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Day 1: Wednesday, 17 August 2005: Biodiversity and Critical Habitat

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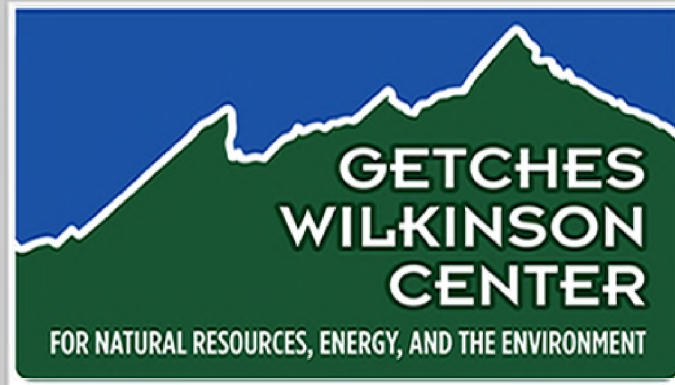
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Day 1: Wednesday, 17 August 2005: Biodiversity and Critical Habitat, in ENDANGERED SPECIES ACT
CONGRESSIONAL FIELD TOUR 2005 (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 2005).

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Biodiversity and Critical Habitat ***Holiday Inn Denver, Downtown***

Overview of biodiversity hot spots and the importance private lands Discussion of critical habitat, safe harbor agreements, and existing private landowner incentives

Panel:

- **Charles Bedford, The Nature Conservancy, Colorado State Director**

Charles Bedford is a native of Fort Collins, Colorado. As Director of The Nature Conservancy's Colorado Chapter, he focuses on what he views as the state's most pressing conservation issues: water management, protecting wildlife habitat, and restoring our natural areas. Prior to his work at the Conservancy, Bedford served as the director of the Colorado Board of Land Commissioners where he was responsible for the long-term management of over three million acres of state land and other real estate. He was also deputy legal counsel for Governor Roy Romer, and an attorney with Kutak Rock in Denver. Bedford holds a bachelor of science degree in Foreign Service from Georgetown University and a juris doctor from the University of Colorado School of Law.

- **Federico Cheever, University of Denver College of Law**

Federico Cheever is Professor of Law at the University of Denver College of Law. He arrived at the University of Denver in 1993, and holds a B.A./M.A. 1981, from Stanford University; J.D. 1986, UCLA School of Law. Judicial Clerk, United States Court of Appeals (9th Circuit), Hon. Harry Pregerson, 1986-1987. Associate Attorney, Sierra Club Legal Defense Fund, 1987-1989. Research Fellow, Natural Resources Law Center, University of Colorado School of Law, Spring 1990. Associate, Faegre & Benson, 1990-1993. Hughes/Rudd Research Professor at the University of Denver College of Law 2002. Visiting Fellow Queen Mary and Westfield College, University of London, Spring 2000. Visiting Professor Northwestern Law School, Lewis & Clark College, Summer 2005.

Professor Cheever has represented environmental groups in cases under the Endangered Species Act, the National Forest Management Act, the National Environmental Policy Act, the Wilderness Act and a number of other environmental laws. He has also represented regulated parties in disputes under the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Clean Air Act.

- **Tim Sullivan, Environmental Defense**

Tim Sullivan is Regional Director for Environmental Defense. He guides Environmental Defense's programs in seven states in the Rocky Mountain west with a focus on ecosystem conservation, endangered species, and Farm Bill programs. He works with private landowners across the west on voluntary efforts to restore and conserve endangered species habitat and has direct experience in developing and reviewing Safe Harbor Agreements under the Endangered Species Act. Prior to joining Environmental Defense he served as Deputy Director for Conservation Programs for the Chicago Zoological Society. He has an undergraduate degree in Biology and History from Cornell University, and a

master's degree in Conservation Biology from the Yale School of Forestry and Environmental Studies.

Reading:

The Endangered Species Act: Success or Failure? Environmental Defense, May 2005.

Critical Habitat: What is it? U.S. Fish & Wildlife Service, February 2002.



U.S. Fish & Wildlife Service

Critical Habitat

What is it?

When a species is proposed for listing as endangered or threatened under the Endangered Species Act (Act), we must consider whether there are areas of habitat we believe are essential to the species' conservation. Those areas may be proposed for designation as "critical habitat." The determination and designation of critical habitat is one of the most controversial and confusing aspects of the Act. Here are answers to some of the most frequently asked questions about critical habitat.

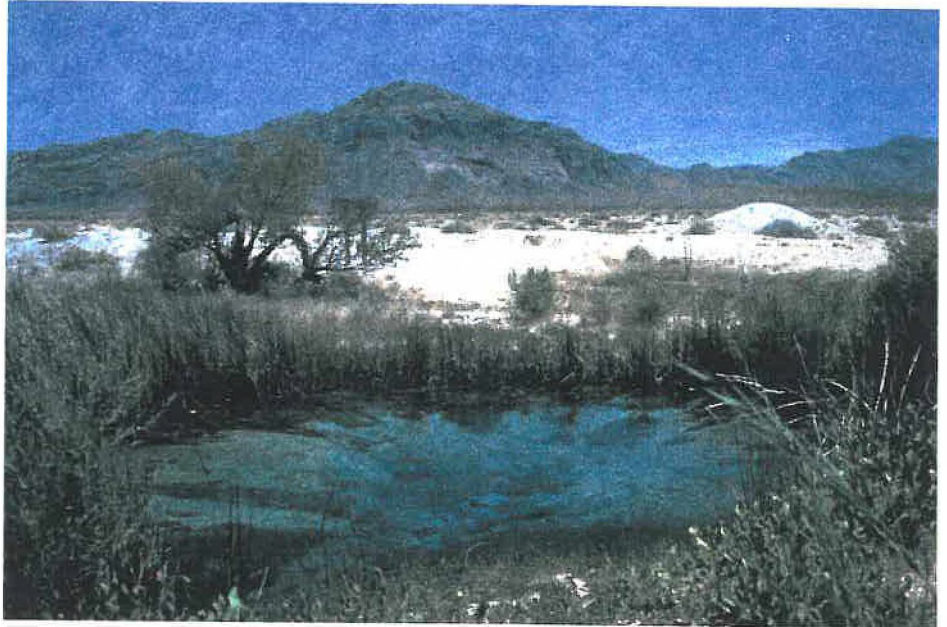
What is critical habitat?

Critical habitat is a term defined and used in the Act. It is a specific geographic area(s) that is essential for the conservation of a threatened or endangered species and that may require special management and protection. Critical habitat may include an area that is not currently occupied by the species but that will be needed for its recovery. An area is designated as "critical habitat" after we publish a proposed Federal regulation in the *Federal Register* and then we receive and consider public comments on the proposal. The final boundaries of the critical habitat area is also published in the *Federal Register*.

What is the purpose of designating critical habitat?

Federal agencies are required to consult with us on actions they carry out, fund, or authorize to ensure that their actions will not destroy or adversely modify critical habitat. In this way, a critical habitat designation protects areas that are necessary for the conservation of the species.

A critical habitat designation has no effect on situations where a Federal agency is not involved – for example, a landowner undertaking a project on private land that involves no Federal funding or permit.



Ash Meadows National Wildlife Refuge in Nevada provides critical habitat for eight threatened or endangered species. Photo by Mike Bender

Do listed species in critical habitat areas receive more protection?

An area designated as critical habitat is not a refuge or sanctuary for the species. Listed species and their habitat are protected by the Act whether or not they are in an area designated as critical habitat. To understand the additional protection that critical habitat provides to an area, it is first necessary to understand the protection afforded to any endangered or threatened species, even if critical habitat is not designated for it.

■ The Act forbids the import, export, or interstate or foreign sale of endangered and threatened animals and plants without a special permit. It also makes "take" illegal – forbidding the killing, harming, harassing, pursuing, or removing the species from the wild.

■ The Act requires that Federal agencies conduct their activities in such a way as to conserve species.

■ The Act also requires that Federal agencies must consult with us to conserve listed species on their lands and to ensure that any activity they fund, authorize, or carry out will not jeopardize the survival of a threatened or endangered species. This is known as consultation.

In consultation for those species with critical habitat, Federal agencies must also ensure that their activities do not adversely modify critical habitat to the point that it will no longer aid in the species' recovery. In many cases, this level of protection is very similar to that already provided to species by the "jeopardy standard." However, areas that are currently unoccupied by the

Myths & Realities

If critical habitat is designated, does that mean no further development can occur?

No. A critical habitat designation does not necessarily restrict further development. It is a reminder to Federal agencies that they must make special efforts to protect the important characteristics of these areas.

Does a critical habitat designation affect all activities that occur within the designated area?

No. Only activities that involve a Federal permit, license, or funding, and are likely to destroy or adversely modify the area of critical habitat will be affected. If this is the case, we will work with the Federal agency and, where appropriate, private or other landowners to amend their project to allow it to proceed without adversely affecting the critical habitat. Thus, most Federal projects are likely to go forward, but some will be modified to minimize harm to critical habitat.

species, but which are needed for the species' recovery, are protected by the prohibition against adverse modification of critical habitat.

Must Federal agencies consult with us outside critical habitat areas?

Yes, even when there is no critical habitat designation, Federal agencies must consult with us to ensure any action they carry out, fund, or authorize is not likely to jeopardize the continued existence of a listed species.

What is the impact of a critical habitat designation on economic development?

Most activities that require a Federal agency to consult with us can proceed. If modification of the project is necessary, it is likely that those changes would have been needed anyway, in order to avoid jeopardy. However, in areas where the species is not currently present, there may be some project modifications that would not have occurred without the critical habitat designation.

How do we determine what areas to designate as critical habitat?

Biologists consider physical and biological habitat features needed for life and successful reproduction of the species.

These include:

- space for individual and population growth and for normal behavior;
- cover or shelter;
- food, water, air, light, minerals, or other nutritional or physiological requirements;
- sites for breeding and rearing offspring; and
- habitats that are protected from disturbances or are representative of the historic geographical and ecological distributions of a species.

The areas shown on critical habitat maps are often large. Are all the areas within the mapped boundaries considered critical habitat?

No. Our rules normally exclude by text developed areas such as buildings, roads, airports, parking lots, piers and other such facilities. Additionally, projects will only require consultation if they effect areas that contain the primary constituent elements required by the species. Primary constituent elements are those physical and biological features of a landscape that a species needs to survive and reproduce.

Why are large areas shown on critical habitat maps if the entire area is not actually considered critical habitat?

In such cases, precisely mapping critical habitat boundaries is impractical or impossible, because the legal descriptions for these precise boundaries would be to unwieldy.

Does the Act require an economic analysis as part of designating critical habitat?

Yes. We must take into account the economic impact, as well as any other benefits or impacts, of specifying any particular area as critical habitat. We may exclude any area from critical habitat if we determine that the benefits of excluding it outweigh the benefits of specifying the area as part of critical habitat, unless we determine that the failure to designate the area as critical habitat will result in the extinction of the species.

Does this economic analysis have any effect on the decision to list a species as threatened or endangered?

No, under the Act, a decision to list a species is made solely on the basis of scientific data and analysis.

How many species have critical habitat designations?

As of January 31, 2002 critical habitat has been designated for 152 of the 1,256 U.S. species listed as threatened or endangered.

Why haven't we designated critical habitat for more species?

After a Congressional moratorium on listing new species ended in 1996, we faced a huge backlog of species needing to be proposed for listing as threatened or endangered. For this reason, we have assigned a relatively low priority to designating critical habitat because we have believed that a more effective use of our limited staff and funding has been to place imperiled species on the List of Endangered and Threatened Species.

Additionally, the critical habitat designation usually affords little extra protection to most species, and in some cases it can result in harm to the species. This harm may be due to negative public sentiment to the designation, to inaccuracies in the initial area designated, and to the fact that there is often a misconception among other Federal agencies that if an area is outside of the designated critical habitat area, then it is of no value to the species.

U.S. Fish & Wildlife Service
Endangered Species Program
703/358 2105
<http://endangered.fws.gov>
February 2002

TEXT SELECTIONS FOR UNDERSTANDING CRITICAL HABITAT

Federico Cheever

August 17, 2005

§ 1532. Definitions [December 1973]

For the purposes of this chapter--

...

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. . . .

TITLE 50--WILDLIFE AND FISHERIES

Part 402--Interagency Cooperation--Endangered Species Act of 1973

§ 402.02 Definitions [January 1978]

revised 1986 - see p. 2

"Destruction or adverse modification" means a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species. Such alterations include, but are not limited to those diminishing the requirements for survival and recovery listed in § 402.05(b). There may be many types of activities or programs which could be carried out in critical habitat without causing such diminution.

§ 1532. Definitions [November 1978]

Extensive mod. of the Act.

For the purposes of this chapter--

...

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

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

....

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

§ 1533. Determination of endangered species and threatened species

(a) . . .

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable--

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat . . .

(b)

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

§ 402.02 Definitions. [June 1986]

"Destruction or adverse modification" means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.