis of HCPs.[3] Nevertheless, our findings suggest that improving the design and management of public participation will lead to better and more enduring HCPs.

We draw extensively on case studies and survey results to understand the perspectives of FWS employees, HCP applicants, and outside stakeholders who are actively involved in the HCP process. As much as possible, we tell the story in their words in order to share the variety of HCP experiences we encountered. In many respects, this story is discouraging and frustrating. Still, in a small number of our case studies, FWS staff and applicants effectively involved the public and balanced private and public interests. These success stories provide useful lessons for improving habitat conservation planning.

Public participation is defined in this study as . . .

The involvement of all nonapplicant and non-U.S. Fish and Wildlife Service participants in HCP development and implementation. Outside stakeholders include independent scientists, interest groups, Native American tribes, local governments, state and other Federal agencies, nonapplicant landowners, and the public.

Meaningful public participation is. . .

A dynamic process in which applicants, the FWS, and outside stakeholders share information with each other about their interests, concerns, and ideas. While this may take many forms, depending on the context of individual HCPs:

- It requires applicants to solicit public participation when it can be incorporated into the planning process, to listen and respond to public input, and to implement proposed changes when appropriate.
- It also requires that all parties clearly communicate their expectations of how public input will be used in the planning process.
- In the most effective processes, parties work together to find creative and acceptable solutions to problems and develop trust through face-to-face interaction.

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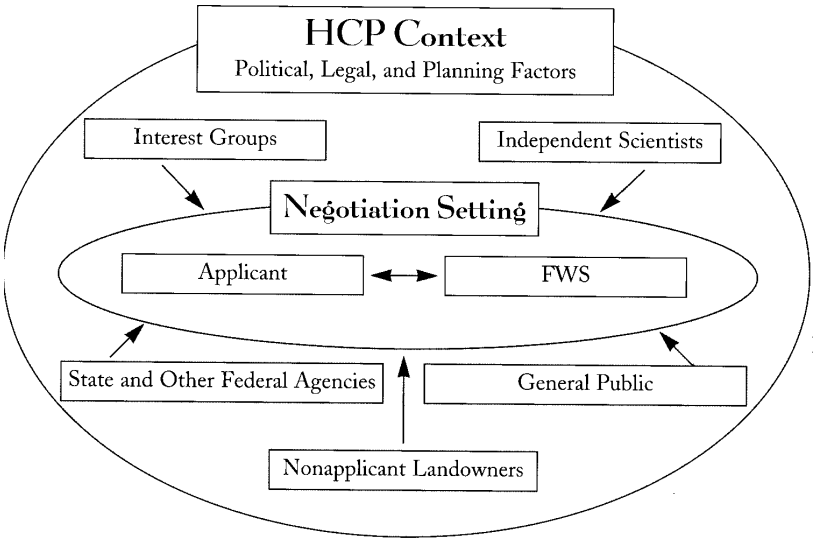
[3] Frayed Safety Nets; P. Brussard et al., A Statement on Proposed Private Lands Initiatives and Reauthorization of the ESA from the Meeting of Scientists at Stanford University, April 3, 1997; G. Meffe, Letter from 169 Scientists to Senator Chafee and Congressman Saxton, July 23, 1996; J. Kostyack, "Surprise," Environmental Forum: March/April 1998, 15(2), pp. 23–28.



THE HCP EXPERIENCE

A Wide Variety of Approaches

HCPs are essentially products of negotiations between limited parties—primarily the applicant and FWS. Outside stakeholders—independent scientists, interest groups, Native American tribes, local governments, state anti other Federal agencies, nonapplicant landowners, and the public—are involved to varying degrees in particular HCPs. Their involvement depends a great deal on the political, legal, and biological context of the HCP and the willingness of the applicant to include them.

Indeed, the HCPs we studied used many different forms of public participation, and outside stakeholders tended to play a variety of roles during the negotiation of individual HCPs. Approximately half of the 45 large, recent HCPs included in our survey results held public forums, 40 percent convened steering committees, and 30 percent gave site tours. According to our survey, state agencies were involved in a high percentage of HCPs, while local governments, interest groups, independent scientists, and tribes were involved in fewer HCPs.

In a number of our case studies, outside stakeholders had significant opportunities to participate in the development of the HCP and the applicant and FWS responded meaningfully to their input. In many of these cases, HCPs stakeholders were allowed to participate directly in HCP negotiations. In others, applicants made a concerted effort to communicate with stakeholders about their input and changes made to the HCP as a result of that input.

For example, the applicant in the Karner blue butterfly HCP in Wisconsin used a collaborative steering committee process in which the committee developed the entire HCP for FWS approval. The committee consisted of a number of outside stakeholders, including state agencies, environmental groups, utility companies, and forest products companies. In this and similar cases, outside stakeholders tended to be very satisfied with the HCP process. Indeed, this type of HCP illustrates many of the potential benefits of a well-managed public participation process.

However, we found two other types of HCPs that were much more common. In the first, the applicant and FWS provided significant opportunities for public participation but failed to respond meaningfully to the public's input. In the Plum Creek HCP, for example, the applicant provided outside stakeholders with numerous opportunities to comment on its plans and created expectations that it would seriously consider those comments. However, many outside stakeholders felt frustrated that the company and FWS ignored their comments. In the second and most common type of HCP, the applicant and FWS did not provide significant opportunities for public participation during the development of the HCP. For example, in its Willamette HCP, Weyerhaeuser negotiated directly with the FWS, and the public was only formally involved late in the process through a comment period on an environmental assessment (EA) prepared under NEPA.

These two types of HCPs have several common characteristics. First, outside stakeholders sit on the periphery of the negotiations between the applicant and FWS. As a result, they are forced to use other legal and political means to influence the HCP. Stakeholders also tend to be dissatisfied with these HCPs because they do not provide meaningful opportunities for public participation. Indeed, we found that stakeholders are less satisfied with HCPs that provide less meaningful opportunities for public participation. Finally, these HCPs provide numerous examples of pitfalls to avoid when designing and managing a public participation process. These pitfalls arc discussed throughout the report.

The actual level of outside stakeholder involvement in an HCP depends on their perceived power and the context of the HCP. Because levels policy gives applicants almost complete discretion to shape public participation beyond the comment period requirements of the ESA and NEPA, outside stakeholders are typically involved only to the extent that the applicant perceives their involvement to be in its interest. If the FINS and applicant perceive outside stakeholders as powerful, they are more likely to address outside stakeholders' concerns, at least cosmetically, during HCP negotiations. Stakeholders have power if they can affect or delay an HCP decision through litigation or have political influence over the primary negotiating parties.

For example, in the Orange County Ccntral-Coastal HCP, which was one of California's first planning efforts under the Natural Community Conservation Planning (NCCP) program [4] environmentalists who participated on an advisory committee initially had little clout. Many of their early suggestions were ignored. However, as Dan Silver of the Endangered Species Habitats League explained: "As time wore on, we had more [influence] as the resource agencies realized that the overall NCCP program wasn't going to have much support in Congress or the Legislature if the first one [NCCP] had no conservation group support. In the end, they [FWS and the applicant] made the easy changes because they needed our support politically." Peter DeSimone of the National Audubon Society similarly explained: "It's all politics and personality. The politics are so extreme here that you are better off schmoozing with some politician than sitting down and doing some real planning."

The level of stakeholder involvement in HCPs also depends on landownership patterns, the type of applicant, and the extent to which HCPs affect local economies. In particular, outside stakeholders tend to be more involved in HCPs with state or local government applicants than they are in HCPs with private landowner applicants. While many private applicants do not perceive themselves as having incentive to pursue meaningful public participation strategies, government applicants typically have extensive public participation requirements and experience. Government applicants also tend to have a greater political interest in public participation, because their HCPs affect a wider varies" of interests and public resources. .

Why Is Public Participation Beneficial?

Public Participation . . .

- Can improve the quality of an HCP.

Outside stakeholders can bring technical information and other resources to HCP decisionmaking. They are more likely than either the applicant or the FWS to be able to articulate their real concerns with an HCP, which allows these concerns to be addressed in an effective and efficient manner. Outside stakeholders also can help craft creative solutions that balance the range of interests involved in HCP decisions.

- Can build public support for an HCP.

Involvement in the decisionmaking process can improve stakeholders' understanding of the choices made in an HCP and the constraints facing both the applicant and FWS. Applicants can also be more responsive to stakeholder concerns. Meaningful public participation can build relationships and trust that can enable the HCP to move forward. For an HCP involving a single, private applicant, public support is needed to provide the enhanced certainty that landowners seek. For an HCP involving government applicants or public lands, public support is necessary for the plan to achieve political acceptability. Ultimately, a plan that is supported by outside stakeholders is more efficient than one that faces potential litigation and political action.

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[4] The California NCCP program is a state program that encourages conservation planning activities in urban southern California, with a special focus on coastal sage scrub habitat. It was passed by the California legislature in 1991 and has been marketed (much like the HCP program) as a means to resolve environmental-economic conflicts over endangered species on private lands. Two of the HCPs that we studied through case studies (Orange County Central-Coastal HCP and San Diego Multiple Species Conservation Program Plan are moving through the HCP and NCCP processes concurrently.

- Provides an important measure of the likely success of an HCP.

For many HCPs, evaluation of success in biological terms will not be possible in the near term. One indicator of the likely success of an HCP is the satisfaction level of outside stakeholders, including independent scientists. If people with different interests, knowledge, and perspectives all look favorably on the direction set in an HCP, it is more likely that it will achieve its biological targets. In addition, a plan that is supported by outside stakeholders is more likely to be implemented successfully.

- Is a vital component of the FWS's responsibilities under Federal law and landowner obligations as neighbors in communities.

Congress has established public participation as an important element of endangered species decisionmaking. Through the citizen suit, review-and comment, and full disclosure elements of the ESA, NEPA, and other laws Lauding Federal administrative procedures, the FWS is directed to organize an effective process for involving the public. Such involvement is an important element of a democratic society, and its significance is magnified in decisions affecting public trust resources such as wildlife, publicly used landscapes, and public funds, as are often involved in HCP decisionmaking. Involving the public in HCP decisionmaking is also part of being a good citizen and neighbor. Well-established norms associated with communities establish responsibilities associated with citizenship and landownership.

The Potential Benefits of Public Participation

A meaningful public participation process has the potential to provide significant benefits to HCP applicants, the FWS, the public, and affected species. While the majority of HCPs do not currently capture these benefits, these potential gains suggest reasons why applicants and the FWS should consider improving their public participation policies and practices.

Participation clearly improves the quality of information available to decisionmakers. Ninety-four percent of FWS respondents to our survey said that public participation increased the quality of information available to develop HCPs. According to Rich Wininger of Weyerhaeuser, public participation can bring up legitimate issues that can "help defuse misperceptions."

Public participation can also help stakeholders learn about the legal, political, and biological complexities of HCPs. If participants are involved early and consistently in the process, this learning can help establish communication and trust among participants, which is important for plan approval, implementation, and future conservation efforts. In the Karner blue butterfly HCP, forest products and utility industry representatives reported that the inclusive HCP process improved their communication with others in their field. Nonprofit and government representatives also improved their relationships with the private sector. As Nancy Braker of The Nature Conservancy said, "If it had been an easy process, and we only had to meet a couple of times, we would have never developed stronger ties with the timber companies that have resulted in further opportunities to do effective conservation work in Wisconsin."

Involvement of outside stakeholders can build public support for an HCP and increase the likelihood of plan approval and implementation. With opportunities for learning and building trust, public participation can help garner the support of potential critics and prevent future conflicts and delays. Our case study results show that this is especially true when HCPs provide for early and consistent public participation. HCPs with a greater level of public participation tend to have higher and broader levels of outside stakeholder satisfaction, which decreases the chance of future delays through administrative appeals or litigation.

On the other hand, HCPs that do not effectively involve the public can become vulnerable to lawsuits and other delays. In the Riverside County Stephens kangaroo rat HCP in California, the public had significant opportunities to participate, but many participants felt that their comments were ignored. One result was a high number of lawsuits from environmentalists and property owners, which slowed the planning process and drained the coffers of the joint county-municipal authority created to develop the HCP. By 1996 (before the HCP was approved and even more lawsuits were filed), the joint county-municipal authority reported spending $1.3 million on litigation and legal services. The county seems to have learned from its mistakes. Local officials developing a multi-species HCP in Western Riverside are trying to avoid the high degree of controversy associated with the earlier single-species HCP. Although the multiple species HCP is not yet complete, all participants—applicant, FWS, and outside stakeholders—characterized it as a more collaborative and satisfactory process than the first plan.

Clark County: Capturing the Benefits of Public Participation

The Clark County HCP for the desert tortoise effectively managed several aspects of public participation. As a result, the HCP enjoys wide support in this growing area of Nevada.

As with other HCPs that enjoy public support, Clark County, the primary applicant, created a steering committee at the outset of the planning process that involved a wide array of interests, including the county, local, state, and Federal agencies; academics; developers; off-road vehicle interests; miners; and national and local environmental groups. This diverse membership legitimized the committee process and helped build trust and ownership of the plan.

Dolores Savignano, a FWS biologist involved in the HCP, said: "There was good buy-in because of all the participation. Our approach definitely lowered the controversy level and actually promoted learning, which has resulted in more actions getting implemented."

The steering committee kept the planning process running smoothly by hiring a facilitator and establishing two subcommittees. The technical subcommittee kept the steering committee from bogging down in technical uncertainty, while the education subcommittee worked to enlist the public's support in protecting the tortoise. They educated the public by using a telephone hotline, speaking engagements, school materials, videos, billboards, and newspaper, radio, and TV ads.

Participant continuity also facilitated the success of the HCP by building trust and understanding. The steering committee met more than 100 times over 8 years. Many of the core committee members stayed involved throughout the planning process and even formed an implementation and monitoring (I&M) committee.

The committee operated on a principle that compromise was necessary and that everyone needed to buy into the overall document. According to Paul Selzer, the process facilitator: "No matter how long we took we were never going to get total unanimity. The key was consensus not on every little item but on the whole thing."

Broad committee support translated into broad public support. When the committee submitted its plan to the county commissioners, the commissioners unanimously voted for it and submitted it to the FWS as their official HCP application. As Selzer noted: "ESA matters are explosive and most government entities love it when the enviros walk hand-in-hand with the biggest developers in the region and request in unison for them to do something."

While some biological and policy questions linger, the plan continues to be supported by key stakeholders. According to Selzer: "No one from any side has really complained about the plan or its implementation. There are issues and everyone is not totally happy. But if you asked them, would you rather have this plan or not, they would all want it." In fact, the process worked so well that the county is using the HCP committee to prepare a new, 5-million-acre multi-species HCP that will be the largest HCP in the country if it is approved. [6]

If structured and managed correctly, steering and advisory committees enable outside stakeholders to get involved earlier and more consistently in the development of HCPs, thereby helping to capture many of the benefits of public participation. For example, an environmentalist involved in a number of HCPs said that being part of a working group: "allowed us to understand how the plan developed and evolved.

[The plan] is easier to accept if you understand the series of step-wise decisions that occurred. We had the opportunity to satisfy ourselves that we couldn't do certain things like connect two reserves. . .

[The plan] worked for me, but if I had not been a part of the working group, I would likely not have been able to accept the plan. Having that ability to see it as it was developed was critical."

The involvement of outside stakeholders, particularly independent scientists, can also strengthen the negotiating position of FWS staff. In negotiations information is power, and outside stakeholders often provide useful and credible information to FWS staff. Having groups other than the FWS make the case for permit conditions can also strengthen the Service's bargaining position.

According to interviewees, outside stakeholders can also aid field-level FWS staff in making their case with upper-level decisionmakers.

HCPs that include the involvement of outside stakeholders after HCP approval are more likely to be implemented successfully. For example, in the Georgia Safe Harbors HCP, the steering and scientific advisory committees—both made up of outside parties—will oversee the implementation process. In the Orange County Central/Coastal NCCP/HCP, three public members sit on the 15-member board of the nonprofit corporation created to implement the HCP. They can act as watchdogs,

[6] Las Vegas Review Journal, November 17, 1997, p. B1.

informing the agencies and outside stakeholders if problems occur. According to Dave Harlowe, an assistant FWS field supervisor: "I think more people will come around to appreciate this element of the final plan. It is a very positive, partnership-building mechanism, and it essentially gives continued life to the plan so that it doesn't become like many processes, where frankly the final product is largely forgotten by the public."

The involvement of outside stakeholders can also help the FWS and applicants leverage other valuable resources and expertise, which is particularly important given the FWS's chronic budget and staffing problems. For example, The Nature Conservancy has been critical to the implementation of the Coachella Valley fringetoed lizard HCP in southern California, which was one of the first HCPs ever completed. The Conservancy provided funding, secured options on reserve lands, and is the repository and distributor of mitigation fee funds. It also manages the reserve, oversees management activities, and conducts public outreach. All parties to the HCP agree that the plan would not work without the Conservancy's continued involvement. [7]

The involvement of independent scientists can have a particularly beneficial effect on HCP processes and products. In several of our case studies, independent scientists helped design conservation strategies and improved the scientific basis of the plans. For example, in the Clark County HCP, independent scientists were involved in a technical subcommittee early in the planning process. They helped formulate the plan and provided scientific review of the steering committee's proposals. As the plan developed, members of the technical subcommittee continued to sit on the overall steering committee and played a critical role in shaping the plan.

Continued involvement by independent scientists in the planning process can also increase the public credibility of an HCP. For example, in the Washington Department of Natural Resources (DNR) HCP, a science team recommended overall conservation strategies. The team's work was widely supported by industry groups and environmentalists alike. Unfortunately, those groups lost confidence in the plan when, according to Tim Cullinan of the National Audubon Society, among others, the "policy people took over" and the scientific basis for the plan was perceived to have been altered.

The early involvement of independent scientists also has the potential to help applicants and the FWS negotiate HCPs more efficiently by providing information that enables the FWS to clarify requirements for applicants. Applicants tend to negotiate plans that come as close as possible to the minimum acceptable conservation standard. However, this minimum standard is often difficult to define in practical terms, and the FWS often keeps standards ambiguous in individual HCPs to strengthen its negotiating position. For example, Kristi Lovelady, senior administrative analyst of the Riverside County Habitat Conservation Agency, described her frustration with the lack of FWS clarity: "They were supposed to be the authorities on how much is enough . . . . The whole process of the plan was like trying to construct something in a pitch black room and somebody saying 'you're kind of close.'" Early scientific involvement can reduce problems like this by shedding light on biological questions that bog down negotiations and providing objective criteria to which negotiating parties can appeal.

In the best of situations, public participation can also "expand the pie" and help participants discover creative solutions that at least partially meet their interests. As Paul Seizer, the facilitator for the Clark County HCP, said, "You might not get your way on every item, but in the end the document ought to be better for all than the status quo and any alternative you could get through regulation or litigation." In this inclusive HCP, everyone received something they wanted. Developers received greater assurances that they could continue to develop in fast growing Las Vegas. In addition, development fees paid for state and FWS research, fencing along highways to protect desert tortoises, public outreach on tortoise conservation, the purchase of grazing leases from willing sellers, and other activities that met the interests of participating stakeholders.

The Full Benefits of Public Participation Are Unrealized

Unfortunately, while there are a number of HCPs that illustrate the benefits of engaging in a meaningful public participation process, most of the HCPs we studied do not capture these benefits. In fact, according to our survey and case study results, interest groups and independent scientists are not involved in a large number of HCPs, and few HCP agreements are significantly changed because of public participation. Significant substantive change> to HCPs tend to occur early in the plan-

[7] M. Bean, S. Fitzgerald, and M. O'Connell, Reconciling Conflicts Under the Endangered Species Act: The HCP Experience, World Wildlife Fund, Washington, DC, 1991, pp. 66–78.

ning process, before interest groups or other stakeholders are involved in a significant way. As a result, outside stakeholders generally are less satisfied with HCP processes and agreements than applicants or the FWS.

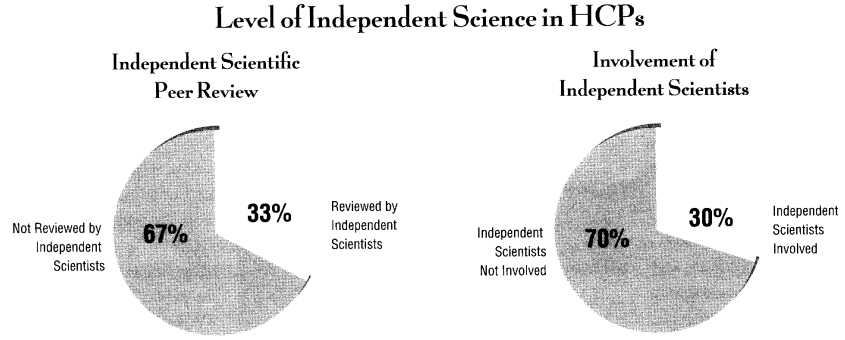
Outside stakeholders are not significantly involved in a large number of HCPs. According to our survey results, groups representing environmental, Native American, and commodity interests were not involved in more than 40 percent of large HCPs. We also found that when these groups were involved, the timing of their involvement diminished their influence. They tended to be more involved during comment periods on ESA and NEPA documents than during earlier phases of the planning process when most key HCP decisions are made.

Nonagency and nonapplicant scientists generally are not involved in most HCP processes. Independent scientists were actively or moderately involved in only 30 percent of surveyed HCPs. Less than a third of surveyed FWS staff reported that they or the applicant submitted documents for peer review by independent scientists.

However, even if outside stakeholders have an opportunity to participate in an HCP, this does not necessarily mean that they will be meaningfully involved or have their comments seriously considered or implemented. Indeed, even when the public is involved, most substantive changes to HCPs are driven by the interests of applicants and the FWS, not the public. Only 14 percent of FWS staff responding to the survey said that public participation resulted in significant substantive changes to the HCPs in which they were involved. In more than a third of HCPs, public participation led to no substantive changes. In the Plum Creek I–90 Corridor HCP, the FWS and Plum Creek tightly controlled the development of the HCP. According to Jim Matthew of the Yakima Indian Nation, "It was basically a Plum Creek and FWS show, and whatever they were came up with is what we got."

While there are important exceptions, outside stakeholders tend to be dissatisfied with HCP processes and final HCPs, and their expectations of influencing HCPs typically go unmet. In a number of our case studies, applicants provided significant opportunities to participate, but outside stakeholders did not feel that applicants or the FWS incorporated their input. As a participant in the Washington DNR HCP stressed: "The Washington DNR came out and said, "OK, we're going to do all these things to retrieve input from the public and we are really interested in what you have to say." And the public commented at length and intelligently, and that input was not only ignored, but in some cases it was almost ridiculed by the Department." Dennis Hollingsworth of the Riverside County Farm Bureau, a participant in the Stephens kangaroo rat HCP echoed this sentiment. "We can say that we had a lot of accessibility to the process by the public . . . . But if we look at how it all came out in the wash, it didn't matter. There's a healthy number of folks that feel like their public input was wasted—that it was nothing but window dressing."

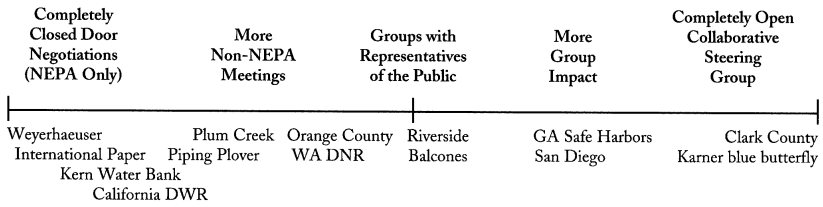
Clearly, pleasing everyone, especially single-issue interest groups, can be difficult given the complex nature of HCP agreements and the biological requirements of the ESA. As Chuck Turley of the Washington DNR suggested, "There's a difference between providing someone an opportunity to comment and making some sort of upfront guarantee that you're going to do everything they recommend." Neither the law nor FWS policy requires the applicant or the Service to change HCPs based on public comments. And except in unusual cases where the applicant and Service prepare an environmental impact statement (EIS), the FWS's public participation policy does not require the applicant or Service to respond to public comments.



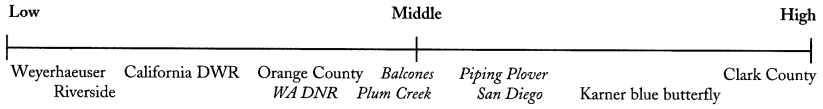
However, unmet stakeholder expectations can lead to disappointment and dissatisfaction. For example, failure to acknowledge and respond to public comments

can fuel outside stakeholders' impressions that applicants and the FWS ignore their comments. Furthermore, the FWS and applicants can create expectations that public input will be incorporated into an HCP, which leads to frustration when comments are not addressed. As Alike Collins of Plum Creek observed: "If you are going to make [your HCP] available to the public and they are going to comment on it, then you really have an obligation to respond to what they say. There is a tradeoff of making information more available but creating a monster in terms of being able to manage the results that you get." Applicants trying to improve their image or curry public favor should be wary of promising meaningful public participation if they do not intend to respond to public concerns.

Spectrum of Outside Stakeholder Participation



Spectrum of Outside Stakeholder Satisfaction[9]



Our analysis indicates that outside stakeholders are more satisfied with the HCP planning process when HCPs have early and consistent public participation, involve advisory committees, and use independent scientists. Furthermore, outside stakeholders' satisfaction with HCPs increases when they are able to participate more intensively—to work with others to develop a plan rather than provide feedback on a plan. Similarly, the less involved a group is in the negotiation process, the more opposed to the HCP they tend to be. This suggests that outside stakeholders may be more satisfied with future HCPs if they are able to participate earlier and more consistently in the process. Unfortunately, this is not the norm.

While outside stakeholders are generally dissatisfied with the HCP process, FWS staff believe that they are very responsive to public concerns. An amazing 94 percent of FWS survey respondents reported that their final HCP agreement responded very effectively or moderately effectively to the concerns and interests of outside stakeholders, including those not actively involved in the planning process. This wide difference in groups' satisfaction is also evident in our case studies. For example, when asked to rate their satisfaction with the Washington DNR HCP, both the FWS and the DNR (the applicant) gave the final HCP a 4 on a scale of 1 to 5, with 5 being very satisfied. Environmentalists, however, ranked the final plan as a 2 and Bob Dick of the Northwest Forestry Association asked, "is there anything less than a 1?"

The fact that FWS staff perceive that they respond effectively to public concerns while the public is dissatisfied with many HCPs suggests that there are real problems with the HCP program. Either FWS staff do not expect to make significant changes to HCPs based on public input, or staff are not effectively communicating with the public about the changes made to HCPs based on their input. In either case, the FWS is not managing the process to maximize the benefits of public participation. Moreover, while stakeholder satisfaction is certainly not the only measure of HCP success, it is an important one. The more satisfied stakeholders are with an HCP, the more likely that HCP is to protect affected species and balance public and private interests. Unfortunately, the HCP experience to date suggests that many stakeholders are dissatisfied with the process and that the balance between private interests and public trust is missing.

Tribal, State, and Federal Agency Involvement

As articulated in the FWS's Habitat Conservation Planning Handbook, the FWS has special responsibilities to Native American tribes, states, and other Federal

agencies.[8] Our research, however, indicates that these outside stakeholders face many of the same obstacles to participating effectively in the HCP process as other stakeholders. For example, according to Patty Garvey-Darda, a Forest Service biologist: "Plum Creek circulated things, but only some, and more importantly they would not incorporate our feedback. The sense was there it is, but don't ask questions." They didn't really want us involved."

Native American tribes share similar experiences. The environmental impact statement for the Washington DNR HCP describes significant efforts to incorporate the interests of tribes, and one FWS contact felt that tribes were catered to a bit on this project." Yet, according to Terry Williams of the Tualip Tribe, "the tribes were left out of the planning process." Indeed, a number of tribes recently filed a notice of intent to sue the DNR over the HCP. Mike Collins of Plum Creek explained a similar difference of perceptions in the Plum Creek HCP by saying: "No one translated the HCP into the issue that concerns the tribes the most, and that is treaty rights. We thought more in terms of considering their interests biologically, but to expand to the bigger issue of treaty rights—we missed it."

OBSTACLES TO PARTICIPATION

Problematic FWS Policies and Attitudes

The FWS's policies and attitudes limit HCP participants' ability to capture the full benefits of public participation. The Service sends its staff conflicting messages about the importance of public participation relative to other agency priorities, such as streamlining the planning process, securing HCP agreements, and being flexible advisors to applicants. indeed we found significant evidence that the FWS prioritizes other goals above public participation.

For example, Service policy statements promoting public participation are vague and unenforceable, while policies that limit participation are specific and effective. The FWS's Habitat Conservation Planning Handbook (Handbooks directs staff to "encourage" applicants to involve outside stakeholders like Federal and state agencies and to use steering committees or other means to involve interested parties in HCPs.[10] We found little evidence to suggest that this vague policy is leading to meaningful public participation.

In fact, the FWS has several specific policies that undermine effective participation. FWS staff are under pressure to meet Service-imposed approval deadlines, SUCH as the target permit processing times outlined in the Handbook.[11] These deadlines limit stakeholders' ability to review HCPs thoroughly and the FWS's ability to respond effectively to public input.

For example, despite receiving more than 34 letters asking for a comment period extension in the Orange County Central-Coastal NCCP/HCP, the FWS and the applicant denied the request because of a previously negotiated deadline. In the Plum Creek HCP, the Environmental Protection Agency (ERA), Forest Service, and Washington Department of Fish and Wildlife (DFW) felt constrained by the limited time to review documents. Dave Whipple of the DFW stressed that Plum Creek had defined a specific timeline and "in some instances we ended up without enough time to review things thoroughly."

Other HCP policies also limit public participation. For example, the FWS's policies of categorically excluding "low effect" HCPs from NEPA review and recommending that applicants prepare environmental assessments (EA) instead of environmental impact statements (EIS), which require more public disclosure and involvement, sends the message that public participation is not a high agency priority.[12]

The FWS also follows a satisfied customer approach to working with applicants, which places a high priority on meeting the needs of applicants and securing HCP agreements. The Service has been encouraged to take this approach from several sources. Government "reinvention" efforts have encouraged agencies to focus on customer service. The Clinton Administration has also defended the ESA by using HCPs to show that the Act can be used to balance species protection and development. Indeed, in response to national and local pressures, the Service has deferred more to applicants in order to develop a constituency of satisfied applicants and increase the number of HCPs.

Numerous respondents told us that these dynamics reduce the power of outside stakeholders and FWS staff and give applicants excessive control over the process.

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[8] FWS and NMFS, Habitat Conservation Planning Handbook, (Washington, DC, US Department of Interior and Commerce, 1996).

[10] Handbook, pp. 3–8, 6–22.

[11] Handbook, pp. 1–10, 1–14.

[12] Handbook, p. 5–2, 5–3.

As a FEES biologist working on numerous HCPs said: "We have been bombarded from above with this sort of can do attitude—to get out there and work with the applicant and get some product on the market. Anything that delays that or makes it more difficult is not viewed favorably. The whole concept of customer service has been really stressed with the applicant being considered the only customer."

While streamlining the process is a valid goal, the public must remain an important customer too, and its interests must be represented in permitting decisions. Unfortunately, many in the FWS view public participation as a procedural burden rather than an opportunity to improve its negotiating position or develop better HCPs. Indeed, many see public participation simply as a legally required step in an approval process that must be completed as quickly and effortlessly as possible.

FWS staff are also left to decide for themselves how to balance guidance that they be advisors to applicants without being "rigid dictators."16 We found little evidence to suggest that FWS staff make encouraging public participation a high priority with applicants. We also found that staff have low expectations for making changes to HCPs based on public input. Peter Cross, a FWS field director, summarized his interpretation of FWS policy by saying, "The FWS doesn't think it's proper to dictate who an applicant should or shouldn't invite to attend."

The Service's narrow view of public participation partly reflects its history and capabilities. The FWS faces staffing and other resource shortages, and deadlines limit the staffs ability to effectively involve the public. The FWS has years of experience as a regulatory agency, but effectively managing HCPs and other cooperative conservation programs requires staff to use new techniques, work with new constituencies, and balance more complex issues than it has in the past. Unfortunately, many HCP staff do not have effective collaborative decisionmaking or negotiation skills. Indeed, 59 percent of FWS survey respondents reported that they did not have public participation training. FWS staff also work in a complex legal environment defined by statutes like the Federal Advisory Committee Act, which makes them even more wary of dealing with outside stakeholders.

Ultimately, the Service's approach undermines the effectiveness of the HCP process. To improve the HCP program, the FWS should carefully review its internal priorities and improve its policies.

The U.S. Fish and Wildlife Service's Public Participation Policy

Together, ESA, NEPA, and state environmental laws such as the California Environmental Quality Act require applicants and the FWS to disclose proposed activities and their potential impacts, consider a range of alternative actions, and accept public comment on those actions.

The Service typically notices receipt of an HCP application in the Federal Register and then conducts at least a 30- to 45-day comment period on NEPA and ESA documents depending on whether an environmental assessment (EA) or more extensive environmental impact statement (EIS) is being prepared. If an EIS is being prepared, the Service and applicant also conduct a scoping period early in the planning process to identify issues to be addressed in the EIS.

The law does not require the FWS to incorporate public comments into an HCP or make decisions based on public comments. Instead, the Service reads public comments, makes a final decision to approve or reject the HCP, prints its decision in the Federal Register, and in the case of an EIS, publishes a record of decision and final EIS.

The law provides the FWS with significant discretion to shape its own public participation policy. However, rather than using the law's flexibility to craft effective public participation processes, the FWS interprets the law narrowly and focuses on explicit disclosure and comment period requirements.

The Service encourages applicants to pursue the bare minimum in NEPA documentation and comment periods. For example, it encourages applicants to pursue EAs or "mitigated EAs" instead of more extensive EISs.[13] Only EISs include an analysis of alternative actions and a response to public comments.

Some HCPs receive no public review. HCPs deemed "low effect" by the FWS can be categorically excluded from NEPA review. These HCPs are not necessarily small. For example, the FWS recently determined that the 400,000 acre Gulf States Paper Corporation HCP was a "low effect" HCP that could be excluded from NEPA review.[14]

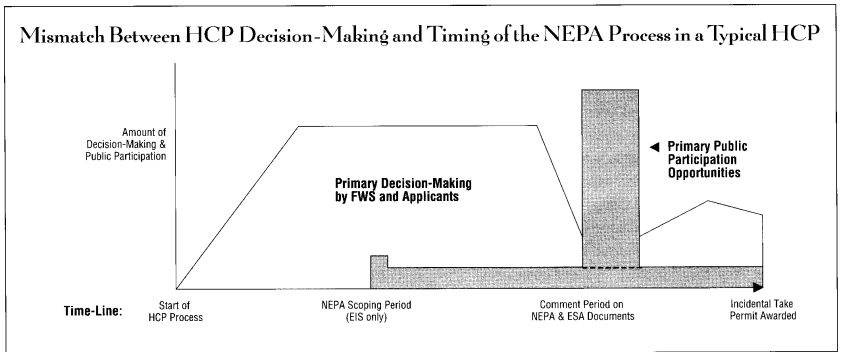
The FWS also grants much of its discretion under the law to applicants. According to the Service, the development of an HCP "is considered a private action and is,

[13] Handbook, p. 5–3.

[14] FWS, Notice of Availability of an Application by Gulf States Paper Corporation, Federal Register: 63(103): 29423–29424, May 29, 1998.

Therefore, not subject to public participation or review until the Service receives an official application."[15] As outlined in the FWS's Habitat Conservation Planning Handbook (Handbook), FWS staff are directed to "encourage" but not require applicants to provide for public participation beyond chat explicitly required by the ESA and NEPA.

The Handbook makes special mention of encouraging the development of stakeholder advisory committees and the involvement of other Federal and state agencies and Native American tribes. It also outlines a number of suggestions for making committee processes function more effectively. While this is sound advice, we found chat FWS staff do not make public participation a high priority with applicants. In most HCPs, the vague encourage-but-not-require policy fails to lead to meaningful public participation. In fact, in most HCPs, the NEPA and ESA comment periods are the sole public participation mechanism.



NEPA Is Not Enough

NEPA provides important access for outside stakeholders into the HCP decision-making process. But the dynamics of the negotiation process used to design HCPs are ill-matched to the opportunities that NEPA provides for public participation. Thus, NEPA provides a necessary but insufficient approach to public participation in habitat conservation planning.

The NEPA process was designed to provide-the public with information about project objectives, alternative actions, and environmental effects. In doing so, it can provide a consistent vehicle for public disclosure and comment on nearly finalized HCPs, which is especially important when an HCP has been negotiated by landowners and the FWS behind closed-doors. NEPA also gives the public an important opportunity to file formal comments on proposed HCPs. Finally, because it is required and institutionalized, NEPA creates benchmarks that help stakeholders gauge the progress of the planning process.

However, NEPA was not designed to facilitate public participation in the negotiations that take place in the development of most large-scale HCPs. The timing of comment periods on NEPA documents is particularly mismatched with the dynamic decisionmaking that occurs in HCP negotiations. NEPA provides for scoping periods early in the planning process when an EIS is prepared and comment periods on ESA and NEPA documents at the end of the planning process when either an EIS or less extensive environmental assessment EA is prepared.[17] However, in HCP negotiations, key decisions tend to be made iteratively throughout the process. Indeed, most key HCP decisions are negotiated after the NEPA scoping process (if an HCP has one, and most do not) and well before the comment period on ESA and NEPA documents. As a result, unless they are involved in a committee process, outside stakeholders do not typically have an opportunity to participate in the planning process when key decisions are being made.

This timing problem is magnified by the dynamics of HCP negotiations, which can be intense, involved, and protracted. Over time, issues become increasingly interconnected, and negotiators become vested in specific elements of the agreement and reluctant to unravel tentative agreements. Several FWS staff indicated that once a planning process is underway, every plan provision becomes hinged to every other. As Bill Vogel of the FWS explained "an HCP becomes like a house of cards where you don't want to risk altering too much for fear the whole structure will collapse."

[15] FWS, Habitat Conservation Plans and the Incidental Take Permitting Process.
[17] ESA documents include a draft HCP and an implementation agreement.

By the time ESA and NEPA documents go out for public review late in the planning process, negotiators are increasingly unlikely to change tentative agreements even if new information is discovered or legitimate concerns are raised during the comment period. As Ruth Siguenza of the EPA said: "The culture of [NEPA and HCPs] is a very rough fit. NEPA alone is not a very effective tool when it comes to HCPs in terms of affecting changes that come out of the whole process. I have seen folks at the FWS go back to the negotiating table after NEPA but it is very hard to do that."

FWS staff are also reluctant to make significant substantive changes to HCPs because they do not want to prepare supplemental NEPA documents. Applicants can use this reluctance to their advantage and out-negotiate FWS staff. As a IONS staff person acknowledged: "The political pressures got pretty nasty. Because the public comment period had already occurred, there was tremendous pressure brought on us not to change the HCP too much. People said, 'If you change it too much, you'll have to do a supplemental EIS.'"

Similarly, as the planning process nears completion, negotiators become increasingly less open to scientific input that challenges tentative agreements. Indeed, the burden of proving that there are scientific problems with a negotiated agreement can shift away from the applicant and the FWS and onto independent scientists and interest groups concerned with HCP provisions. In the Plum Creek case, Dave Whipple of the Washington DEW said, "We had to prove that what Plum Creek was proposing was bad, not necessarily that they had to prove what they were proposing was good."

The mismatch between the NEPA process and the character of HCP decisionmaking can be extremely frustrating to outside stakeholders who often invest significant amounts of time reviewing, commenting, and trying to influence HCPs at the end of the process when their comments are less likely to be useful or incorporated into the HCP. Our case study and survey results indicate that public participation before the comment period on ESA and NEPA documents results in more substantive changes to HCPs than participation during other phases of planning or implementation. Yet we also found that interest groups tend to be more involved during the comment period on ESA and NEPA documents than during any other planning phase.

Outside stakeholders also expect their input to be incorporated into the plan, and when it is not, they tend to be dissatisfied and unsupportive of the process and resulting HCP. According to Timothy Neely, the county planning administrator involved in developing the Orange County Central-Coastal NCCP/HCP: "The problem was people felt they had already missed the point to really affect the plan and that the decisions were already made [by the point of the NEPA comment period]. A lesson we learned was the need to do more public workshops before the comment period—when it was easier to make adjustments."

Although outside participants understand the legal importance of filing written comments for the public record, some outside stakeholders have also learned strategies for dealing with these dynamics. Dave Whipple of the Washington DEW reported: "What I learned is to be super prepared. If we don't comment or have feedback when something is presented they will take it for approval. Silence is really consent in these arenas." Other outside stakeholders push for advisory committees to be created as a vehicle for providing input throughout the negotiations. Others design innovative ways to provide comments that are difficult to ignore. For example, environmental groups concerned about the Weyerhaeuser Willamette HCP commissioned two scientific review panels to analyze the HCP.

By itself, NEPA also fails to facilitate active communication among the parties interested in an HCP. In HCPs with broad public support, stakeholders often build personal relationships and open new lines of communication with other participants. These lines of communication help build trust among the participants, dispel misinformation, and open new opportunities for cooperation in the future. But the NEPA process—with its focus on written documentation—does not facilitate this type of cross-party communication. As Rich Wininger of Weyerhaeuser said: "A lot of comments came out of NEPA. With many, we thought we could handle or answer them, but that is not our job. Once you go through public comment, it is the Service's job to respond and the applicant isn't supposed to be involved. It's frustrating. I don't think a lot of environmental groups realize all the things that we have since worked through and resolved." In an effective process, the lines of communication would be open so that the interested parties would know about these types of changes and might actually be working with the applicant to craft them.

Designing a reasonable range of alternatives, as required by NEPA, is also difficult in many HCPs. As Ruth Siguenza of the EPA said, "What is quirky about HCPs is that because they are voluntary and negotiated, it is hard to come up with

three or four reasonable alternatives as the process leads you to some sort of settlement." Tony Metcalf of the San Bernardino Audubon Society similarly complained of the Riverside Stephens kangaroo rat HCP: "If you look at the various alternatives that were proposed by the environmentalists, you don't see them anywhere. The only thing that comes even close, unfortunately, is a 'no project' alternative which nobody was really happy with."

Although the FWS and applicants have adequate room within the guidance of NEPA and the ESA to craft processes that provide more opportunities for effective public participation, they rarely do so. As currently applied, the formal public participation process is misleading to outside stakeholders and an unsatisfactory decisionmaking process.

Ineffective Management of HCP Negotiations

Applicants and the FWS have also structured and managed individual HCPs in ways that fail to capture the full benefits of public participation. Research and experience in other natural resource decisionmaking arenas suggests that managers of effective negotiations design dynamic processes in which stakeholders share information about their interests and concerns, test the validity of competing technical arguments, develop trust through face-to-face interaction, and work together to find creative and acceptable solutions to problems.[18] They also ensure that participants' roles are well defined, the agenda and scope of the negotiations are defined early in the process, all legitimate interests are represented, and participants have an incentive to be involved in a good-faith manner. In our research, we found a number of examples where these elements of an effective process are not incorporated into HCP negotiations.

Managing effective negotiations requires a different approach than the traditional public participation approach that most HCPs follow. Most HCP negotiations are not structured so that the outside stakeholders concerned about an HCP can continue to communicate with and learn from each other throughout the planning process. As Jim Fries of The Nature Conservancy of Texas commented on the traditional nature of the process in the Balcones Canyonlands HCP: "The public participation process allows people who already have preconceived positions to continue to state them and argue for them, not to adjust their positions based on new information. That's a real deficiency. I don't think it's a dynamic or real iterative process; it's a real static process."

There is often confusion during HCP development about the role of certain stakeholders, particularly the role of FWS staff. For example, in the Riverside Stephens kangaroo rat HCP and the Balcones Canyonlands HCP, Service staff initially took a hands-off approach while participants expected them to provide more guidance. Alan Glen, a committee member representing the Greater Austin Chamber of Commerce, said of the Balcones HCP, "There was confusion about whether the FWS was really a participating member or whether they were a resource for the committee." In both HCPs, the resulting misunderstanding led to significant frustration on the part of participants.

While the FWS officially defines its role in steering committees and other HCP processes as that of a "technical advisor,"[19] in a more effective process it would play a host of different roles. At various times throughout HCP negotiations, FWS staff may need to act as experts, facilitators, leaders, stakeholders, and final decisionmakers. These roles are different from those played in traditional regulatory decisionmaking processes and will require FWS staff to learn new skills. These roles should also be articulated clearly and repeatedly to other HCP stakeholders throughout the planning process.

With few exceptions, the public has little role in negotiating the agenda or scope of HCP planning processes, even though the scope and agenda have a significant effect on the shape of final HCP agreements. More typically, applicants, acting to varying degrees with the FWS, determine the basic scope and agenda of planning processes. This leads to frustration and, at times, distrust among stakeholders. For example, in negotiating the scope of the Orange County Central-Coastal NCCP/HCP, the primary negotiating parties excluded from the negotiation a major toll road that eventually bisected a key HCP reserve and at the end of the process included a controversial development project located away from the main permit area. Interest groups and the public tried unsuccessfully to affect these decisions. In par-

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[18] J. Wondolleck, Public Lands Gnflict and Resolution, Plenum Publ., New York, 1988; S. Yaffee, "Cooperation: A Strategy for Achieving Stewardship Across Agency Boundaries," pp. 299–324, in R. Knight and P. Landres, StevJardship cross Boundaries, Island Press, Washington, DC, 1998.

[19] Handbook, pp. 3–5, 3–6.

ticular, the last minute addition of the development project damaged trust among those involved in the HCP. Dave Harlowe, an assistant FWS field supervisor working on the project, said, "In the long run, this one issue really hurt us in terms of understanding and support."

Delays and other problems arise when critical outside stakeholders are not included in the planning process. The exclusion of a critical viewpoint from an advisory committee can undermine the legitimacy of a committee, lead to increased controversy and litigation, and prevent plans from being implemented. For example, according to Ralph Costa of the FWS, the applicants for the Georgia Safe Harbors HCP chose members for its steering committee "just by intuition and a lot of knowledge about the players."

The committee included an environmental representative from the Georgia Wildlife Federation, but it did not anticipate needing a national environmental group representative. After the HCP was released in draft form, national environmental groups raised serious concerns about the plan and successfully delayed approval of the final HCP. Similar problems can arise when advisory committee members do not represent the positions of their organizations or claim to represent interests they do not actually represent.

HCP negotiations can also bog down because important participants do not have the incentive to begin negotiating or make hard choices. Paul Seizer, the facilitator in the Clark County HCP, described that highly collaborative process as a "balance of terror." He further stressed: "The process works only when every member [of the steering committee] is convinced that the product will be the best available alternative at that time. So the challenge becomes finding that alternative so that they become convinced over time that it is better to participate than fight."

For example, in the Orange County and San Diego HCPs, the listing of the California gnatcatcher and the threat of development restrictions gave certain parties more incentive to move the planning processes forward and made the HCP ripe for negotiation. Designers of the piping plover HCP in Massachusetts failed to thoroughly consider the incentives facing the beach managers whom they wanted to apply for coverage under the HCP. Only one beach manager applied. According to Susanna von Oettingen of the FWS: "Because the HCP was so restrictive, most of the beach managers didn't want to bother. Too much work for not enough payback."

Planning process organizers are not always sensitive to the needs of certain participants. For example, Ann DeBovoise, an individual landowner affected by the San Diego MSCP Plan, complained that important working group meetings took place in the middle of the day, which made them inconvenient and burdensome to attend. Allison Rolfe of the Southwest Center for Biodiversity, among others, complained that meetings were poorly advertised and getting on mailing lists was difficult. Moreover, while the San Diego working group regularly accepted public comments, it did so at the end of its meetings, which often lasted two or 3 hours.

Advisory committees present unique challenges to managing a multi-party planning process. For example, in the Balcones HCP, participants acknowledged that employing a consistent, neutral facilitator may have improved the process. Facilitators can keep lines of communication open and ensure that the process is designed to build trust among parties. They can also keep the process moving forward by defusing conflict and promoting cooperation and compromise. In Balcones, two interviewees spoke of decisions often being made "behind the scenes" in unofficial meetings with only a select group in attendance. Other committee participants disputed this, but the distrust of those who believed the process was unbalanced and unfair may have been alleviated if an experienced facilitator had helped the Balcones committee set up ground rules and communicate about the activities of its members.

Outside stakeholders often do not have the resources to participate as effectively in the planning process as they would like. This can lead to nonparticipation by important stakeholders, significant power differences among participants, and approval delays. In particular, independent scientists currently have few professional or financial incentives to participate in the HCP planning process. Landowner Ann DeBovoise stressed: "It was irritating to look around and see all these people who were getting paid to do this, especially when their decisions affect our land and a lot of other people. To participate and protect our interests took all of our spare time, evenings, and weekends." In the Riverside HCP, environmental representatives had a particularly difficult time attending HCP meetings because they were all volunteers.

Both the applicant and FWS staff complained that delays occurred in the Plum Creek HCP because the National Marine Fisheries Service (NMFS) did not have the resources necessary to participate effectively in planning process. As Mike Collins of Plum Creek stressed: "The biggest frustration I had was that NMFS was a part-

ner in this process in theory only. In practice, because of severe staffing limitations, they were not able to participate as a true partner. They sometimes intervened at points when we thought we had an agreement with the government. We assumed because of their absence at meetings that the FWS was speaking for both of them, which it couldn't."

Applicants and the FWS can also have difficulty gauging the public's level of interest in an HCP at the outset of the planning process. In a number of our cases, applicants and the Service tried to involve the public early, during the scoping phase of the planning process, only to find little public interest in their efforts. In some of these cases, the applicant and FWS assumed that low turnout or minimal controversy at early public meetings justified fewer or no public meetings later in the process. In the Plum Creek HCP, this assumption added to public frustration with the HCP. Several dissatisfied participants reported that while Plum Creek offered them a number of opportunities to air their concerns early in the process, it was not very responsive to their concerns later in the process. As Charlie Raines of the Sierra Club said, "Plum Creek and the Service started with this big splash that didn't bring them much, and so later on they rationalized 'let's just get these documents out: these meetings are a waste of time.'"

As the examples illustrate, applicants and the FWS do not always manage negotiations or public participation as effectively as they could. HCPs are a different decisionmaking environment than traditional FWS regulatory decisionmaking. In these differences lie the great potential for HCPs to balance public and private interests, but only if HCP dynamics are managed more effectively on-the-ground. Indeed, a greater understanding of the dynamics of the negotiation process and how to manage public participation could go a long way to improving HCP planning.

Fear of Public Participation

The benefits of public participation are also not realized in the HCP planning process because applicants, the FWS, and outside stakeholders fear the burdens of public participation.

Developing an HCP takes significant time and resources, especially given the complexity of most HCPs. Most interviewees reported that public participation adds to the cost and length of the planning process even if it provides other benefits. Applicants who have significant investments at stake in an HCP are legitimately concerned about delays and the costs of responding to public demands. As Bruce Beckett, a Weyerhaeuser representative stated: "The HCP effort is going to die under its own weight. The more the FWS burdens the process down, the less willing people are going to be to enter it." FWS policies and practices echo concerns that active public participation will scare away potential HCP applicants.

Outside stakeholders may also not have the interest or resources to participate in an HCP. Participating in an HCP can have high opportunity costs, and stakeholders can grow frustrated if they feel applicants are not seriously addressing their concerns. Some are concerned that their involvement will lend credibility to an inadequate HCP. National Audubon's A Citizen's Guide to Habitat Conservation Plans recommends that activists "carefully evaluate the time required to fully participate, as well as the limits of such participation. . . .If participation does require some measure of support for the final plan, or a role in negotiating the plan itself, conservationists should think carefully before agreeing to participate."[20]

While developing an effective public participation process can be challenging, our analysis suggests that applicants, the FWS, and the HCP benefit significantly by making public participation more meaningful. As the facilitator in the Clark County HCP, said: "We worked out differences without imposing solutions. This is a longer process and more expensive—but it works."

Different HCP applicants and stakeholders have different needs, and there is no one-size-fits-all approach that works for everyone. Indeed, not every applicant should pursue a multistakeholder HCP negotiation like the Clark County HCP. Meaningful participation may mean forming an advisory committee with a clearly defined mission that educates key stakeholders about HCP tradeoffs or calling stakeholders to discuss their input. Outside stakeholders should approach applicants by demonstrating their value to the process. What do they have that applicants want, and how can applicants meet the group's interests and still meet their own needs?

This all takes time and effort. Still, our research suggests that increasing communication early in the process, seeking input within clearly articulated parameters, and working face-to-face with others to solve problems, pays off handsomely in

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[20] M. Minette and T. Cullinan, Citizen's Guide to Habitat Conservation Plans, National Audubon Society, August 1997, p. 12.

terms of increased credibility, trust, relationships, and support. As such, we strongly encourage applicants and the FWS to explore ways to make their policies and practices more effective.

POLICY RECOMMENDATIONS MAKING PUBLIC PARTICIPATION MORE MEANINGFUL

Policy Recommendations

Expand Participation Policies and Procedures

1. Require HCPs with major effects to be guided by a public advisory committee.
2. Require new public disclosure and comment periods throughout the HCP process.
3. Extend NEPA comment periods.
4. Eliminate target processing times.
5. Clarify the "maximum extent practicable" standard and document its determination.

Expand Independent Science

6. Facilitate the involvement of independent scientists in all HCPs with major effects.

Develop Regional HCPs

7. Encourage local governments to pursue programmatic HCPs.

Create New Incentives

8. Create a grant program that encourages participation.
9. Acknowledge the public's right to enforce HCP agreements.

Enable EWS and Applicants

10. Increase funding to hire and train additional HCP field staff.
11. Redirect staff to encourage applicants to pursue expanded public participation.
12. Provide HCP staff with public participation and negotiation training.
13. Create a public participation resource team to help design effective planning processes.
14. Make HCP information more readily accessible to the public.

Expand Public Participation Policies and Procedures

1. Congress and the FWS should require that HCPs with major collects hi designed and guided lay an advisory committee that includes outside stakeholders.

Steering or advisory committees can provide a structure that enables participants to get involved earlier and more consistently in the development of HCPs, thereby helping to capture many of the benefits of public participation. Committees that include all affected outside stakeholders, including independent scientists, interest groups, and members of the public, can find innovative ways to solve problems, strengthen relationships among stakeholders, and develop plans that are more biologically and politically viable. HCPs with major effects include those with significant impacts on species, public lands, or public finances or significant public demand for inclusion in the HCP process.

2. Congress and the FWS should build new public disclosure and comment periods into the HCP planning process. These periods can be held periodically or at trigger points in the planning process. All HCPs should require public scoping under NEPA.

Public participation must be better structured to deal with the dynamics of the negotiation process. In particular, the process must consider the ongoing nature of HCP negotiations and the strong disincentives to change tentative agreements once they have been made. Comment periods on ESA and NEPA documents, as they are currently implemented, generally come too late in the process.

Comment and disclosure periods would be more useful if they occurred throughout the HCP negotiation process. As such, all HCPs, including those that only require an EA should hold scoping periods. Other trigger points for public disclosure and comment should also be added. These points could be structured for each planning process and be negotiated by stakeholders early in the process.

Points for review might include:

(a) after completion of draft and final conservation strategies or reserve designs,

(b) directly before the preparation of NEPA documents (i.e. the project has been designed and alternatives can be evaluated), and

(c) after applicants submit their application to the FWS. [21]

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[21] T. Cullinan, "Habitat Conservation Plans in Industrial Forests of the Pacific Northwest" End. Species Update, July/August 1997, 14(7&8) p. 31.

The FWS could deem these additional requirements satisfied for applicants using advisory committees.

3. NEPA comment periods should be extended to a minimum of 90 days for steering Committee HCPs and 120 days for all other HCPs.

Many members of the public find current comment periods prohibitively brief, especially considering the complexity and risk associated with HCPs. As such, the length of comment periods on ESA and NEPA documents should be extended. Having comparatively shorter comment periods for open steering committee processes could provide an incentive for applicants to increase public participation. Presumably, outside stakeholders involved in an HCP with a committee process would also be more knowledgeable about the HCP and better able to comment quickly on it.

4. The Service should eliminate target processing times in its HCP Handbook.

These deadlines send the message that efficiency is more important than public participation and put pressure on agency staff to speed through the NEPA process and their review of the HCP application.

5. The Service should develop criteria used to evaluate whether an applicant has mitigated take to the "maximum extent practicable" and explicitly document its determination of this standard in NEPA documents for all HCPs.

Before the FWS can approve an HCP it must determine that the plan will mitigate the take of endangered species to the "maximum extent practicable." This approval standard is not very well defined, however, and FWS staff have significant discretion to determine its meaning in individual HCPs. In cases of scientific ambiguity, applicants often limit public disclosure and participation in their HCPs because they fear that public input will cause the FWS to interpret the standard to their disadvantage. As Bruce Beckett of Weyerhaeuser said, "When you don't know what you are shooting for, your distrust among participants increases." Moreover, the public often does not have access to the information or logic the FWS uses to make its determination of this important standard. The standard should be clarified, and the evidence supporting the FWS's determination should be made available to the public.

Expand Evolvement of Independent Scientists

6. The Service should facilitate the involvement of independent scientists in all HCPs with major effects.

The involvement of independent scientists benefits everyone. It helps clarify how regulatory standards will be interpreted in individual HCPs, makes the decision-making process more credible and efficient, and provides applicants with greater certainty. It may also help bolster the negotiating position of FWS field staff.

In HCPs with major effects, FWS staff should work to ensure that independent scientific review happens early and consistently as HCPs develop, particularly after baseline data collection and analysis are complete. Funding to implement this recommendation is critical. One approach would use a blind trust arrangement with funds provided by the government or the applicant. To keep the process independent, the Service should coordinate selection of scientists in conjunction with professional societies and other Federal and state agencies. Scientists involved with relevant recovery and other scientific plans should be included. The comments of independent scientists should be made available to the public, perhaps on an anonymous basis.

Encourage Development of Regional HCPs

7. The Service should encourage more local governments to initiate programmatic HCPs.

Rather than working with a large number of individual private landowners, FWS staff should encourage local governments to pursue programmatic HCPs.

Once a programmatic plan is approved, the local government or other public entity that holds the HCP permit provides certificates to landowners who agree to follow the HCP's requirements. Local governments often have incentive to pursue these HCPs because they can be held liable under the ESA for issuing building permits that result in the take of endangered species.

There are a number of benefits associated with pursuing programmatic HCPs. The FWS can develop proactive and broad-scale plans to protect affected species. They can also better address the cumulative effects of development activities on ecosystems. Programmatic HCPs are also more efficient. Rather than participating in a number of small HCPs, FWS staff and outside stakeholders, including independent scientists, can participate in a larger process. This would also expedite the process for landowners, who would be able to apply to their local government for the proper certificate once the programmatic HCP is developed and approved rather than applying for their own Federal HCP permit.

Programmatic HCPs are also likely to have more public participation because more people would be affected by the HCP and interested in the planning process. Interest groups and other outside stakeholders are also likely to invest more resources in the process than they would in individual landowner processes. Finally, HCPs that are initiated by local governments typically have more opportunities for public participation than individual landowner HCPs. As one local government official involved in HCPs said, "The successful HCP is a government applicant HCP, because the process must be public and totally open."

Create Incentives to Encourage Public Participation

8. Congress or the FWS should create a grant program that encourages public participation.

Congress should authorize and appropriate funds to the FWS to establish two competitive grant programs. The first would support innovative programs for involving the public in the HCP process beyond current legal requirements. The FWS should select recipients based on criteria such as the balance of interests represented, ease of participation, and potential of replication.

The second grant program would support stakeholders verity limited resources who want to participate in the HCP process. There is precedent for funding participants with limited resources. In six of the HCPs responding to our survey, either the applicant or the Service provided citizens with financial support to participate in the planning process. Also, in the negotiated rulemaking model that we studied, Federal agencies financially assisted participants who had inadequate resources.

9. Congress and the FWS should explicitly acknowledge the public's right to enforce HCP agreements.

Outside stakeholders may sue to enforce the ESA and most other environmental laws. HCPs, however, lack clear outside stakeholder enforcement mechanisms and most recent HCP agreements do not acknowledge citizen enforcement rights. Under traditional contract law, this failure to either explicitly or implicitly acknowledge the rights of outside stakeholders means that they lack third-party beneficiary status and may not be able to enforce the agreements. [22]

Providing outside stakeholders with the explicit right to enforce HCP agreements, either in Section 11 of the ESA or in individual HCP agreements, would provide more incentive for HCP applicants to address the concerns of outside stakeholders and include them more meaningfully.

Enable the FWS and Applicants to Involve the Public More Effectively

10. Congress and the FWS should increase funding to hire and train additional FWS field-level HCP staff.

Currently, Service HCP staff are stretched thin, often handling multiple HCPs under significant time constraints. The lack of adequate resources limits the Service's ability to handle the scientific basis of HCPs, let alone effectively incorporate the public into the process. In certain cases inadequate Service resources can also contribute to significant HCP processing and approval delays. Increasing staff funding would improve the efficiency of the planning process.

11. The FWS should reaffirm guidance in the HCP Handbook to encourage applicants to pursue expanded public participation.

To its credit, the FWS has included valuable information about designing an effective public participation process in its Handbook. The Handbook makes special mention of encouraging the development of stakeholder advisory committees and the involvement of other Federal and state agencies and Native American tribes. According to the Handbook, advisory committees can help guide development of an HCP; consider appropriate development, land use, and mitigation strategies; and communicate progress to their larger constituencies, all of which can reduce conflict surrounding the HCP. The Handbook also outlines a number of valuable suggestions for making committee processes function more effectively. [23]

While this is sound advice, we found that many Service staff are not making public participation a high priority with applicants. Given conflicting messages about the importance of public participation relative to other Service priorities, FWS staff need to be told clearly that public participation is a high priority within the Service. Moreover, in the case of large effect HCPs, the FWS needs to require expanded participation.

The Service should also make information about effective public participation more accessible to applicants and staff and develop literature that illustrates the benefits of public participation. This literature could include case studies of success-

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[22] John Kostyack, "Surprise," The Environmental Forum, March/April 1998, 15(2) p. 28.
[23] Handbook, pp. 3–4, 3–5.

ful public participation processes in completed HCPs. Staff should distribute this literature to applicants during initial conversations about preparing an HCP.

12. The Service should provide HCP staff with public participation and negotiation training.

Communicating effectively with the public, designing effective and efficient public participation processes, and negotiating complex agreements require skills that many FWS staff do not have. Public participation training would better enable staff to negotiate HCPs that best meet the needs of the species, the Service, applicants, and the public. The Service should prepare a training curriculum that addresses communication and negotiation with a particular focus on the HCP experience.

13. The FWS should create a public participation resource team made up of individuals with HCP public participation, and negotiation experience.

The resource team could be called to help other FWS staff and HCP applicants design effective and efficient public participation processes or overcome participation roadblocks. Drawing on field experience, the team would develop an understanding of the factors that facilitated successful HCPs. It could then share this knowledge with other FWS staff and help them network with those who have experienced similar public participation challenges. The team could also help staff strategize for HCP negotiations.

14. The FWS should make information about HCPs more readily accessible to the public.

The public often has difficulty obtaining current, centralized information about the status of HCPs (both completed and in-process). To alleviate this problem, the FWS should create a publicly accessible, comprehensive HCP data base that tracks the progress of in-process HCPs. This data base should be posted on the World Wide Web and revised often.

We also found that outside stakeholders can have problems obtaining key HCP and NEPA documents. The FWS should require that field-level staff make NEPA and other documents readily available to the public. To obtain copies of NEPA documents, those interested in an HCP should neither be directed to HCP consultants nor asked to pay exorbitant fees.

INNOVATIVE WAYS TO INVOLVE OUTSIDE STAKEHOLDERS

International Paper's Red-Hills Salamander HCP: Involving Scientific Experts

There was very little controversy regarding International Paper's HCP for the Red-Hills salamander, in part because of the company's willingness to include scientists in the planning process. Joe McGlincy of International Paper said that he asked three salamander experts to review the HCP the company had developed. "I could anticipate that if we were going to get criticism, it would be from these two or three people. Asking them to review our plan made them aware of what we were doing as well as brought them on board with us. . . .When the HCP came out in the Federal Register for the general public review, those guys had already seen it, and there wasn't a big surprise in it for them."

The company also contracted a highly respected scientist to perform much of its fieldwork, and had a strong reputation for taking cooperative steps to protect salamanders in the past all of which helped make the HCP noncontroversial.

Karner Blue Butterfly HCP: Expanding the Range of Involved Stakeholders

In the Karner blue butterfly HCP in Wisconsin, those involved in the HCP divided themselves into two groups: partners who had land or other assets at stake and participants who were other active members of the public. The Wisconsin DNR sought to include as many partners and participants as possible in the process. Fred Souba of Johnson Timber Corporation credited the DNR for their work. "[Short of actually dragging people to the meetings, I think there's been an excellent effort made to involve as many public entities and individuals as possible."

Moreover, decisionmaking in the process was primarily by consensus. According to Dave Lentz, the HCP coordinator for the Wisconsin DNR: It's consensus of all participants—in other words, if we have a nonpartner who dissents on an issue, we don't just tell them to go away. We want them there. We want to know their position, we want them to try and convince us and work to great ends to do that." In only one or two cases were partner-only votes taken because a decision had to be made: in all other cases the process remained consensus based. As a result of the inclusive HCP process, several participants noted improved relationships. The draft HCP is anticipated to be completed during the summer of 1998.

Weyerhaeuser Willamette HCP: Interest Groups Involve Scientists

Environmental groups who were excluded from the negotiations surrounding the Weyerhaeuser Willamette HCP commissioned two scientific panels to review the

plan. One panel reviewed the HCP's aquatic protections and the other its terrestrial protections. The environmental groups then submitted the panels' comments to the FWS as part of their official NEPA comments. The groups felt that the panels provided new information and analysis and helped depoliticize the HCP decisionmaking process. For a number of reasons, including concerns raised by the panels, final approval of the HA continues to be delayed.

ADVICE TO HCP PRACTITIONERS: MAKING YOUR HCPS MORE EFFECTIVE

Building Elective HCPs

1. Involve the public early and consistently in the process.
2. Form a steering committee.
3. Involve independent scientists.
4. Define stakeholders' roles early in the planning process.
5. Tell outside stakeholders how they can help the process.
6. Use a variety of public outreach tools.
7. Hold public meetings, workshops, and field trips.
8. Make planning documents available.
9. Communicate with the public about their input.
10. Begin following existing FWS guidance.

During our conversations with FWS staff, applicants, and other HCP stakeholders and our research on public participation, we heard several consistent messages about how to design more effective public participation processes.

1. Involve the public early and consistently in the process.

Early, consistent, and meaningful public participation facilitates learning about proposed projects and the complexities and tradeoffs of the HCP planning process. It also gives outside stakeholders an opportunity to outline their interests and concerns before tentative agreements are reached that limit the negotiating parties' ability to make substantive changes to the HCP. Finally, early, consistent, and meaningful involvement can reduce conflict surrounding an HCP. help participants begin to trust each other, and build ownership of evolving agreements. As Susanna von Oettingen of the FWS said, "I think we are getting the message to get the public involved and knowledgeable as soon as possible. The trigger point for getting people involved should be the start of the project. Let folks know, get the players involved."

To involve the public throughout the process, managers may want to consider forming a steering committee or accepting written comments at any time during the planning process. Interviewees also recommended distributing draft documents or newsletters throughout the process to solicit public comments.

2. Form a steering committee.

Our research shows that outside stakeholders tend to be more satisfied with an HCP when public participation begins early in the planning process and involves a steering or advisory committee. Committees help participants understand the difficult issues and choices invoked in designing an HCP. When managed well, they can also help establish trust among participants and build public support for the HCP. The steering committee's job in the Georgia Safe Harbor HCP was to oversee and approve the actions of advisory subcommittees. The system worked well, according to Ralph Costa of the FWS, "I don't see how you could do a plan of this magnitude without those committees."

Still, committees are note panacea. Participants have to be given the opportunity to participate meaningfully in the process and have their input taken seriously by applicants and the FWS. Participants wild be unsatisfied if "Everyone at the table has an equal voice and no power," as Tony Metcalf of San Bernardino Audubon Society described his involvement in the Riverside Stephens kangaroo rat HCP.

3. Involve independent scientists.

An effective process is both technically sound and publicly credible. Independent scientists, especially when they are involved early in the process, can help achieve both of these goals. Their involvement also has the potential to make the process more efficient by helping to resolve the controversial technical issues that often surround HCPs.

4. Define stakeholders' roles early in the planning process.

Applicants and outside stakeholders often grow frustrated when they have conflicting expectations of their roles or the FWS's role in the planning process. Defining the scope of the project, ground rules, timing of public participation, and different participants' roles in the process early in the planning process, can make the process more efficient and less frustrating. Indeed, the closer outside stakeholders' expectations are to reality, the less likely they are to be frustrated by the HCP process.

5. Tell outside stakeholders how they can help the process.

Applicants should explain their goals with their property and HCP, and ask outside stakeholders to help them figure out how to meet the group's interests while still meeting their goals. Many creative solutions have come from this approach. Applicants should be sure to preface their remarks by explaining their expectations of the relationship. Applicants can tell outside stakeholders that they do not need their permission to do a project, but that they want the stakeholders to be informed about it and will accept reasonable advice if it can be accommodated.

6. Use a variety of public outreach tools.

A number of HCPs use large mailing lists, personal phone calls, or newspaper, radio, or television advertisements to alert the public to the HCP process. Information displays in public places, such as libraries, may also be useful. In the Georgia Safe Harbors HCP, the FWS conducted a series of statewide public meetings, but attendance was low. Attendance increased considerably, however, after the Service advertised the meetings using newspapers, television, and radio.

7. Hold public meetings, workshops, and field trips.

Holding public events or targeted meetings with particular outside stakeholders gives applicants opportunities to solicit early feedback and to educate outside stakeholders about their HCP vision and certain complex HCP issues. Field trips provide a special opportunity to educate stakeholders and spur relationships among participants.

8. Make planning documents available.

Outside stakeholders often have difficulty obtaining HCP documents, especially while HCPs are being developed. Some even have trouble during the NEPA comment period. The public needs easy and timely access to draft plans, ESA and NEPA documents, and other information to educate itself on HCP issues and participate meaningfully in the process.

9. Communicate with the public about their input.

If changes are made to an HCP based on public input, let outside stakeholders know about it. If changes are not made, explain to them know why they were not. Involve outside stakeholders in crafting certain changes to the HCP. In many cases, public comments can be easily addressed. Involving the public in making those changes will build valuable relationships and trust.

10. Begin following existing FWS guidance.

The Handbook provides a number of useful ideas for structuring an effective HCP process, such as negotiating in good faith, assigning experienced staff to large-scale or regional HCPs, including all affected interests in the process, and paying attention to stakeholders' perceptions of the process.24 Public participation would be more meaningful and effective if applicants and FWS staff regularly followed this guidance.

Running Elective Advisory Committee

Advisory committees, working groups, and steering committees are particularly effective at involving outside stakeholders in the HCP process. The mix of technical expertise and the collaborative process can help shape HCPs with wide credibility and support. Practitioners offered the following advice for making committees more effective.

- Ensure that all legitimate interests are represented. The exclusion of a critical viewpoint can undercut the legitimacy of a committee and lead to increased controversy, litigation, and delay. Orange County used a creative method to identify environmental community representatives: they allowed statewide conservation organizations to nominate environmental representatives.
- Participate in committee meetings. Because applicants and the FWS are the decisionmakers in the HCP process, their active involvement in meetings gives committees legitimacy, prevents end-runs around the committee process, and provides outside stakeholders with some assurance that their input will be used.
- Form subcommittees. Subcommittees with certain areas of expertise can make the committee process more manageable and efficient, especially when the committee is faced with complex and controversial scientific or financial issues. Smaller groups can also help build trust among participants.
- Hire a skilled facilitator. A facilitator can help keep negotiations moving forward, encourage compromise, and expand the negotiating pie by helping parties find creative solutions to problems. Participants in several HCPs, including Karner blue butterfly and Clark County, found a facilitator to be very useful.
- Work to maintain committee member continuity. Building strong relationships among participants and developing an understanding of complex HCP issues can take a long time. Regular attendance at meetings and continuity of committee participants helps the process move more smoothly. According to landowners involved

in the San Diego MSCP Plan, continuity helped participants move away from posturing, develop respect for divergent positions, and improve communication.

- Assist committee members who lack the financial resources to fully participate. Environmentalists and other interest groups are often unable to fully participate because Hey lack adequate resources. Several of the HCPs we examined dealt with this problem by reimbursing some participants' expenses or otherwise helping these groups participate.
- Open committee meetings to the public. Open meetings help communicate complex HCP provisions to citizens or interest groups who are not actively involved on an advisory committee. Open meetings can also help make the process more credible. The Balcones HCP took this idea further by televising several committee meetings and giving He public opportunities to voice their concerns following meetings.
- Train committee members. The legal and scientific issues surrounding HCP processes can be very complex. The more participants know about the legal and scientific underpinnings of the HCP the better. Providing negotiation skills training can also help participants learn how to communicate their interests and participate more usefully.

STATEMENT OF DEFENDERS OF WILDLIFE

Defenders of Wildlife submits the following testimony on S. 1100 to the Fisheries, Wildlife, and Drinking Water Subcommittee of the Senate Environment and Public Works Committee. Defenders is a non-profit organization founded in 1947 with more than 300,000 members and supporters that advocates for the conservation of all native wild animals and plants in their natural communities. Much of our work before the Congress, Federal courts, and administrative agencies is focused on improving the effectiveness of our nation's most important law for the conservation of biological diversity—the Endangered Species Act ("ESA").

General Comments

S. 1100 would make several relatively narrow amendments to the ESA. The substance of those amendments will be addressed below, but first we would like to offer a word of caution on the potential risk that this legislation presents. As this subcommittee is well aware, the ESA has been up for reauthorization since 1992 and despite numerous attempts, Congress has been unable to reauthorize the Act. Defenders believes that the issues addressed in S. 1100 would be best addressed in the context of a comprehensive, bipartisan reauthorization bill that improves the effectiveness of the entire program. There has been no shortage of attempts over the last several years to weaken various aspects of the ESA through appropriation riders and other pieces of legislation. Defenders is extremely concerned over the prospect of S. 1100's narrow focus being lost and the bill becoming simply a vehicle for weakening amendments to the ESA. Should that occur Defenders and others will work to kill the legislation. We therefore urge the bill sponsors and members of the Senate to avoid efforts to attach provisions to S. 1100 that would weaken the ESA.

Defenders supports those provisions of S. 1100 that would provide deadlines for the development of recovery plans for endangered and threatened species and require critical habitat to be designated for endangered and threatened species concurrently with the final recovery plan. We strongly oppose the provision that would amend the ESA's citizen suit provision. With the inclusion of changes recommended below, we are hopeful that this legislation can help resolve two of the biggest implementation failures of the current ESA program: 1) the failure to develop recovery plans in a timely and effective manner; and 2) the failure to designate critical habitat at all.

Recovery Planning

The primary purpose of the ESA is, "to provide a means whereby the ecosytems upon which endangered species and threatened depend may be conserved. . . ." The terms "conserve," "conserving," and "conservation" are defined by the Act as, "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 the Act are no longer necessary." In short, the goal of the ESA is the recovery of endangered and threatened species. To aid in the attainment of this goal the ESA requires, with limited exceptions, that the Secretary of the Interior or the Secretary of Commerce ("Secretary") develop and implement recovery plans for all listed species. To date, recovery plans have been developed for about 75 percent of the approximately 1,200 U.S. species listed under the ESA. Even when recovery plans are developed in a timely manner, they are frequently implemented inadequately, if at all. Without the development and implementation of scientifically

sound recovery plans, achieving the goal of recovery is far less likely. Provided the Congress appropriates the necessary funding to allow the Secretary to meet these new obligations, something it has consistently failed to do with respect to the existing ESA program but which is absolutely critical, S. 1100 could significantly improve the recovery planning process by amending the ESA to provide for the first time a deadline of 36 months for the development of recovery plans for species listed after the date of enactment of this legislation. In addition, it would require the Secretary within 5 years of the date of enactment to finalize recovery plans for all currently listed species lacking such plans. This will be a much needed improvement to the ESA.

Critical Habitat

Perhaps even more important to the recovery of our nation's endangered and threatened species, is the ESA provision that with limited exceptions requires the Secretary to designate critical habitat for all listed species, and the requirement that all Federal agencies avoid actions likely to destroy or adversely modify such habitat. The most prevalent cause of endangerment for endangered and threatened species is habitat loss—affecting more than 95 percent of listed species according to one study. Clearly, we will not stem the growing number of species added to the Federal list of endangered and threatened species, or recover those species currently on the list, unless our conservation efforts are focused on reversing the loss and fragmentation of habitat. S. 1100 would amend one of the most important but improperly implemented provisions of the ESA for conserving habitat—the requirement that the Secretary designate critical habitat for species listed as endangered or threatened. As disappointing as the implementation of the ESA's recovery planning provisions have been, compliance with the duty to designate critical habitat has been even worse. Notwithstanding a clear statutory mandate to designate critical habitat, less than 10 percent of the nearly 1,200 species listed by the U.S. Fish and Wildlife Service have critical habitat designated.

Critical habitat is generally defined under the Act as that area determined to be, "essential for the conservation of [listed] species. . . ." In other words, critical habitat is that habitat necessary for the recovery of endangered and threatened species. Defenders believes that, given critical habitat's proper focus on recovery, it makes more sense to designate it concurrently with finalization of the recovery plan, but only if there is a clear deadline for development of recovery plans and some habitat protection provided at the time of listing. This change is consistent with the National Research Council's ("NRC") recommendation that the designation of critical habitat be done at the time the recovery plan is finalized, and it is one that Defenders supports.

Concerns and Recommended Changes

First, the duty of the Secretary to designate critical habitat for those species listed at the date of enactment and for which recovery plans have been developed, but for which critical habitat has not yet been designated, is unclear. The bill establishes clear deadlines for the Secretary to designate critical habitat for those species listed after the date of enactment (concurrent with the recovery plan, but no later than 3 years after the date of listing), and for those species listed prior to the date of enactment but for which no recovery plan has been developed (concurrent with the recovery plan, but no later than 5 years after the date of enactment). We are extremely concerned that in failing to expressly address the Secretary's duty to designate critical habitat for currently listed species with recovery plans, the bill could be interpreted in a manner that would excuse the Secretary from having to make such designations. While we are confident that the intent of the bill's sponsors was not to create a critical habitat loophole, we strongly urge that language be inserted clearly establishing the Secretary's duty to designate critical habitat for those species listed at the date of enactment for which recovery plans have been developed.

Second, we strongly urge that the language amending the citizen suit provision of the ESA be stricken from the bill. The citizen suit provision is perhaps the most effective and important provision of the ESA. We see no compelling reason why this language is needed or how it would improve the ESA. Moreover, in light of the Supreme Court's Bennett v. Spear, 520 U.S. 154 (1997) decision, it appears that the intended purpose of this language would not be accomplished.

Third, in cases where the critical habitat of a species is not determinable at the time of the final listing determination, the ESA currently allows the Secretary one additional year to designate critical habitat. S. 1100 would retain the "not determinable" exception, but would not impose any durational limit on its use by the Secretary. Given that this bill would require critical habitat to be designated concurrently with the recovery plan, rather than at the time of listing, we seriously ques-

tion the need for retaining the "not determinable" exception. We find it difficult to imagine a situation when critical habitat would not be determinable at the time the recovery plan is finalized. We therefore recommend that the "not determinable" exception be eliminated or at the very least that it include a durational limit on its use.

Finally, as stated previously, requiring that the designation of critical habitat be done concurrently with the final recovery plan is consistent with the recommendation of the NRC. The NRC, however, also recognized the importance of designating some habitat at the time of listing to the extent that sufficient information regarding a species' habitat requirements is available. The NRC called these areas "survival habitat." To the extent that sufficient information was available, survival habitat would be, "that habitat necessary to support either current populations of a species or populations that are necessary to ensure short-term survival, whichever is larger." The designation of survival habitat would be important in helping to guide habitat conservation efforts during the interim period between final listing and the time the recovery plan is finalized and critical habitat is designated. Given that survival habitat would be based solely on a species' habitat requirements to the extent that they are known at the time of listing, and would therefore be based on exactly the same information evaluated during the listing process, such a requirement should not impose any additional resource burdens or time constraints on the Secretary. We recommend that S. 1100 include a provision requiring the designation of survival habitat at the time of listing.

Thank you for the opportunity to provide testimony on S. 1 100. If you have any questions concerning this testimony, please contact: Mike Senatore at 202–682–9400.

LETTER SUBMITTED FOR THE RECORD

WESTERN URBAN WATER COALITION,
June 28, 1999.

SENATOR JOHN H. CHAFEE, *Chairman,*
Environment and Public Works Committee,
Washington, DC 20510.

DEAR SENATOR CHAFEE: The Western Urban Water Coalition (WUWC) would like to applaud your initiative to reform the critical habitat designation process of the Endangered Species Act. S. 1100 recognizes two fundamental facts about the current critical habitat process in the Act. First, the bill acknowledges that the best time to designate critical habitat is when we have had the opportunity to study and learn more about the species. The current system of designating critical habitat at the listing stage has resulted in designations without the kind of sound scientific credibility all parties expect. Early designations have unnecessarily alarmed states, regions and communities and resulted in unfortunate and unnecessary economic hardships. Second, the bill places more emphasis on recovery of threatened and endangered species. This bill recognizes that the best way to get a species off the endangered list is to recover it off the list.

WUWC is a national organization of major municipal water agencies located in the Western United States. Its membership includes water suppliers from seven Western states serving over 30 million water users in 17 metropolitan areas, providing water management, water supply and hydroelectric generation services. Few, if any, entities are more dependent on long-term planning and reliance on consistent environmental standards. As a result, the WUWC is dedicated to rational and reasonable reform of the Endangered Species Act (ESA) that can protect both species and the communities that live with them. WUWC has worked with the Committee for many years to develop bipartisan common-sense reform of the Act and welcomes the opportunity to do so in the future.

We also hope that the Committee will continue to consider other ESA amendments in this Congress. Amendments to Section 10 of the Act are critical to assuring habitat conservation for the future. No surprises, natural systems conservation plans and conservation equality for Federal facility users are provisions which deserve to be added to the weapons we use to combat species extinction. We look forward to working with you in the future.

Respectfully yours,

GUY MARTIN,
National Counsel, Western Urban Water Coalition.

II

106TH CONGRESS
1ST SESSION

S. 1100

To amend the Endangered Species Act of 1973 to provide that the designation of critical habitat for endangered and threatened species be required as part of the development of recovery plans for those species.

IN THE SENATE OF THE UNITED STATES

MAY 20, 1999

Mr. CHAFEE (for himself, Mr. CRAPO, and Mr. DOMENICI) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To amend the Endangered Species Act of 1973 to provide that the designation of critical habitat for endangered and threatened species be required as part of the development of recovery plans for those species.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. RECOVERY PLANS AND CRITICAL HABITAT DESIGNATIONS.

The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) is amended—

(1) by inserting after section 4 the following:

"RECOVERY PLANS AND CRITICAL HABITAT DESIGNATIONS

"SEC. 4A.";

(2) by moving subsection (f) of section 4 to appear at the end of section 4A (as added by paragraph (1)); and

(3) in section 4A (as amended by paragraph (2))—

(A) by striking "(f)(1) RECOVERY PLANS.—The" and inserting the following:

"(a) IN GENERAL.—The";

(B) by redesignating paragraphs (2) through (5) as subsections (b) through (e), respectively;

(C) in subsection (b) (as so redesignated)—

(i) by striking "(b) The Secretary" and inserting the following:

"(b) RECOVERY TEAMS.—

"(1) IN GENERAL.—The Secretary"; and

(ii) by adding at the end the following:

"(2) APPOINTMENT OF A TEAM.—Not later than 60 days after the date of publication under section 4 of a final determination that a species is a

threatened species or endangered species, the Secretary, in cooperation with any State affected by the determination, shall—

"(A) appoint a recovery team to develop a recovery plan for the species; or

"(B) after public notice and opportunity for comment, determine that a recovery team shall not be appointed."; and

(D) by adding at the end the following:

"(f) SCHEDULE.—For each species determined to be an endangered species or a threatened species after the date of enactment of this subsection for which the Secretary is required to develop a recovery plan under subsection (a), the Secretary shall publish—

"(1) not later than 18 months after the date of the publication under section 4 of the final regulation containing the listing determination, a draft recovery plan; and

"(2) not later than 3 years after the date of publication under section 4 of the final regulation containing the listing determination, a final recovery plan.".

SEC. 2. CRITICAL HABITAT DESIGNATIONS.

(a) IN GENERAL.—Section 4A of the Endangered Species Act of 1973 (as added by section 1) is amended by adding at the end the following:

"(g) CRITICAL HABITAT DESIGNATIONS.—

"(1) RECOMMENDATION OF THE RECOVERY TEAM.—

"(A) RECOVERY TEAM APPOINTED.—Not later than nine months after the date of publication under section 4 of a final regulation containing a listing determination for a species, the recovery team (if a recovery team has been appointed for the species) shall provide the Secretary with a description of any habitat of the species that is recommended for designation as critical habitat pursuant to this subsection and any recommendations for special management considerations or protection that are specific to the habitat.

"(B) NO RECOVERY TEAM APPOINTED.—If a recovery team is not appointed by the Secretary, the Secretary shall perform all duties of the recovery team required under this section.

"(2) DESIGNATION BY THE SECRETARY.—The Secretary, to the maximum extent prudent and determinable, shall by regulation designate any habitat

that is considered to be critical habitat of an endangered species or a threatened species that is indigenous to the United States or waters with respect to which the United States exercises sovereign rights or jurisdiction.

"(A) DESIGNATION.—

"(i) PROPOSAL.—Concurrently with publication of a draft recovery plan, the Secretary, after consultation and in cooperation with the recovery team, shall publish in the Federal Register a proposed regulation, based on the draft recovery plan for the species, that designates critical habitat for the species.

"(ii) PROMULGATION.—Concurrently with publication of a final recovery plan, the Secretary, after consultation and in cooperation with the recovery team, shall publish a final regulation, based on the final recovery plan for the species, that designates critical habitat for the species.

"(B) OTHER DESIGNATIONS.—If a recovery plan is not developed under this section for an endangered species or a threatened species, the Secretary shall publish a final critical habi-

tat determination for the endangered species or threatened species not later than three years after making a determination that the species is an endangered species or a threatened species.

"(C) ADDITIONAL AUTHORITY.—The Secretary may publish a regulation designating critical habitat for an endangered species or a threatened species concurrently with the final regulation implementing the determination that the species is endangered or threatened if the Secretary determines that designation of such habitat at the time of listing is essential to avoid the imminent extinction of the species.

"(3) FACTORS TO BE CONSIDERED.—The designation of critical habitat shall be made on the basis of the best scientific and commercial data available and after taking into consideration the economic impact, impacts to military training and operations, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary shall describe the economic impacts and other relevant impacts that are to be considered under this subsection in the publication of any proposed regulation designating critical habitat.

"(4) EXCLUSIONS.—The Secretary may exclude any area from critical habitat for a species if the Secretary determines that the benefits of the exclusion outweigh the benefits of designating the area as part of the critical habitat, unless the Secretary determines that the failure to designate the area as critical habitat will result in the extinction of the species.

"(5) REVISIONS.—The Secretary may, from time-to-time and as appropriate, revise a designation. Each area designated as critical habitat before the date of enactment of this subsection shall continue to be considered so designated, until the designation is revised in accordance with this subsection.

"(6) PETITIONS.—

"(A) DETERMINATION THAT REVISION MAY BE WARRANTED.—To the maximum extent practicable, not later than 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the revision

may be warranted. The Secretary shall promptly publish the finding in the Federal Register.

"(B) NOTICE OF PROPOSED ACTION.—Not later than one year after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how to proceed with the requested revision, and shall promptly publish notice of the intention in the Federal Register.

"(7) PROPOSED AND FINAL REGULATIONS.—Any regulation to designate critical habitat or implement a requested revision shall be proposed and promulgated in accordance with paragraphs (4), (5), and (6) of section 4(b) in the same manner as a regulation to implement a determination with respect to listing a species.".

(b) CITIZEN SUITS.—Section 11(g) of the Endangered Species Act of 1973 (16 U.S.C. 1540(g)) is amended—

(1) in paragraph (1)(C), by inserting "or section 4A" after "section 4"; and

(2) in paragraph (2), by adding at the end the following:

"(D) ACTIONS RELATING TO CRITICAL HABITAT DESIGNATION.—With respect to an action relating to an alleged violation of section 4A(g) concerning the area designated by the Secretary as critical habitat, no action may be commenced independently of an action relating to an alleged violation of subsection (a) or (f) of section 4A.".

(c) PLANS FOR PREVIOUSLY LISTED SPECIES.—

(1) IN GENERAL.—In the case of species included in the list published under section 4(c) of the Endangered Species Act of 1973 (16 U.S.C. 1533(c)) before the date of enactment of this Act, and for which no final recovery plan was developed before the date of enactment of this Act, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall develop a final recovery plan in accordance with the requirements of section 4A of the Endangered Species Act of 1973, including the priorities of subsection (a)(1) of that section, for not less than one-half of the species not later than 36 months after the date of enactment of this Act and for all species not later than 60 months after such date.

(2) DESIGNATIONS OF CRITICAL HABITAT.—The Secretary of the Interior or the Secretary of Commerce, as appropriate, shall review and revise as necessary any designation of critical habitat for a species described in paragraph (1) based on the final recovery plan for the species and in accordance with section 4A(g) of the Endangered Species Act of 1973.

(d) CONFORMING AMENDMENTS.—

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

(A) in clause (i), by striking ", at the time it is listed in accordance with the provisions of section 4 of this Act,"; and

(B) in clause (ii), by striking "at the time it is listed in accordance with the provisions of section 4 of this Act".

(2) Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) (as amended by section 1(2)) is amended—

(A) in subsection (a), by striking paragraph (3);

(B) in subsection (b)—

(i) by striking paragraph (2);

(ii) in paragraph (3), by striking subparagraph (D);

(iii) in paragraph (5), by striking ", designation, or revision referred to in subsection (a)(1) or (3)," and inserting "referred to in subsection (a)(1),";

(iv) in paragraph (6)—

(I) by striking "(6)(A)" and all that follows through the end of subparagraph (A) and inserting the following:

"(6) FINAL REGULATIONS.—

"(A) IN GENERAL.—Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

"(i) a final regulation to implement the determination;

"(ii) notice that the one-year period is being extended under subparagraph (B)(i); or

"(iii) notice that the proposed regulation is being withdrawn under subpara-

graph (B)(ii), together with the finding on which the withdrawal is based.";

(II) in subparagraph (B)(i), by striking "or revision";

(III) in subparagraph (B)(iii), by striking "or revision concerned, a finding that the revision should not be made,"; and

(IV) by striking subparagraph (C); and

(v) by redesignating paragraph (8) as paragraph (2) and moving that paragraph to appear after paragraph (1);

(C) in subsection (c)(1)—

(i) in the second sentence, by inserting "designated" before "critical habitat"; and

(ii) in the third sentence, by striking "determinations, designations, and revisions" and inserting "determinations";

(D) by redesignating subsections (g) through (i) as subsections (f) through (h), respectively; and

(E) in subsection (g)(4) (as so redesignated), by striking "subsection (f) of this section" and inserting "section 4A".

(3) Section 4A of the Endangered Species Act of 1973 (as added by section 1) is amended—

(A) in subsection (a)—

(i) in the first sentence—

(I) by striking "this subsection" and inserting "this section"; and

(II) by striking "this section" and inserting "section 4";

(ii) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively; and

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

(I) by redesignating clauses (i) through (iii) as subparagraphs (A) through (C), respectively; and

(II) in subparagraph (B) (as so redesignated), by striking "the provisions of this section" and inserting "section 4";

(B) in subsection (c), by striking "this section" and inserting "section 4"; and

(C) in subsection (e), by striking "paragraph (4)" and inserting "subsection (d)".

(4) Section 6(d)(1) of the Endangered Species Act of 1973 (16 U.S.C. 1535(d)(1)) is amended in the first sentence by striking "section 4(g)" and inserting "section 4(f)".

(5) Section 10(f)(5) of the Endangered Species Act of 1973 (16 U.S.C. 1539(f)(5)) is amended by striking the last sentence.

(6) Section 104(c)(4)(A)(ii)(I) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1374(c)(4)(A)(ii)(I)) is amended by striking "section 4(f)" and inserting "section 4A".

(7) Section 115(b)(2) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1383b(b)(2)) is amended by striking "section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f))" and inserting "section 4A of the Endangered Species Act of 1973".

(8) Section 118(f)(11) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1387(f)(11)) is amended by striking "section 4" and inserting "section 4A".

(9) The table of contents in the first section of the Endangered Species Act of 1973 (16 U.S.C.

prec. 1531) is amended by inserting after the item relating to section 4 the following:

"Sec. 4A. Recovery plans and critical habitat designations.".

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