CRITICAL HABITAT UNDER THE ENDANGERED SPECIES ACT: DESIGNATION, RE-DESIGNATION, AND REGULATORY DUPLICATION*

In 1973, Congress passed the Endangered Species Act (ESA)[1] in an effort to provide for the conservation of threatened and endangered species and for the preservation of their habitat.[2] Indeed, at the time the ESA was passed, the extinction rate in the United States was one animal species per year,[3] and half of the recorded extinctions of animals in the preceding two millennia had occurred in the prior fifty years.[4] In passing the ESA, Congress recognized that some mechanism was needed to prevent the country's economic development from destroying irreplaceable parts of America's natural heritage.[5] Prior to the ESA, existing law afforded some protection to endangered species but neither prohibited the taking (i.e., causing harm) of endangered species nor required federal agencies to preserve endangered species.[6] Dissatisfaction with existing law, combined with a growing realization that human modification of habitat was causing the loss of biological diversity, led Congress to pass the ESA.[7] The stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . . ."[8] To achieve these goals, the ESA (1) mandates a listing procedure for threatened and endangered species,[9] (2) prohibits both public and

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1. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (2000)).

2. *See* ESA § 2(b). The Act passed the House with only four dissenting votes and passed the Senate unanimously. 119 CONG. REC. 25,694, 42,915 (1973).

3. *See* ESA § 2(a)(1); S. REP. NO. 93-307, at 2 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2989, 2990.

4. Thomas F. Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 209-10 (2000) (citing 119 CONG. REC. 30,165 (1973) (statement of Rep. Grover)).

5. *See* 119 CONG. REC. 30,528 (1973) (Rep. Lehman arguing that "[a]s man extends his control over the surface of the globe, he must take special care not to destroy what he cannot replace").

6. *See* James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 312 (1990); *see also* Endangered Species Preservation Act of 1966, Pub L. No. 89-669, 80 Stat. 926 (repealed 1973); Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (repealed 1973).

7. *See* sources cited *supra* note 6; *see also Endangered Species Conservation Act of 1972: Hearings on S. 3818 Before the Subcomm. on the Env't of the S. Commerce, Science, & Transp. Comm.*, 92d Cong. 1 (1972) (statement of Sen. William B. Spong, Jr.).

8. 16 U.S.C. § 1531(b) (2000).

9. *See id.* § 1533.

private actions that result in the taking of an endangered species,[10] (3) establishes procedures for land acquisition,[11] and (4) provides for cooperation between federal agencies and between federal and state governments.[12]

The Act gives the Secretary of Interior[13] the power to designate "critical habitat" as a means of preserving the habitat of listed species.[14] Though the original Act did not define "critical habitat,"[15] the 1978 amendments defined it as follows:

> (i) the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management consideration or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.[16]

The Act also makes clear that critical habitat should not consist of the "entire geographical area which can be occupied by the threatened or endangered species," except in circumstances determined by the Secretary.[17] However, the designation of critical habitat is intended to recover species, not merely to maintain their current population.[18]

This Comment will focus on how the Fish and Wildlife Service's (FWS) institutional distaste for critical habitat manifests itself through the Agency's implementation of the ESA. Specifically, it will demonstrate how FWS's flawed interpretation of the critical habitat language in the ESA leads the Agency to refuse to designate critical habitat and to reduce already existing critical habitat. Part I will explain the background of critical habitat and will look at how FWS uses the statutory language of the ESA to avoid designating critical habitat. This Part will also entail an examination of how FWS designed its regulations in a way that is contrary to the meaning and

10. *See id.* § 1538.
11. *See id.* § 1534.
12. *See id.* §§ 1535-1536.
13. The Endangered Species Act is implemented by both the Department of Interior (through the Fish and Wildlife Service (FWS)) and the Department of Commerce (through the National Marine Fisheries Service (NMFS)). ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 270 (2003); *see also* 16 U.S.C. § 1532(15). Therefore, any reference in this Comment to the Secretary of Interior or the FWS includes the Secretary of Commerce and the NMFS by implication.
14. *See* 16 U.S.C. § 1533(a)(3)(A).
15. Katherine Simmons Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811, 828 (1990); *see also* ESA, Pub. L. No. 93-205, § 3, 87 Stat. 884 (1973) (defining terms for the purposes of the Act, but omitting any definition of "critical habitat").
16. 16 U.S.C. § 1532(5)(A).
17. *Id.* § 1532(5)(C).
18. The ESA defines "conservation" as "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided . . . are no longer necessary." 16 U.S.C. § 1532(3). The FWS regulations define "recover" in the same terms as "conservation." *Compare id. with* 50 C.F.R. § 402.02 (2005).

intent of the ESA. Part II will look at how critical habitat can be revised or re-designated and demonstrate how FWS cooperates with efforts to reduce existing critical habitat, while fighting efforts to expand it. While the ESA provides reasonably clear guidelines that govern the procedure for the initial designation, the time line for re-designation is less clear. This uncertainty acts as an obstacle to efforts to expand existing critical habitat. On the other hand, FWS has used a recent court decision questioning the way the Agency performs its economic analysis of critical habitat designations as a vehicle for shrinking existing critical habitat. In short, FWS uses delay and regulatory sleight of hand to avoid designating or expanding critical habitat whenever possible and actively seeks to reduce it when given the opportunity.

I. INITIAL CRITICAL HABITAT DESIGNATION

The only defined role of critical habitat within the ESA is to require all federal agencies to consult[19] with FWS to insure that any action "authorized, funded, or carried out" by the Agency does not (1) "jeopardize the continued existence" of a listed species or (2) "result in the destruction or adverse modification of habitat . . . which is determined . . . to be critical."[20] Therefore, critical habitat's only role in the ESA falls under the "adverse modification" prong of the consultation provision.[21]

While the language of the consultation provision seems to provide heightened protection to species with critical habitat designations, FWS defines the two provisions ("jeopardy" and "adverse modification") to mean essentially the same thing.[22] The jeopardy standard is defined to apply to "an action that reasonably would be expected . . . to reduce appreciably the likelihood of *both the survival and recovery* of a listed species . . . ."[23] The adverse modification standard applies to an action that "appreciably diminishes the value of critical habitat for *both the survival and recovery* of a listed species."[24] Because both prongs are defined in terms of actions that threaten "both the survival and recovery" of listed species, and because any action that threatens recovery also threatens survival, the adverse modifica-

19. At the end of the consultation process, FWS will issue either a jeopardy opinion or a no jeopardy opinion. *See* 50 C.F.R. § 402.14(h)(3). If a jeopardy opinion is issued, the action agency will be given alternatives, if any are available, to allow it to avoid jeopardizing the species or its habitat. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If the action agency acts contrary to the FWS's advice, it is subject to a lawsuit. *See, e.g.*, Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1043-45 (1st Cir. 1982); Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359, 367 (5th Cir. 1976).

20. 16 U.S.C. § 1536(a)(2).

21. Jack McDonald, Chapter, *Critical Habitat Designation Under the Endangered Species Act: A Road to Recovery?*, 28 ENVTL. L. 671, 685-86 (1998).

22. In *Sierra Club v. United States Fish & Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit held that the FWS regulations defining "adverse modification" were facially invalid because "[r]equiring consultation only where an action affects . . . both the recovery and survival of a species imposes a higher threshold than the statutory language permits." *Id.* at 442 (emphasis omitted). The Ninth Circuit came to a similar conclusion in *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059, 1069 (9th Cir. 2004).

23. 50 C.F.R. § 402.02 (emphasis added).

24. *Id.* (emphasis added).

tion prong adds nothing to the Act as it would not apply to actions that only threaten recovery.[25] For example, if a federal agency wanted to take some action that would destroy or adversely modify critical habitat, the agency would not have to consult with FWS if the action would merely threaten the recovery of a listed species. These regulatory definitions are not consistent with the language of the ESA itself. The adverse modification prong is designed to protect critical habitat, defined in the statute as habitat "essential to the conservation of the species."[26] "Conservation" is defined as "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."[27] Similarly, "recovery" is defined as the "improvement in the status of listed species to the point at which listing is no longer appropriate."[28]

Given the similar definitions of "conservation" and "recovery," it seems disingenuous to argue that critical habitat is intended only to allow species to survive but not to recover. It also is misleading to say that a species has been conserved under the meaning of the Act if it is teetering on the brink of extinction but is managing to "survive." As the FWS tacitly acknowledges, the adverse modification prong is a recovery-based standard.[29] The inclusion of an economic impact provision in the ESA also dictates that the adverse modification prong is intended to be based on recovery.[30] The ESA gives FWS the discretion not to designate critical habitat based on "economic impacts," as long as the exclusion of critical habitat does not threaten the species with extinction (i.e., threaten its survival).[31] However, "[o]nly if consultation includes a separate analysis of critical habitat [based on] a recovery standard can there be true economic impacts from critical habitat that would justify the use of an economic exclusion"[32] because any economic impact from merely preventing extinction would occur through listing, whether their critical habitat is designated or not.

Some argue that critical habitat should be removed from the ESA given that FWS essentially defines away its significance.[33] These critics point out that "there does not appear to be any case where a court found 'adverse modification' of a critical habitat without also finding 'jeopardy' to a listed

25. *See id.*
26. *See* 16 U.S.C. § 1532(5)(A) (2000).
27. *Id.* § 1532(3).
28. 50 C.F.R. § 402.02.
29. *See* Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796, 1822 (Jan. 15, 1992) ("[T]he adverse modification standard may be reached closer to the recovery end of the survival continuum, whereas, the jeopardy standard traditionally has been applied nearer to the extinction end of the continuum.").
30. *See* 16 U.S.C. § 1533(b)(2).
31. *See id.*
32. McDonald, *supra* note 21, at 698.
33. *See* Robert J. Scarpello, Note, *Statutory Redundancy: Why Congress Should Overhaul the Endangered Species Act to Exclude Critical Habitat Designation*, 30 B.C. ENVTL. AFF. L. REV. 399, 413 (2003).

species."[34] Indeed, FWS argues that any action that would "adversely modify" habitat would also jeopardize the species and thereby trigger consultation under the jeopardy prong.[35] In short, the critics assert that "[b]ecause destroying or adversely modifying habitat that is critical to a species will, by definition, also jeopardize that species, the requirement that a critical habitat be separately identified and protected is redundant to the ESA."[36]

FWS also has legitimate concerns about the efficacy of critical habitat in promoting the recovery of threatened and endangered species. FWS argues that its limited resources could be better spent on listing more species, as opposed to designating critical habitat for already listed species.[37] Indeed, FWS points out that the cost of designating critical habitat in response to court orders "now consumes nearly the entire listing program budget."[38] Part of the reason designating critical habitat can be so expensive is tied to the cost of performing economic analysis, which can cost up to $500,000.[39] The cost of drafting environmental impact statements and describing the areas proposed for designation can also eat into the budget.[40] Furthermore, FWS's position is that critical habitat is only beneficial in those rare cases when unoccupied habitat is part of the designation.[41] In the end, FWS officials believe that species recovery plans, habitat conservation plans, voluntary partnerships with private landowners, incentives, and land banking can be more effective tools for achieving species recovery than critical habitat.[42]

Despite the fact that critical habitat's role in the consultation process has been lost in a game of semantics, critical habitat still plays a useful role

34. *See id.*

35. *See* Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1069 (9th Cir. 2004); Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 440 (5th Cir. 2001); New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1283 n.2 (10th Cir. 2001) (recognizing that the results that 50 C.F.R. § 402.02 produce are "inconsistent with the intent and language of the ESA").

36. Shawn E. Smith, Comment, *How "Critical" is a Critical Habitat?: The United States Fish and Wildlife Service's Duty Under the Endangered Species Act*, 8 DICK. J. ENVTL. L. & POL'Y 343, 344 (1999).

37. *The Critical Habitat Reform Act of 2003: Hearing on H.R. 2933 Before the H. Res. Comm.*, 108th Cong. (Apr. 28, 2004) (testimony of Craig Manson, Assistant Sec'y for Fish & Wildlife and Parks, Dep't of the Interior) [hereinafter Testimony of Craig Manson], *available at* http://www.fws.gov/laws/Testimony/108th/2004/MansonCHHR2933.htm ("[FWS] believe[s] that available resources could be better spent focusing on those actions that benefit species by providing the protection of the Act to those species that need it, and then pursuing effective conservation of these species through improving the consultation process, the development and implementation of recovery plans, and voluntary partnerships with states and private landowners.").

38. *Id.* The cycle of litigation stems both from lawsuits filed by environmental groups alleging that FWS failed to designate critical habitat, or failed to do so within the appropriate time period, and from lawsuits filed by development interests alleging that FWS failed to properly analyze which land should be included in the designation. *Id.* FWS argues that statutory and court-imposed deadlines prevent it from having time to properly analyze all of the data that goes into making a designation, making the designation more susceptible to attack through litigation. *Id.*

39. *See* Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31,871, 31,873 (June 14, 1999) [hereinafter Notice of Intent to Clarify].

40. *Id.*

41. *Id.* at 31,872 ("For most species, the duplication between the jeopardy standard and the adverse modification standard exists because unoccupied habitat is not involved.").

42. *See* Testimony of Craig Manson, *supra* note 37.

in the conservation of endangered species. First, critical habitat is important in providing notice to the public and government agencies of areas that are important to the conservation of a species.[43] In other words, having defined areas of habitat that are important to the conservation of a species makes it much easier to know when consultation is and is not required. Second, critical habitat provides a clear basis for judicial review of agency decisions.[44] A review of the judicial record indicates that courts have been keenly protective of land designated as critical habitat.[45] On the other hand, courts have been less likely to protect land that has not been designated as critical habitat.[46] Critical habitat allows a plaintiff or prosecutor to avoid having to show the "steps to jeopardy" that normally would be required for species without designated critical habitat.[47] In short, critical habitat functions as a "judicial red flag"[48] to jeopardy violations "because it provides a tangible zone where major impacts are prohibited."[49] Lastly, critical habitat plays an important role when areas not currently occupied by the species are included in the designation.[50] In these situations, no consultation would occur without the protection of the adverse modification prong since the jeopardy prong would not apply.[51] Indeed, there is evidence that indicates that species with critical habitat have a better chance of recovery than species without critical habitat.[52]

Almost all of the litigation concerning critical habitat involves the initial decision of whether to designate any critical habitat. Indeed, most of these battles pit economic interests on the one side against environmental interests on the other. The litigation grows out of the simple commandment in the ESA that the Secretary, "to the maximum extent prudent and determinable," designate critical habitat at the same time that a species is listed.[53] If designation is deemed prudent and determinable for a listed species, FWS conducts biological research and a cost-benefit analysis.[54] After a notice and

43. *See* McDonald, *supra* note 21, at 688. The FWS has acknowledged that designation can provide "clear notification to Federal agencies and the public of the existence and importance of critical habitat." Proposed Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover, 60 Fed. Reg. 11,768, 11,773 (Mar. 2, 1995).

44. McDonald, *supra* note 21, at 688-89.

45. *Id.* at 688.

46. *See* Sierra Club v. Froehlke, 534 F.2d 1289, 1305 (8th Cir. 1976) (refusing to find jeopardy when no critical habitat had been designated); McDonald, *supra* note 21, at 689.

47. *See* Salzman, *supra* note 6, at 330. Salzman also notes that critical habitat has "great rhetorical value for environmental groups outside of the courtroom." *Id.*

48. *See id.* at 327.

49. *See* McDonald, *supra* note 21, at 689.

50. *See* 16 U.S.C. § 1532(5)(A)(ii) (2000).

51. *See* Notice of Intent to Clarify, *supra* note 39, at 31,872 ("When unoccupied habitat is designated as critical habitat, the duplication ceases because consultation under section 7 of the Act must then be completed on an area not previously included in the analysis.").

52. *See infra* note 186.

53. 16 U.S.C. § 1533(a)(3)(A). *See generally* 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 15C:4 (2006); Ann K. Wooster, Annotation, *Designation of "Critical Habitat" Under Endangered Species Act*, 176 A.L.R. FED. 405 (2005).

54. *See* 16 U.S.C. § 1533(b)(2).

consultation period, FWS makes a final decision of whether to list.[55] If the Agency decides to designate critical habitat, the designation becomes final when a map of the habitat is published in the Code of Federal Regulations.[56] However, if no designation is made, the reason for the decision must be stated in the proposed or final rules that list the species.[57]

In practice, the Secretary has a great deal of discretion in the initial designation decision. For example, Congress said "[t]he phrase 'to the maximum extent prudent' is intended to give the Secretary the discretion to decide not to designate critical habitat concurrently with the listing where it would not be in the best interests of the species to do so."[58] Indeed, in early 2007, fewer than half of the listed species (482 out of 1,007 listed species) had critical habitat designations.[59] This failure to designate flies in the face of Congress's clear intention that critical habitat should be designated in almost all situations.[60] FWS has put forth three justifications for not designating critical habitat: "(1) the 'not prudent' exception; (2) the 'not determinable' standard; and (3) 'impossibility' or 'impracticability' of designation due to fiscal restraints."[61]

The "not prudent" exception is the Agency's most common justification for failing to designate critical habitat.[62] The ESA provides that FWS may decline to designate critical habitat if it thinks the benefits of not designating outweigh the benefits of designating, though FWS may not decline to designate if it believes that failure to do so will lead to a species' extinction.[63] The Agency's regulations provide that designation is not prudent if "the species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species,"[64] or "if critical habitat would not be beneficial to the species."[65]

Natural Resources Defense Council v. United States Department of the Interior[66] provides an example of how FWS attempts to use the "not prudent" exception to avoid designation. The case involved critical habitat designation for the California gnatcatcher.[67] FWS listed the species but decided

55. *See* 50 C.F.R. §§ 17.11-.12, 17.95 (2005).
56. *Id.* § 17.95.
57. 50 C.F.R. § 424.12(a); *see also* H.R. REP. NO. 97-835, at 24 (1982) (1982 amendments to the ESA), *as reprinted in* 1982 U.S.C.C.A.N. 2860, 2865.
58. H.R. REP. NO. 95-1625, at 16 (1978) (1978 amendments to the ESA), *as reprinted in* 1982 U.S.C.C.A.N. 9453, 9466.
59. U.S. Fish & Wildlife Service, Threatened & Endangered Species System, General Statistics for Endangered Species, http://ecos.fws.gov/tess_public/SummaryStatistics.do (last visited Mar. 20, 2007).
60. *See* H.R. REP. NO. 95-1625, at 17 ("The committee intends that in most situations the Secretary will, in fact, designate critical habitat at the same time that a species is listed as either endangered or threatened.").
61. *See* Darin, *supra* note 4, at 224.
62. *Id.*
63. *See* 16 U.S.C § 1533(b)(2) (2000).
64. 50 C.F.R. § 424.12(a)(1)(i) (2005).
65. *Id.* § 424.12(a)(1)(ii).
66. 113 F.3d 1121 (9th Cir. 1997).
67. *Id.* at 1123.

not to designate critical habitat for two reasons: (1) the identification of habitat would lead to takings, and (2) a critical habitat designation "would not appreciably benefit [the species]" as most of the habitat was on private land and not subject to the ESA's section 7 prohibition relating to federal agency actions.[68] FWS argued that landowners had destroyed gnatcatcher nesting sites in the past and would be aided in doing so by the designation of critical habitat.[69] Indeed, in over two-thirds of cases in which FWS cites imprudence as the reason for not designating a species, vandalism is cited as a justification for the decision.[70] The Ninth Circuit rejected this argument as purely speculative and noted that FWS failed to consider the benefits that flow from designation.[71] The court also rejected the idea that designation would not be beneficial because most of the species are on private lands not subject to section 7's consultation and critical habitat modification requirements.[72] In rejecting this argument, the court noted that the regulations permitted FWS not to designate if the designation would not be "beneficial to the species," not merely "*most* of the species."[73]

Cases challenging FWS's failure to designate are typically brought under the Administrative Procedure Act,[74] which gives the courts the power to overrule certain agency decisions if they constitute an abuse of discretion.[75] In reviewing an agency's actions, "the federal courts consider whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the FWS purports to have relied have some basis in the record, and whether the FWS considered the relevant factors."[76] Courts also will examine whether the agency used the "best scientific and commercial data available" when making critical habitat decisions.[77] It is interesting to note that FWS's decisions not to designate critical habitat frequently are reversed when environmental groups challenge them in court.[78]

However, FWS has prevailed in challenges to its critical habitat decisions when it has been able to justify its decisions with adequate factual support. *Fund for Animals v. Babbitt*[79] is an example of such a case. *Babbitt* involved a challenge to FWS's decision not to designate critical habitat for the grizzly bear.[80] In upholding FWS's decision, the court noted that preexisting "recovery zones" covered more area than critical habitat would and

68. *Id.*
69. *Id.* at 1125.
70. *See* McDonald, *supra* note 21, at 683.
71. *See* 113 F.3d at 1125.
72. *See id.* at 1125-26.
73. *See id.* at 1126 (some emphasis omitted).
74. 5 U.S.C. § 706 (2000).
75. *See id.*; Smith, *supra* note 36, at 365.
76. *See* Smith, *supra* note 36, at 367.
77. *See* 16 U.S.C. § 1533(b)(2) (2000).
78. *See* Notice of Intent to Clarify, *supra* note 39, at 31,872-73 (noting the growing number of adverse judgments).
79. 903 F. Supp. 96 (D.D.C. 1995).
80. *See id.* at 102.

provided similar protections.[81] The court in this case might have given greater deference to FWS's decision not to designate since there was an alternative plan of protection,[82] as opposed to the California gnatcatcher case where no alternative protection scheme existed.[83]

The "not determinable" exception has provided FWS with another reason to avoid designation. The exception first arose in the 1982 amendments, which gave FWS a one-year extension for designating critical habitat when information was lacking at the time of listing.[84] Some argue that this exemption leads to "inexcusable" agency delay.[85]

The leading case dealing with this exemption is *Northern Spotted Owl v. Lujan*.[86] *Lujan* involved a challenge to FWS's decision to delay designating critical habitat for the spotted owl by one year.[87] FWS argued that the 1982 amendments automatically allowed a one-year extension to designating critical habitat.[88] The court rebuked FWS and held that it had an affirmative duty to collect as much information as possible on the designation and to state with particularity the reasons why designation would be indeterminable.[89] The court made clear that the "not determinable" exception does not provide a one-year extension automatically in every case.[90] Despite the reasoning of *Lujan*, courts frequently have had to step in to force FWS to make designations in cases where FWS has claimed a "not determinable" exception, often after years of delay on the Agency's part.[91]

FWS has also attempted to assert that the fiscal restraints placed on the designation of critical habitat by Congress act as an exception to the general duty to designate.[92] This issue of fiscal constraints was most acute in the mid-1990s, when Congress passed a moratorium on listings and critical habitat designations.[93] The moratorium was passed in an effort to prevent the overregulation of private property rights.[94] While the moratorium is no longer in effect, Congress continues to cap the amount of money that can be spent on listing actions, including critical habitat designations, each fiscal

81. *Id.* at 117.
82. *See* Jeffrey B. Slaton, Note, Natural Resources Defense Council v. United States Department of the Interior*: Making Critical Habitat Critical?*, 21 ENVIRONS ENVTL. L. & POL'Y J. 75, 98 (1998).
83. *See* Natural Res. Def. Council v. Dep't of Interior, 113 F.3d 1121 (9th Cir. 1997).
84. Darin, *supra* note 4, at 228.
85. *See id.*
86. 758 F. Supp. 621 (W.D. Wash. 1991); Darin, *supra* note 4, at 228.
87. *See* 758 F. Supp. 621.
88. *See id.* at 626-27.
89. *See id.* at 629.
90. *See id.*; *see also* Darin, *supra* note 4, at 229.
91. *See* Darin, *supra* note 4, at 229-31 ("Even a cursory review of the *Federal Register* illustrates that FWS delays critical habitat designation far beyond the one-year extension when it is 'not determinable' . . . .").
92. *See, e.g.*, Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999); Marbled Murrelet v. Babbitt, 918 F. Supp. 318 (W.D. Wash. 1996).
93. Act of Apr. 10, 1995, Pub. L. No. 104-6, 109 Stat. 73, 86.
94. *See* 141 CONG. REC. 8181 (1995). The moratorium passed the Senate by a vote of ninety-seven to three. *See* 141 CONG. REC. 8203-28.

year.[95] Though FWS no longer assigns any priority level to critical habitat determinations,[96] FWS has made it clear in the past that designating critical habitat is one of the Agency's lowest priorities.[97] Despite the fiscal constraints placed on designating critical habitat, courts have "held that the non-discretionary duty of designating critical habitat cannot be avoided for lack of funding."[98] In *Forest Guardians v. Babbitt*,[99] the court held that fiscal constraints could not be grounds for application of the "not determinable" exception in a case where more than four and one-half years had passed since the listing of the species in question.[100] In short, the court held that "'[s]hall' means shall"[101] and that a lack of resources is not an excuse for avoiding a mandatory requirement to designate critical habitat within a statutorily prescribed period of time.[102] The clear statutory requirement that critical habitat be designated within one year of listing (unless one of the exceptions applies) gives FWS very little room to assert an impracticability defense successfully.[103] However, when it comes to the re-designation of critical habitat, FWS has much more room to maneuver.

II. RE-DESIGNATION OF CRITICAL HABITAT

Once critical habitat has been designated, it can be challenged in one of two ways. First, the designation can be challenged like any final agency action under the Administrative Procedure Act as being "arbitrary [or] capricious."[104] This method usually involves an allegation that FWS failed to follow the requirements of the ESA or some other federal statute in making the final designation.[105] Second, citizens can petition FWS to re-designate the critical habitat.[106] Environmental organizations typically use this type of challenge to enlarge already existing critical habitat.[107] However, as this

95. *See* Darin, *supra* note 4, at 232 ("[T]he budget allocated to FWS has been severely limited due to the fear that increased funds will mean increased listings and hence more critical habitat designations that will curb private development and halt federal projects.").

96. *See* Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 2000, 64 Fed. Reg. 57,114, 57,115 (Oct. 22, 1999).

97. *See* Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 1997, 61 Fed. Reg. 64,475 (Dec. 5, 1996) (ranking critical habitat designation as the lowest priority in the listing program).

98. *See* Darin, *supra* note 4, at 233.

99. 174 F.3d 1178 (10th Cir. 1998).

100. *See id.* at 1192-93.

101. *See id.* at 1187 (emphasis omitted).

102. *See id.* at 1187, 1192.

103. However, courts have considered the Agency's fiscal constraints in crafting a timetable for FWS to issue a final designation after being sued for failure to do so. *See, e.g.*, Ctr. for Biological Diversity v. Norton, 212 F. Supp. 2d 1217, 1226 (S.D. Cal. 2002).

104. *See* 5 U.S.C. § 706 (2000); *Forest Guardians*, 174 F.3d at 1186.

105. *See, e.g.*, Home Builders Ass'n v. U.S. Fish & Wildlife Serv., 268 F. Supp. 2d 1197, 1203 (E.D. Cal. 2003).

106. *See* 16 U.S.C. § 1533(b)(3)(D) (2000); 50 C.F.R. § 424.14 (2005); *see also* 5 U.S.C. 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

107. *See* Murray D. Feldman & Michael J. Brennan, *The Growing Importance of Critical Habitat for*

Part will show, the lack of mandatory deadlines in the statutory, petition-driven re-designation process, combined with FWS's receptivity to efforts to shrink critical habitat, makes it much easier for industry or property rights advocates to reduce critical habitat than for environmentalists to expand it. This Part will begin with a discussion of how pro-development interests are scaling back existing critical habitat designations by challenging the economic analysis used by FWS in the initial designation. Then, it will explain how environmental organizations are attempting to use the ESA's petition provisions to force FWS to update and expand existing critical habitat. It also will compare the two methods and show how the process tends to favor efforts to reduce the scope of critical habitat.

A. Challenges to Final Agency Action

Many of the recent challenges to final designations of critical habitat have been based in large part on the Tenth Circuit Court of Appeals' decision in *New Mexico Cattle Growers Ass'n v. United States Fish & Wildlife Service* (*Cattle Growers II*).[108] The case involved a challenge to the final designation of critical habitat for the southwestern willow flycatcher, which was designed to protect the fewer than 500 nesting pairs left in seven states.[109] A group of New Mexico agricultural and industrial interests (the Association) filed suit alleging that FWS did not properly consider the economic impact of the designation.[110] While the district court rejected the challengers' arguments,[111] the Tenth Circuit proved more receptive.[112] The Association argued that FWS did not evaluate the economic impact of critical habitat designations properly because it did not include the economic impact of the initial listing in the evaluation.[113] The ESA provides that "[t]he Secretary shall designate critical habitat . . . after taking into consideration the economic impact . . . of specifying any particular area as critical habitat."[114] However, FWS cannot consider economic impact during the initial listing determination.[115] The practice of only considering the economic impact of the critical habitat designation in isolation, without including the impact of the listing itself, is known as the "baseline approach" be-

Species Conservation, 16 NAT. RESOURCES & ENV'T 88, 93 (2001) (noting that the petition process typically is used to expand the scope of critical habitat designations).

108. 248 F.3d 1277 (10th Cir. 2001).

109. *See id.* at 1279-80; Laura Hartt, New Mexico Cattle Growers Association v. United States Fish & Wildlife Service *and Other Efforts to Undermine Critical Habitat Designation Essential for Species Recovery*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 799, 814 (2004).

110. Hartt, *supra* note 109, at 815.

111. N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv. (*Cattle Growers I*), 81 F. Supp. 2d 1141, 1157-58 (D.N.M. 1999), *rev'd*, 248 F.3d 1277 (10th Cir. 2001).

112. *See Cattle Growers II*, 248 F.3d at 1284-86.

113. *Id.* at 1280, 1283.

114. 16 U.S.C. § 1533(b)(2) (2000).

115. *Id.* § 1533(b)(1)(A) ("The Secretary shall make determinations . . . solely on the basis of the best scientific and commercial data available . . . .").

cause only impacts above the listing baseline are considered.[116] FWS's use of the baseline approach is connected to its view that "jeopardy" (applied in the context of listing) and "adverse modification" (applied in the context of critical habitat) are functional equivalents.[117]

The Tenth Circuit held that the baseline approach is not supported by "the language or intent of the ESA."[118] The court based its decision largely on FWS's regulations, which define "jeopardy" and "adverse modification" almost identically.[119] The court noted that the functional equivalence doctrine rendered any economic analysis performed in connection with a critical habitat designation "virtually meaningless" because FWS viewed any impact from designation as equivalent to the impact from listing.[120] The court concluded: "Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes."[121] It should be noted that the Tenth Circuit was unable to invalidate the regulations establishing the functional equivalence doctrine[122] (unlike the Fifth and Ninth Circuits)[123] because that issue was not before the court.[124] Some have said *Cattle Growers* is an example of "a hard case making bad law."[125]

Pro-development interests have taken the Tenth Circuit's decision in *Cattle Growers* and used it as a key weapon in their arsenal to attack critical habitat designations.[126] In *Home Builders Ass'n v. United States Fish & Wildlife Service*,[127] trade associations, the state chamber of commerce, and private landowners challenged the final designation of critical habitat for the Alameda whipsnake.[128] They argued, among other things, that the designation was "arbitrary [and] capricious"[129] under the Administrative Procedure Act because FWS failed to identify the essential "physical or biological features"[130] of the critical habitat and failed to conduct the economic analy-

116. *See* Hartt, *supra* note 109, at 812-14.
117. *See Cattle Growers II*, 248 F.3d at 1283 (noting that "[t]he root of the problem lies in the [Service]'s long held policy position that [critical habitat designations] are unhelpful, duplicative, and unnecessary").
118. *Id.* at 1285.
119. *See id.*; *see also* 50 C.F.R. § 402.02 (2005) (defining "jeopardy" and "adverse modification").
120. *See Cattle Growers II*, 248 F.3d at 1285.
121. *Id.*
122. *See* 50 C.F.R. § 402.02 (establishing the functional equivalence doctrine).
123. *See supra* note 22.
124. *See Cattle Growers II*, 248 F.3d at 1283.
125. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 130 (D.D.C. 2004).
126. While not relying on *Cattle Growers*, environmental groups also have challenged the adequacy of final designations of critical habitat. *See, e.g.*, Ctr. for Biological Diversity v. Norton, 240 F. Supp. 2d 1090 (D. Ariz. 2003), *amended in part*, No. CV-01-409 TUC DCB, 2003 WL 22849594 (D. Ariz. Feb. 19, 2003) (involving a challenge to the adequacy of critical habitat for the Mexican spotted owl).
127. 268 F. Supp. 2d 1197 (E.D. Cal. 2003).
128. Final Determination of Critical Habitat for the Alameda Whipsnake, 65 Fed. Reg. 58,933 (Oct. 3, 2000).
129. *Home Builders*, 268 F. Supp. 2d at 1206 (citing 5 U.S.C. § 706(2)(A) (2000)).
130. *Id.* at 1209 (citing 16 U.S.C. § 1532(5)(A)(i) (2000)); *see also* 50 C.F.R. § 424.12(b)(5) (2005) ("When considering the designation of critical habitat, the Secretary shall focus on the principal biologi-

sis properly.[131] The court agreed with the challengers on both counts and remanded and vacated the final designation.[132] Interestingly, FWS agreed that the designation should be remanded so a new economic analysis could be conducted following the *Cattle Growers* formulation.[133]

FWS also sided with challengers to a final designation in *Building Industry Legal Defense Foundation v. Norton*.[134] The case involved a group of development interests challenging the final designation of critical habitat for the riverside fairy shrimp and arroyo toad.[135] FWS joined the challengers in requesting that the court vacate and remand the final designation so FWS could conduct a new economic analysis.[136] Despite the best intervention efforts of an environmental organization,[137] the court vacated and remanded the final designation.[138]

In *Cape Hatteras Access Preservation Alliance v. United States Department of the Interior*,[139] a group of local governments and a business association challenged the final designation of critical habitat for the piping plover.[140] The challengers alleged that FWS improperly included some areas in the critical habitat that did not contain the "primary constituent elements" (PCEs)[141] that are "essential to the conservation of the species"[142] and that FWS improperly conducted the economic analysis.[143] The court agreed that FWS improperly analyzed the PCEs of the plover's habitat[144] but partially rejected the challenge to the economic analysis.[145] The court rejected the holding of *Cattle Growers* and held that the baseline approach "is itself sound and in accordance with the law."[146] The court also noted that "the Fifth and Ninth Circuit's rejection of . . . the Service's functional equivalence doctrine is well reasoned."[147] In the end, the court remanded the final

cal or physical constituent elements within the defined area that are essential to the conservation of the species.").

131. *See Home Builders*, 268 F. Supp. 2d at 1206-09, 1225.

132. *See id.* at 1239-40.

133. *Id.* at 1228 (noting that FWS conceded that the prior economic analysis was "in error").

134. 231 F. Supp. 2d 100 (D.D.C. 2002).

135. *Id.* at 102 (discussing Final Designation of Critical Habitat for the Riverside Fairy Shrimp, 66 Fed. Reg. 29,384 (May 30, 2001) and Final Designation of Critical Habitat for the Arroyo Toad, 66 Fed. Reg. 9,414 (Feb. 7, 2001)).

136. *Id.* at 102 ("FWS has concluded that . . . *Cattle Growers [II]* is correct . . . .").

137. *See id.* at 103.

138. *Id.* at 108.

139. 344 F. Supp. 2d 108 (D.D.C. 2004).

140. *See id.* at 116; *see also* Final Determination of Critical Habitat for Wintering Piping Plovers, 66 Fed. Reg. 36,038 (July 10, 2001).

141. *See Cape Hatteras*, 344 F. Supp. 2d at 120 (citing 50 C.F.R. § 424.12(b)(5) (2005)).

142. *Id.* (citing 16 U.S.C. § 1532(5)(A)(i)(I) (2000)).

143. *See id.* at 120, 127.

144. *See id.* at 122 ("The Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation.").

145. *See id.* at 126-33.

146. *See id.* at 132.

147. *Id.* at 130.

designation of critical habitat so FWS could, among other things, properly analyze the PCEs of the plover's habitat.[148]

FWS also has entered into consent decrees and settlements with industry litigants that are challenging final critical habitat designations.[149] In *National Ass'n of Home Builders v. Evans*,[150] the National Marine Fisheries Service (FWS's counterpart in the Department of Commerce that governs marine species) joined in a consent decree that resulted in the critical habitat designation for salmon and steelhead being vacated and remanded for economic analysis under the *Cattle Growers* standard.[151] The same procedure has been used to remand the critical habitat designations of the cactus ferruginous pygmy-owl,[152] the California coastal gnatcatcher,[153] and the red-legged frog.[154] Indeed, FWS has acknowledged that it is focusing more on "providing incentives to private landowners to protect the habitats of endangered species" than designating critical habitat.[155] In fact, between 2001 and 2003, FWS designated only 41 million of the 83 million acres of critical habitat recommended by FWS biologists.[156] Overall, it seems FWS has given a friendly ear to industry suggestions that existing critical habitat designations be reduced in size and scope. This stands in stark contrast to FWS's attitude toward environmental organizations' efforts to expand existing critical habitat.

B. Re-Designation

The ESA provides two mechanisms for the re-designation of critical habitat. First, FWS "may, from time-to-time . . . as appropriate, revise [the critical habitat] designation" of an endangered species.[157] Second, any "interested person" may petition FWS to make a revision to critical habitat.[158] Once an interested person submits a petition, "[t]o the maximum extent practicable," FWS has ninety days to issue "a finding as to whether the petition presents substantial scientific information indicating that the revision

148. *See id.* at 136-37.

149. *See* Michael Senatore et al., *Critical Habitat at the Crossroads: Responding to the G.W. Bush Administration's Attacks on Critical Habitat Designation under the ESA*, 33 GOLDEN GATE U. L. REV. 447, 448 (2003) ("The Administration's principal tactic is to enter behind-the-scenes settlements with industry litigants that are challenging critical habitat designations.").

150. No. 00-CV-2799, 2002 WL 1205743 (D.D.C. Apr. 30, 2002).

151. *Id.* at *4-*6.

152. *See* Nat'l Ass'n of Home Builders v. Norton, No. 00-CV-903, 2001 WL 1876349, at *5-*6 (D. Ariz. Sept. 21, 2001).

153. *See* Natural Res. Def. Council v. U.S. Dep't of Interior, 275 F. Supp. 2d 1136, 1156 (C.D. Cal. 2002).

154. *See* Home Builders Ass'n v. Norton, 293 F. Supp. 2d 1, 4-5 (D.D.C. 2002).

155. Juliet Eilperin, *Endangered Species Act's Protections are Trimmed*, WASH. POST, July 4, 2004, at A1.

156. *Id.* For example, FWS did not designate as critical habitat nearly one million acres that the Agency's biologists had recommended as critical habitat for fifteen vernal pool species in California. *Id.*

157. 16 U.S.C. § 1533(a)(3)(B) (2000).

158. *Id.* § 1533(b)(3)(D).

may be warranted."[159] If FWS decides that revision may be warranted, it "shall determine how [it] intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register."[160] This determination must be made within twelve months after receiving a petition, regardless of when FWS made its ninety-day finding.[161]

The citizen petition process has been the subject of litigation involving the Cape Sable seaside sparrow and various species of beach mouse along the Gulf of Mexico. In *Biodiversity Legal Foundation v. Norton*,[162] an environmental group challenged FWS's failure to revise critical habitat for the Cape Sable seaside sparrow.[163] An environmental group petitioned FWS to revise the bird's critical habitat, and FWS found that the petition "presents substantial information" that re-designation may be warranted.[164] Later, in a litigation-induced twelve-month finding, FWS stated that it "will proceed with a proposal to revise critical habitat for the Cape Sable seaside sparrow as soon as feasible, considering [its] workload priorities and available funding."[165] The Biodiversity Legal Foundation requested the court to order FWS to make a more concrete statement of how it intended to proceed with the re-designation of the habitat.[166] Therefore, the issue before the court was whether the citizen petition provision of the ESA requires FWS to make a specific determination of how and when it intends to proceed with a re-designation if it determines that one is appropriate in response to a citizen petition.[167] First, the court held that FWS's twelve-month finding was adequate under the language of the ESA because the plain language of the law only requires FWS to state "how [it] intends to proceed" and does not require any concrete timetable.[168] Second, the court refused to find that FWS engaged in "unreasonable delay" under the APA.[169] However, the court was

159. *Id.* § 1533(b)(3)(D)(i).
160. *Id.* § 1533(b)(3)(D)(ii).
161. *Cf.* Biodiversity Legal Found. v. Babbitt, 63 F. Supp. 2d 31, 34 (D.D.C. 1999).
162. 285 F. Supp. 2d 1 (D.D.C. 2003).
163. *Id.* at 2. The court previously recognized that "the Cape Sable seaside sparrow is at significant risk of imminent extinction." *See* Biodiversity Legal Found. v. Norton, 215 F. Supp. 2d 140, 141 (D.D.C. 2002).
164. 285 F. Supp. 2d at 6. The existing critical habitat for the bird was inadequate in part because of habitat modification caused by Army Corps of Engineers projects in the Everglades. *Id.* at 5.
165. 12-Month Finding for a Petition to Revise Critical Habitat for the Cape Sable Seaside Sparrow, 66 Fed. Reg. 53,573 (Oct. 23, 2001).
166. *See* 285 F. Supp. 2d at 8.
167. *See id.*
168. *See id.* at 11. The court supported its finding by drawing a comparison with the language in the section of the ESA that deals with citizen petitions for listing species as endangered. *See id.* at 10. In the listing context, Congress mandated that the twelve-month finding contain "the complete text of a proposed regulation to implement" the listing. 16 U.S.C. § 1533(b)(3)(B)(ii) (2000).
169. *See Biodiversity*, 285 F. Supp. 2d at 12-17. In deciding whether plaintiff should be granted equitable relief under the APA for agency delay, the court mentioned six factors:

> (1) the time agencies take to make decisions must be governed by a "rule of reason";
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;

concerned that four years had passed since FWS first recognized that the bird's critical habitat designation was inadequate.[170] The court also was troubled that the bird's extinction was expected in less than two decades.[171] Therefore, the court ordered FWS "to declare a date certain on which work on the revision to the Cape Sable seaside sparrow's critical habitat will begin and to provide an estimate for how long it will take."[172] So even though the court did not find a violation of either the ESA or APA, the Biodiversity Legal Foundation was successful in applying judicial pressure on FWS. As the court noted, "[a] 12-Month Finding on a citizen petition starts the clock of reasonable timeliness under the APA . . . . [meaning that] citizen petitions can constrain FWS's discretion when they are scientifically sound and demonstrate that revision of a critical habitat designation is warranted."[173]

In *Sierra Club v. Norton*,[174] environmental groups challenged FWS's delay in re-designating critical habitat for the Alabama beach mouse, the Choctawhatchee beach mouse, and the Perdido Key beach mouse (collectively "the Alabama beach mouse"). The Alabama beach mouse's critical habitat initially was set at 152.5 meters inland from the mean high tide of the Gulf of Mexico along part of the Alabama and the Florida panhandle coastline, which included virtually all primary dunes and some secondary dunes.[175] The plaintiff environmental groups petitioned FWS to revise and expand the critical habitat to include more secondary dunes and scrub dune habitat, partly in an effort to protect the mouse from the inundation caused by hurricanes.[176] Nine months after the petition was filed, FWS determined in its "ninety-day notice" that revision of the critical habitat for the Alabama beach mouse might be warranted.[177] Then, in a litigation-induced twelve-month notice, FWS stated its intention to proceed with a re-designation but did not set any timetable for completion of the process.[178] The plaintiffs

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(4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
(5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
(6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency is 'unreasonably delayed.'"

Id. at 12 n.13 (quoting Telecomm. Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984)) (the "TRAC Factors").

170. *See id.* at 16.

171. *Id.*

172. *Id.* at 17.

173. *Id.* at 11. It also is interesting to note that the court did not accept FWS's argument that the ESA's consultation and taking provisions provided the bird with adequate protection from extinction. *Id.* at 15.

174. 313 F. Supp. 2d 1291 (S.D. Ala. 2004).

175. Determination of Endangered Status and Critical Habitat for Three Beach Mice, 50 Fed. Reg. 23,872, 23,884-85 (June 6, 1985).

176. 313 F. Supp. 2d at 1292-93.

177. *Id.* at 1293 n.1; *see also* Press Release, U.S. Fish & Wildlife Service, Critical Habit Revision Warranted for Endangered Cape Sable Seaside Sparrow (Oct. 23, 2001), *available at* http://www.fws.gov/southeast/news/2001/r01-079.html.

178. *See* 12-Month Finding for a Petition to Revise Critical Habitat for Alabama Beach Mouse, Perdido Key Beach Mouse, and Choctawhatchee Beach Mouse, 65 Fed. Reg. 57,800 (Sept. 26, 2000);

filed suit over two years after FWS's published its twelve-month notice.[179] While the court refused to recognize any timetable requirement for the twelve-month notice in the language of the ESA,[180] the plaintiffs succeeded in extracting from FWS a commitment to publish critical habitat revisions beginning in January 2005.[181] Indeed, the preliminary revision for the Alabama beach mouse was published on February 1, 2006,[182] and the Final Rule was published on October 12, 2006.[183] The revised designation expanded the protected area's overall size by about 200 acres and adjusted its boundaries to account for new science and changed conditions.[184]

Therefore, even though the two courts that have considered the issue have refused to read any deadline provision for finalizing a critical habitat re-designation into the ESA, environmental groups have succeeded in using the citizen petition process to force FWS to set some timetable for the re-designation process. FWS's adversarial attitude in litigation seeking to expand critical habitat stands in stark contrast to its cooperation with industry plaintiffs seeking to reduce critical habitat through a *Cattle Growers* challenge. This probably can be explained by the institutional philosophy within FWS that critical habitat serves no real purpose.[185]

III. CONCLUSION

FWS's long-standing lack of enthusiasm for critical habitat now has spilled over into the re-designation arena. The ESA's lack of a deadline for completing a re-designation of critical habitat under the citizen petition process combined with FWS's inclination to delay the re-designation as long as possible pose a substantial barrier to the expansion of existing critical habitat. And as the cases of the Cape Sable seaside sparrow and Alabama beach mouse demonstrate, there can be good reasons to revise critical habitat. For example, existing habitat can become degraded through modification by private landowners, or the population distribution that the original designation was based upon may change. In short, the natural world is not static, and there should be a reliable, manageable mechanism for revising critical habitat when conditions warrant. However, the current political divi-

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see also Plaintiff's Memorandum in Support of Motion for Summary Judgment at 7, Sierra Club v. Norton, 313 F. Supp. 2d 1291 (S.D. Ala. 2004) (No. 03-377-CB-C).

179. *See* Plaintiff's Memorandum in Support of Motion for Summary Judgment, *supra* note 178, at 7.

180. 313 F. Supp. 2d at 1293-94 ("There are no other deadlines contained in the ESA for action on a petition to amend critical habitat.").

181. *See* Defendants' Opposition to Plaintiffs' Motion for Summary Judgment & Cross-Motion for Summary Judgment at 27, Sierra Club v. Norton, 313 F. Supp. 2d 1291 (S.D. Ala. 2004) (No. 03-377-CB-C).

182. Critical Habitat for the Alabama Beach Mouse, 71 Fed. Reg. 5,516 (proposed Feb. 1, 2006).

183. Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238 (Oct. 12, 2006) (to be codified at 50 C.F.R. pt. 17).

184. *See* Ryan Dezember, *Beach Mouse Ruling Made*, PRESS-REGISTER (Mobile, Ala.), Feb. 1, 2007, at 1A.

185. *See supra* notes 37-42 and accompanying text.

sion over endangered species policy makes the emergence of any such mechanism difficult.

Though problems with critical habitat ought to be corrected,[186] FWS has chosen to use regulatory duplication (i.e., defining "jeopardy" and "adverse modification" to mean the same thing) to impede the ability of critical habitat to serve the goal of species recovery that Congress intended. If FWS cannot convince the American people or their representatives in Congress to abandon or modify the critical habitat provisions of the ESA, it should do its duty and enforce the law. In the end, everyone committed to the protection and recovery of endangered species should find a way to make the ESA work without having to rely on endless litigation. As it stands now, it seems FWS will designate critical habitat or expand it only if ordered to do so by a court. In effect, enforcement of the critical habitat provisions of the ESA has been partially turned over to the judicial branch. One hopes that in the coming years, responsible leaders from the political, business, and environmental advocacy arenas will find a way to breathe meaning back into the idea of species recovery and habitat conservation.[187] If they do, they will be working to advance American democracy and ensure that future generations know the majesty of biological diversity.

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186. One study indicates that species with critical habitat for two or more years were more than twice as likely to have an improving population trend in the late 1990s as those without critical habitat. *See* Martin F.J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 BIOSCIENCE 360, 360-67 (2005).

187. For an example of one such collaborative effort, see Letter from Keystone Ctr. ESA Working Group on Habitat, to Sens. Chafee, Clinton, Crapo, Inhofe, Jeffords, and Lincoln (Feb. 17, 2006), *available at* http://www.keystone.org/spp/env-esa.html (follow "Letter to Senators" hyperlink).