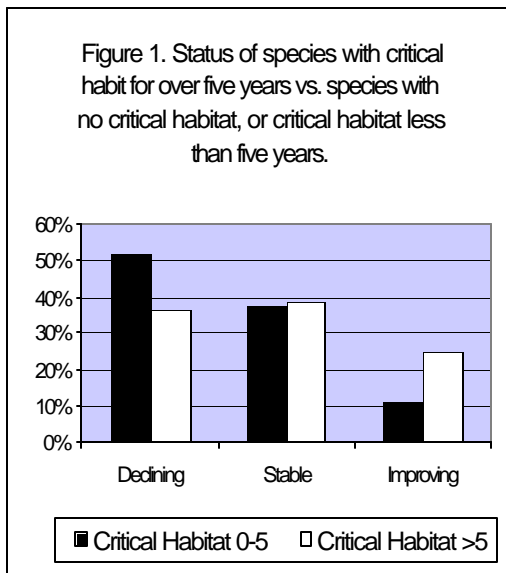


Center for Biological Diversity • Earthjustice • Sierra Club • Defenders of Wildlife • Endangered Species Coalition • Natural Resources Defense Council • Center for Native Ecosystems • Forest Guardians • Save Our Wild Salmon • U.S. PIRG • American Lands Alliance • Northwest Ecosystem Alliance

BUSH ADMINISTRATION ATTACKS ENDANGERED SPECIES ACT

Having undermined listing of endangered species and creation of recovery plans, the administration takes aim at the third leg of ESA: critical habitat areas

The Endangered Species Act (ESA) requires that “critical habitat” areas containing the lands and water necessary for the recovery of endangered species be mapped-out and protected. Critical habitats have ranged from as little as 10 acres for a unique plant, to as much as 80 million acres for a marine mammal. Typical designations are between 10,000 and 2 million acres.



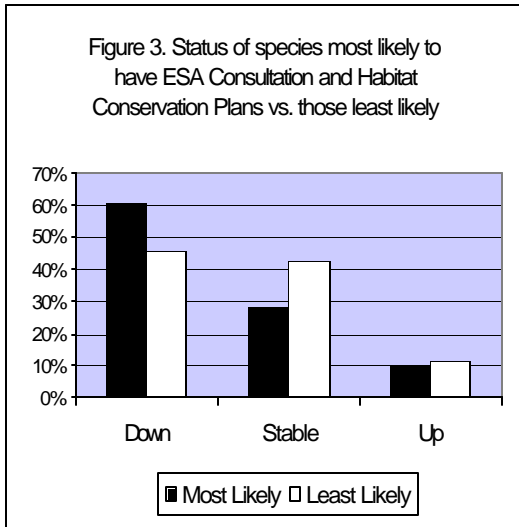
Critical habitat has proven to be a very effective conservation tool: species with it are less likely to be declining, and over twice as likely to be recovering as those without it (figure 1).¹ See Appendix A for a list of species successfully recovering due to critical habitat.

In keeping with its campaign against all effective environmental laws and policies, the Bush administration will hold a press conference tomorrow announcing new policies to minimize and avoid the designation of critical habitats. This will include not complying with court orders, expanding anti-critical habitat loopholes, and inserting legal disclaimers in all critical habitat rules to encourage and support industry lawsuits to strike them down.

The administration will assert that critical habitat is an expensive exercise that does not aid the recovery of endangered species. It will provide no data to support the assertion. It will conveniently ignore reports submitted to Congress by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) showing that species with critical habitat are less likely to be declining and twice as likely to be recovering than those without.

The administration claims that critical habitat is redundant to other sections of the Endangered Species Act (ESA), especially Section 4 which requires the preparation of recovery plans, Section 6 which provides federal grants to states, Section 9 which prohibits take, Section 10 which exempts individuals and corporations from the take prohibition, and Section 7 which exempts federal agencies from the take prohibition.

Section 9 does not completely prohibit the harming and killing of endangered species. Permits to harm and kill endangered species are routinely granted under Sections 7 and 10. Section 9 does not require actions to benefit or recover endangered species. It is not a recovery tool.

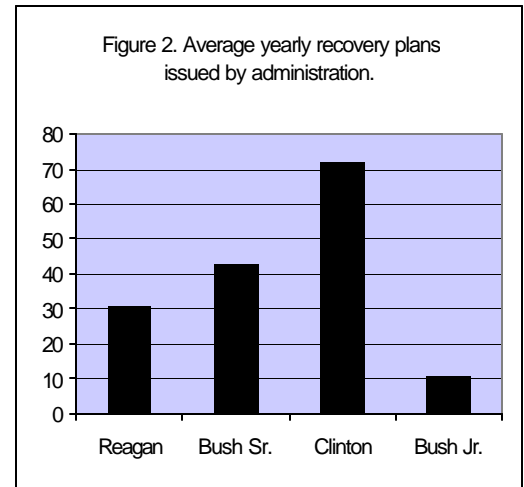


Sections 7 and 10 allow individuals, corporations, and federal and state agencies to kill endangered species through habitat destruction. They regulate and attempt to minimize the harm, but do not prohibit it. In fact, the Section 7 and 10 permits are only needed for projects likely to harm endangered species or their habitats. Neither requires that species benefit or recover. It is not surprising, therefore, that FWS and NMFS data shows that species *most likely* to be subjected to Section 7 and 10 take permits are the *least likely* to be recovering and the *most likely* to be declining (figure 3).¹ The Bush administration’s assertion that Sections 7, 9, and 10 are effective *recovery* tools is nothing short of bizarre.

The creation of recovery plans under Section 4 can help to recover endangered species, but few recovery plans are fully or even mostly implemented. FWS and NMFS data indicate that the combination of a recovery plan and critical habitat is the most effective way to restore and endangered species. A recovery plan without critical habitat is much less effective. The Bush administration’s suggestion that it will substitute recovery plans for critical habitat is cynical in the extreme: it has approved fewer recovery plans than any administration in the history of the ESA (figure 2).¹

Federal grants to states under Section 6 also to help recover endangered species, but are a small part of the overall recovery effort.

Despite the fact that species with critical habitat are less likely to be declining and twice as likely to be recovering as species without it, the Bush administration continues to cling to its theory that critical habitat is redundant. But even the theory has been rebutted: federal judges have repeatedly struck it down. The courts have consistently ruled that critical habitat is meant to be a *recovery* tool with a higher level of protection than is afforded by Sections 4, 6, 7, 9, and 10 of the ESA. Rather than obey the law, the Bush administration is trying to do an end run around the courts, the ESA, and protection of endangered species.



CRITICAL HABITAT IS A PROVEN RECOVERY TOOL

Recognizing that habitat loss is the primary threat to 85% of all endangered species, Congress amended the ESA in 1978 to require the designation of mapped-out critical habitat areas for all endangered species. Congress envisioned critical habitat as a recovery tool, requiring that it encompass all lands and water essential to the recovery of endangered species. Congress clearly intended that critical habitat do more than other sections of the ESA devoted to preventing extinction. Critical habitat is first and foremost a recovery tool:

“It is the Committee’s view that classifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for

that species' continued existence If the protection of endangered and threatened species depends in large measure on the preservation of the species' habitat, then the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat."²

Congress also required the FWS and the NMFS to provide periodic reports on the recovery status of threatened and endangered species. Not surprisingly, the reports show that species with critical habitat are twice as likely to be recovering as those without (figure 1).

BUSH CRITICAL HABITATS VASTLY SMALLER THAN CLINTON'S

The Bush administration is the only presidency not to have designated a single critical habitat except under court order. And the critical habitats it has designated are dramatically smaller than the Clinton administration's. Clinton designated 115 million acres of critical habitat for 50 endangered species. Bush has designated just 40 million acres for 195 species. The Clinton Administration reduced the size of 64% of the FWS critical habitat proposals. The average size reduction was 9%. The Bush administration has reduced the size of 92% of FWS proposals. The average reduction was 76%.

Suffering most under the Bush directives were Hawaiian plants (99% were reduced, average size reduction was 89%) and Texas invertebrates (100% were reduced, average size reduction was 89%). Critical habitat for the spectacled eider in Alaska was cut by 22.7 million acres. Eastern states lost 2.0 million acres of protection for the piping plover. FWS biologists in the Southwest were ordered to slash 8.9 million acres out of the Mexican spotted owl critical habitat proposal. The result was a designation that excluded 95% of all known owls, 80% of owl habitat, and virtually all timber areas sought after by the timber industry. A FWS biologist objected: "the designation would make no biological sense if the [U.S. Forest Service land] was excluded since these lands are the most essential for the owl." Two years later a federal court agreed, calling the designation "nonsensical." Habitat protection for the San Bernardino kangaroo rat in California was slashed by 40%, even though four scientific peer-reviewers warned that the proposal must be expanded. Scientific peer-reviewers also recommended an expansion of critical habitat for the Riverside fairy shrimp. When ordered instead to decrease the proposal by 43%, a FWS biologist complained: "Clearly, the [Fish and Wildlife] Service ignored—or violated—its own policy by failing to address and consider the peer-reviewers expert opinion."³

In all, the Bush Administration removed 42 million acres of critical habitat from the agency's proposed designations.

ENGINEERING A PERPETUAL BUDGET CRISIS

The Bush administration routinely asserts that Congress has not allocated enough money to list all endangered species and designate critical habitat for all listed species. It attacks environmental groups for using the courts to uphold the ESA, thus increasing the FWS workload despite a constrained budget. The FWS is indeed extremely cash strapped, but only because the Bush administration has purposefully underfunded it to create a budgetary crisis. It created the budget crisis to use as a political weapon against endangered species, enforcement of the ESA, and especially against citizen oversight of its actions. The money trail couldn't be clearer.

The FWS says it needs \$153 million dollars to list all known endangered species and designate all legally required critical habitats.⁴ Nonetheless, the administration asked Congress for just \$9 million dollars for

FY2003. And in the request, it expressly acknowledged that the money was insufficient and would likely lead to a crisis:

“The program expects continued litigation in FY2002 and 2003. The Department could face similar situations where courts order the Service to undertake activities beyond available funding.”⁵

Congress granted the administration’s budget request in full on February 13, 2003. Now, just 12 weeks after receiving all the money it requested, the Bush administration is holding a press conference to announce that it does not have enough money to carry out court orders to designate millions of acres of critical habitat.

When Congress granted the administration’s budget request, it expressly invited it to come back for more money:

“The managers understand that the Department believes additional funding, beyond that requested in the budget, will be needed for the Listing Program in 2003 and the managers will consider a supplemental request for additional funds if one is submitted later this year.”

But the administration has not submitted a supplemental funding request. That would defuse the budget crisis it has worked so hard to create. Instead, it proposes to exacerbate the problem by shifting two million dollars from other FWS programs to listing and critical habitat efforts. This hurts other programs while not providing enough money to deal with the backlog of critical habitats. The FWS will thus go from budget crisis to budget crisis as the Bush administration continues to undermine habitat protection and blame environmentalists for insisting that the ESA be implemented.

Delaying Critical Habitat

The Bush Administration often asserts that critical habitat designations are being rushed, and that it quite reasonably wants to delay them until after recovery plans are complete. Yet only 17% (=33) of the 195 critical habitats it has been forced to designate occurred prior to a recovery plan. And in 25 of those 33 cases, it was the Bush administration that was at fault for violating federal guidelines to issue recovery plans within three years of listing. The Bush Administration is playing a cynical and deadly game by asking to delay critical habitat until after recovery plans are complete, then refusing to complete the recovery plans.

In all, only 13% (=169) of all 1,335 listed species received critical habitat prior to a recovery plan. And the great majority of these were done at the FWS’s own bidding, not through litigation. Only 5% (=70) of all listed species received critical habitat before a recovery plan due to environmental litigation.

Endnotes

1. Recovery and “economic conflict” status provided by U.S. Fish and Wildlife Service *1996 Biennial Report to Congress* and the National Marine Fisheries Service *2002 Biennial Report to Congress*. Statistical analysis conducted by Taylor, M., K. Suckling, and J.J. Rachlinski. 2003. *Critical habitat and recovery plans drive endangered species recovery*. Unpublished manuscript. Similar results were reported from a smaller dataset by J. J. Rachlinski. 1997. *Noah by the numbers: An empirical evaluation of the Endangered Species Act*. *Cornell Law Review* 82: 356-89. Species with economic

conflict are more likely to be subject to Section 7 consultation and Section 10 habitat conservation plans than those without conflict.

2. House Committee on Merchant Marine and Fisheries, H.R. Rep. No. 887, 94th Cong. 2nd Sess. at 3 (1976)

3. Letter from Nancy Kehoe to Andy Yuen and Jim Bartel, U.S. Fish and Wildlife Service, Carlsbad, CA, dated June 3, 2001.

4. Declaration by Gary Frazer, Assistant Director for Endangered Species, U.S. Fish and Wildlife Service, in *Defenders of Wildlife et al. v. Gale Norton and Steven Williams* (CIV 02-00165-M-DWM), page 4, dated April 26, 2003.

5. U.S. Department of Interior. 2002. Budget Justifications and Annual Performance Plan, Fiscal Year 2003, page 50. Washington, D.C.

APPENDIX A: SPECIES THAT HAVE BENEFITTED FROM CRITICAL HABITAT

SPECIES	HISTORIC RANGE
American peregrine falcon (<i>fully recovered</i>)	AK, AL, AR, AZ, CA, CO, CT, DC, DE, FL, GA, IA, ID, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MO, MS, MT, NC, ND, NE, NH, NJ, NM, NV, NY, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VA, VI, VT, WA, WI, WV, WY
Ash Meadows Amargosa pupfish	NV
Ash Meadows gumplant	CA, NV
Ash Meadows naucorid	NV
California condor	CA, AZ, UT, OR
Chinook salmon (Central Valley spring run DPS)	CA
Chinook salmon (Sacramento River winter run DPS)	CA
Chinook salmon (Snake River fall run DPS)	ID, OR, WA
Chinook salmon (Snake River spring-summer run DPS)	ID, OR, WA
Chum salmon (Hood Canal summer run DPS)	WA
Coho salmon (Oregon Coast DPS)	OR
Gray wolf (Eastern DPS)	CT, IA, IL, IN, KS, MA, ME, MI, MN, MO, ND, NE, NH, NJ, NY, OH, PA, RI, SD, VT, WI
Hawaiian monk seal	HI
Inyo California towhee	CA
Least Bell's vireo	CA
Mountain golden heather	NC
Plymouth redbelly turtle	MA
Robbins' cinquefoil (<i>fully recovered</i>)	NH, VT
Smoky madtom	TN
Spring-loving centaury	CA, NV
Steelhead trout (Middle Columbia River DPS)	OR
Steelhead trout (Upper Columbia River DPS)	WA
Steller sea-lion (east DPS)	AK, CA, OR, WA
Todsen's pennyroyal	NM
Virginia big-eared bat	KY, NC, WV, VA
White River spinedace	NV
Whooping crane	CO, ID, KS, MT, ND, NE, NM, OK, SD, TX, UT, WY, FL
Yellow-shouldered blackbird	PR