Less is **More**

Using critical habitat exclusions to encourage more wildlife conservation

MISSION WILDLIFE

SAND COUNTY FOUNDATION

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Mission:Wildlife is a new environmental organization advancing bold policies that will do more to restore endangered wildlife while reducing costs to communities and risks for businesses. Changes in technology, information, science, demographics and climate create new opportunities to rethink and improve how we approach wildlife conservation in America. We work to make those opportunities a reality. Sand County Foundation serves as the fiscal sponsor for Mission:Wildlife.

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About Sand County Foundation

Sand County Foundation is a private, non-profit organization dedicated to working with private landowners across North America on voluntary, ethical and scientifically-sound land management practices that benefit the environment.

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The Endangered Species Act (ESA) requires the U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) to identify and map out the places that endangered and threatened species need for their survival and recovery. Thereafter, designated 'critical' habitat is subject to additional scrutiny and protective measures applied when the Services are consulted on any federal project or action. In the past, the Services have applied Critical Habitat in such a way that it provides little benefit to species beyond the protections offered by other parts of the ESA. In addition, it has little to no effect on private, state or local lands unless a project there is federally funded or needs a federal permit. Nonetheless, Critical Habitat is one of the most feared and attacked components of the law because of its perceived impact on private and public lands.

In addition, the law gives the Services broad authority to exclude areas from a designation if the conservation benefits of exclusion are greater than inclusion. In the past, such exclusions have created strong incentives for better conservation from those who seek to be excluded from Critical Habitat. Exclusion from designation has been a reward for important contributions made to wildlife recovery.

On May 9th, the Departments of Interior and Commerce released two proposed rules and one new policy that would affect how Critical Habitat (CH) is implemented wherever designations of habitat occur. They are seeking comments on these proposals by October 9th. For the first time, the agency has proposed policy to define whether, when and how it will offer exclusions.

The Services' proposal includes positive steps to use the flexibility inherent in the ESA to allow the agencies to exclude areas. However, there are many ways the Services' policy could be even stronger. This paper reviews key aspects of the policy and offers additional suggestions that would help agencies deliver more wildlife recovery through less designation of habitat. This work is based on the assumption that incentives that encourage land managers and owners to take actions that contribute to recovery may often provide more meaningful benefits to species than the step of designating those lands as Critical Habitat.

Introduction

ESA, Section 4(b): "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."

Between the 1978 and 1982 amendments to the ESA, Congress gave the Secretaries of Interior and Commerce broad discretionary authority to exclude areas from Critical Habitat. For example, in 2003, the U.S. Fish and Wildlife Service excluded 9,600 acres of private ranchland in Hawaii from Critical Habitat for endangered plants because the ranches were already taking extensive action to conserve the species.[1] Ranchers' existing stewardship included control of invasive plants and out-planting of endangered ones, in partnership with the state wildlife agency and USFWS. Designating Critical Habitat could not have compelled either action and landowners would have likely stopped their proactive conservation work if Critical Habitat had been designated. Thus, the conservation benefits of excluding the areas exceeded including them among the 93,000 acres that were designated on Maui. While the agencies have applied exclusions on a case by case basis for past Critical Habitat decisions covering hundreds of species, they have never before had a policy in place to guide the use of exclusions. The May 12th policy proposal (RIN: 1018-AX87) is first step toward doing so.

Why are **exclusions important?**

On its face, one assumes the ESA is all about wildlife and the science of wildlife management, but it's also equally about human behavior.

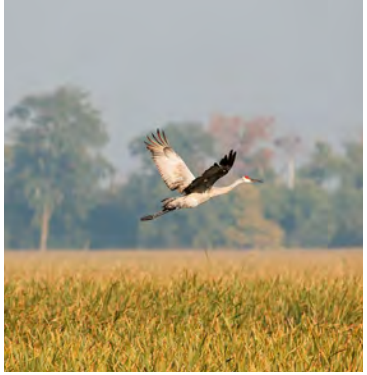
Critical Habitat likely provides its most important benefit to wildlife because it may discourage certain land uses, especially on federal lands, from ever being proposed in designated areas. Projects are sited elsewhere. However, once a proposal has been offered, the designation may provide little benefit to species not offered by other parts of the ESA.[2] This is particularly true on private lands.

Yet many private landowners and federal ones fear Critical Habitat and the risk they perceive it creates to future uses of their land. Almost more than any other part of the ESA, Critical Habitat designations provoke this fear which in turn can create responses by landowners that may be harmful to wildlife and plants. For example, many species depend on active habitat management to survive and the ESA lacks any tools to compel or require active management.[3] If landowners who are fearful of having their land designated as

1 The USFWS also excluded two permanently protected preserves managed by The Nature Conservancy http://www.fws.gov/news/ShowNews.cfm?ID=F4AE7AF5-1962-43BE-B8AC3FFB9C7E0A29

2 In 1999, Clinton administration officials testified that Critical Habitat, "rarely affords additional protections to species listed under the ESA;" http://www.epw.senate.gov/107th/cla_5-27.htm

3 D.C. Baur, M.J. Bean and W.M. Irvin. 2009. A recovery plan for the Endangered Species Act. Environmental Law Reporter. 2009. http://www.eli.org/sites/default/files/docs/



Critical Habitat refuse to allow habitat management, endangered species are likely to disappear from their land over time. In addition, landowners may 'shoot, shovel, and shut up,' destroying species habitat and populations before anyone is aware they are present on a property. Conversely, if landowners would be willing to do more for wildlife in exchange for having their land excluded from a designation, exclusions would produce conservation benefits that would not happen if lands were included in a designation. Thus, it makes sense for the Services to use the open-ended authority granted them by the ESA if there are ways to get direct or indirect positive outcomes for wildlife through exclusions.

In general, the Services' May 12th Critical Habitat exclusions policy takes a big step in the right direction that will create better incentives for private and federal landowners to assist in the conservation and recovery of endangered species. This paper offers additional suggestions and recommendations for how the policy could be improved.

Discretion

"In articulating this general practice, the Services do not intend to limit in any manner the discretion afforded to the Secretaries by the statute."

The Services' go to great lengths throughout this policy to note that they are maintaining their discretion whether to carry out an exclusion analysis and how exclusions will apply. By doing so, the Services miss key opportunities to provide more clarity and stronger assurances to potential partners. From an outsider's perspective broad agency discretion often appears harmful. Discretion makes it difficult or impossible for businesses, landowners and communities to predict the decisions an agency will make. Such partners are less likely to want to be part of wildlife conservation if they cannot predict how federal wildlife agencies will behave — it undermines trust and makes proactive investments risky.

*The Services could maintain their discretion **whether** to apply an exclusion analysis, but do more to constrain their discretion in **how** they will apply it. Comments throughout this paper provide examples where a more predictable approach in how exclusion analysis is applied would encourage more endangered species conservation.*

Strengthen the established preference for **designating Federal lands** instead of private ones

"Lands owned by the Federal government should be prioritized as sources of support in the recovery of listed species. To the extent possible, we will focus designation of Critical Habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands."

The approach to federal versus non-federal land designations is a commendable way to narrow and target future Critical Habitat proposals toward federal lands where designation has the most meaning. Roughly one third of our Nation's lands are managed by federal agencies whose missions require them to protect national resources. In many parts of the country, a federal land emphasis offers opportunities to focus recovery efforts on those lands most important to recovery. Where there are choices in how species will be recovered, the agencies should choose to designate areas in federal ownership over those in private, state or local ownership.

This commitment to focus on federal lands should be strengthened. The draft policy mentions the Secretarial Order relating to Tribal lands and Critical Habitat which reads, "the Services shall .... document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands."[4]

This is a statement that should be extended to all private lands through this policy. Doing so would establish a more definitive preference for designating public lands over private ones. In most cases, Critical Habitat designation will precede development of a recovery plan so it may not be possible for staff to analyze potential recovery tradeoffs of federal versus non-federal land designation. To address this issue, the final policy should include some indication that the agency will revise its recovery planning guidance to create explicit steps in the development of recovery plans in which it considers such tradeoffs. Where appropriate, after recovery plans are finalized, the agencies should revise Critical Habitat to set new boundaries for designations that better match the recovery needs of the species.

4 Secretarial Order 3206, June 5th 1997; http://www.usbr.gov/native/policy/SO-3206_tribalrights_trust_endangeredspecies.pdf

The policy proposes **special treatment for areas covered by an existing management agreement** or plan with USFWS.

"When we undertake a discretionary exclusion analysis, we will always consider areas covered by an approved CCAA/SHA/HCP[5], and generally exclude such areas from a designation of Critical Habitat if three conditions are met:

1. *The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the CCAA/SHA/HCP, Implementing Agreement, and permit.*
2. *The species for which Critical Habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.*
3. *The CCAA/SHA/HCP specifically addresses that species' habitat (and does not just provide guidelines) and meets the conservation needs of the species in the planning area. We will undertake a case-by-case analysis to determine whether these conditions are met and, as with other conservation plans, whether the benefits of exclusion outweigh the benefits of inclusion."*

This is a positive statement of USFWS' intent to generally exclude these areas from a designation. However, it could have gone further. The Services should have said that if they decide to conduct an exclusion analysis, they will always exclude such areas from Critical Habitat if the benefits of exclusion outweigh the benefits of inclusion. Why would an agency with a mission to protect and recover wildlife ever chose differently? First, a clearer statement would create a benefit during the development of such agreements – all parties would have an interest in insuring that the agreement 'meets the conservation needs' of the species as described in this language. Second, it would create an incentive for partners to implement their agreement and ensure that the agencies monitor that implementation. Instead, this language creates only uncertainty – even if an HCP or SHA participant meets all of these criteria and the benefits of exclusion are greater than inclusion, the Services might still not exclude their lands.

Similarly, other kinds of plans deserve specific recognition in the policy and confirmation of how they will be treated with regard to exclusions. For example, the state plan for the lesser prairie chicken has a strong conservation strategy meant to address the needs of the species and may deserve consideration under these same criteria.

5 CCAAs are Candidate Conservation Agreements with Assurances, SHAs are Safe Harbor Agreements and HCPs are Habitat Conservation Plans.



Commit to developing conservation agreements **that meet the Critical Habitat exclusion standard**. Agreements designed to meet a net benefit to recovery in almost every instance will **provide greater conservation benefits** to species than inclusion in a designation.

"The CCAA/SHA/HCP specifically addresses that species' habitat … and meets the conservation needs of the species in the planning area."

Federal HCPs are negotiated so that they minimize and mitigate the impacts of incidental take on listed species to the maximum extent practicable.[6] In contrast, SHAs and CCAAs are negotiated to produce what is generally an overall contribution to the species' conservation or a net benefit. However, none of these agreements is designed to achieve this policy's new standard: to meet the conservation needs of the species in the planning area.

Few HCPs or SHAs address all threats to a species. Conservation strategies in agreements and plans are typically limited to the threats associated with permitted activities on the enrolled properties. For example, a safe harbor agreement for the Chiricahua leopard frog in Arizona[7] addresses ranching activities but not the threat of climate change which is recognized in the frog's recovery plan as a threat.[8] Should most agreement-enrolled areas not be considered for exclusion because they do not meet all the conservation needs of the species? A better approach is to hold these agreements to the agencies' approval standards for each as established in law and policy and require that agreements and plans meet species needs as appropriate in order to be considered for exclusion.

In addition, agreements that fully offset impacts on the species through proper implementation of the full mitigation hierarchy including compensatory mitigation, and that are designed to meet a net conservation benefit or net contribution to recovery standard should by default meet the criteria for exclusion if those commitments are being implemented. HCPs like those throughout California and Hawaii or isolated ones such as the statewide HCPs for Karner blue butterflies in Wisconsin and Michigan are set up to contribute to recovery of covered species. In the case of Candidate agreements, those plans are designed to improve the species condition and reduce threats such that the species will not ever require ESA protection. In all these cases, if the agencies are correctly implementing their own policies in approving agreements and plans (which includes meeting the requirements of state law) properly implemented agreements and plans will always provide a benefit to the species that exceeds that afforded by Critical Habitat.

6 Although note that Sections 2081(b) and (c) of the California Endangered Species Act requires HCPs to 'minimize and fully mitigate' impacts to listed species which thus changes the standard for federal HCPs in California and Hawai'i Endangered Species law (Revised Statutes Chapter 195D) requires that HCPs provide a net recovery benefit to the listed species. More than 40 percent of listed species are only found in these two states.

7 https://www.fws.gov/southwest/es/arizona/Documents/Safe%20Harbors/CLF/AZ%20CLF%20SHA.pdf

8 http://www.fws.gov/southwest/es/Documents/R2ES/DRAFT_Recovery_Plan_for_the_Chiricahua_Leopard_Frog_with_Appendices.pdf

The Services could better recognize the goals of their own HCP, CCAA and SHA policies by stating that the Services' presumption is that agreements and plans designed to achieve a standard that makes a positive contribution to recovery meet the benefits test for exclusion (criterion 3 on page 7).

This approach is not dissimilar to the one Congress put in place that requires the Secretary of Interior and Commerce to exclude Department of Defense installations from Critical Habitat if the installation's integrated natural resource management plan will benefit the species.[9]

If incorporated into a final Critical Habitat exclusion policy, each of these changes would provide a stronger incentive and greater predictability that would encourage partners to participate in agreements and plans that better meet species needs.

Failing adoption of these changes, an alternative that the Services could adopt through revision of HCP, SHA and CCAA policy is to make a determination or finding at the time of HCP, SHA or CCAA approval whether, based on the best available information, the agreement or plan "addresses the species' habitat and meets the conservation needs of the species." By adding such a step into the development and approval process for plans and agreements, the Services would offer greater predictability of how agencies would subsequently interpret this standard in the Critical Habitat designation process. Such an analysis would be particularly important for CCAAs since their development will always precede Critical Habitat designation.

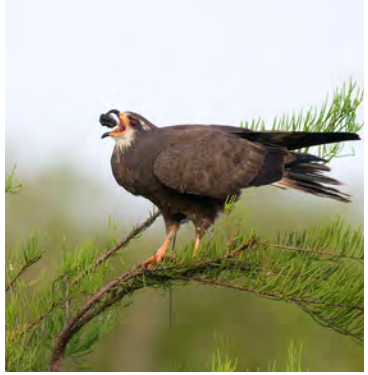
The policy **will undermine Habitat Conservation Plans** unless whole plans are considered for inclusion or exclusion in place of the potential designation of development areas of HCPs in critical habitat.

"HCPs often are written with the understanding that some of the covered area will be developed, and the associated permit provides authorization of incidental take caused by that development (although a properly designed HCP will tend to steer development toward the least biologically important habitat). Thus, designation of the areas specified for development that meet the definition of "Critical Habitat" may still conceivably provide a conservation benefit to the species."

Draft language associated with HCP exclusions is particularly problematic. The Services indicate a general intent to exclude HCP conservation areas from designation, but include development areas. Given that participants in HCPs are generally seeking 'no surprise' assurances that they can develop these very areas, this statement is a clear indication that the Services are considering adding additional Critical Habitat requirements or restrictions

9 Department of Defense installations support populations of more than 400 species on over 25 million acres of land and water in the United States. http://www.denix.osd.mil/nr/upload/T-E-s-fact-sheet-1-15-10-final.pdf





to those already in place through the HCP. This raises a host of uncertainty about HCPs and the incentives for participants to join or initiate them. Imagine this approach in practice with a map showing Critical Habitat only applying to the areas planned for development in a county-wide HCP. How would a county react to such an approach to Critical Habitat designation? HCPs are single plans and should be treated that way when being evaluated for exclusion or inclusion under Critical Habitat. An ad hoc approach by the Services to carve out development areas would undermine many HCPs.

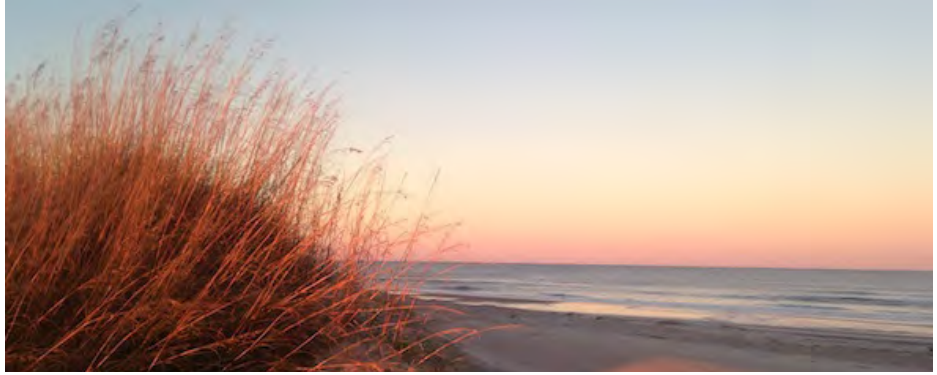
HCPs are already being avoided by developers who can seek approval through section 7 consultation if there is even a weak federal nexus. Section 7 consultation may be a quicker permitting route with lower standards for approval. If the Services provided more definitive and less discretionary commitments to exclude lands enrolled in an HCP, it would create an additional incentive for applicants to use HCPs in place of section 7 for their project. Doing so would frequently be to the benefit of the species based on the higher conservation goals of the Section 10 HCP process as compared to section 7 requirements to avoid jeopardy and adverse modification and adopt reasonable and prudent measures.

Offer revisions of Critical Habitat as an incentive if land management plans or agreements are put in place that have more conservation value to species recovery than the Critical Habitat designation.

Critical Habitat for most species is either already designated or will be designated within one year of listing under the approach taken by the Obama Administration to comply with the requirement of the ESA. Over coming decades, this means that hundreds of Safe Harbor Agreements, HCPs and other conservation plans will be put in place after a designation has already occurred. The draft policy is silent on the issue of Critical Habitat revisions made to reflect new conservation agreements.

In situations where landowners are willing to commit to conservation actions under a voluntary agreement or take additional beneficial actions through a permitting process that will yield a net contribution to recovery, the Services should commit to revise Critical Habitat and exclude those areas from the current designation.

Incorporating such forward-looking Critical Habitat exclusions would serve as a fantastic incentive for parties to enroll under future conservation agreements. To offer that incentive, this policy should provide clear guidance on whether and how the Services would offer exclusions from existing Critical Habitat in exchange for future conservation commitments. For example, if some of Maine's private



forest landowners who own proposed Critical Habitat identified in 2013 agree in 2015 to manage their forests in ways that would benefit Canada lynx, will the Service propose a future exclusion for those lands from already designated Critical Habitat?

To address this opportunity in the final policy the Services should make a commitment to provide such exclusions in the future. The reason for doing so is the one provided in the ESA - because revising Critical Habitat to exclude areas would have a greater benefit than continuing to include them under the designation. The final policy should also identify the need to revise the U.S. Fish and Wildlife Service's HCP and SHA guidance and handbook language. The revisions are needed to provide procedural information to staff on how to negotiate HCPs and SHAs that would meet criteria necessary to receive an exclusion that would be incorporated into a prior designation.

Procedurally, could new Critical Habitat exclusions be proposed through public notice and comment as part of the HCP and SHA development process or would they require separate notice and comment and new rounds of economic analysis? The Services do not currently carry out additional economic analysis for areas excluded between draft and finalization of Critical Habitat so it may be possible to provide public notice and comment and otherwise satisfy procedural requirements to make an exclusion through HCP and SHA development process.

Allow exclusion of areas covered by draft plans and agreements if staff conclude that plans and agreements are likely to be implemented and likely to be effective. **Doing so would create a more uniform standard with the Service's 2003 policy** for evaluation of conservation efforts (PECE).

"However, promises of future conservation actions in draft CCAAs, SHAs, and HCPs will be given little weight in the discretionary exclusion analysis, even if they may directly benefit the species for which a Critical Habitat designation is proposed."

This approach makes no sense in consideration of the Services' established policy for evaluating conservation efforts (PECE) used in other circumstances.[10] Under PECE, the Services consider ongoing or planned conservation actions and if those actions are sufficiently low risk, may decide not to protect a species under the ESA. Such a decision results in no listing, no section 9 prohibitions, no Critical Habitat designation or section 7 consultation protections. Why take such a different approach under Critical Habitat when the risk to species of not including an area in Critical Habitat is so much lower than that of not offering it protection in the first place? Surely, the Services can find a way to evaluate the likelihood that a draft or new HCP or SHA is likely to be implemented and to benefit species, and whether exclusion is likely to provide more benefit than inclusion.

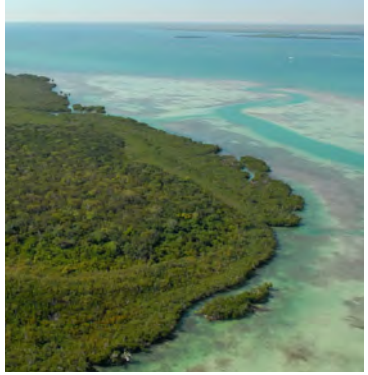
10 https://www.fws.gov/endangered/esa-library/pdf/PECE-final.pdf

Create an incentive for federal land managers if federal land management plans are designed and implemented to achieve a section 7(a)(1) standard that contributes to species recovery

"We generally will not consider avoiding the administrative or transactional costs associated with the section 7 consultation process to be a "benefit" of excluding a particular area from a Critical Habitat designation in any discretionary exclusion analysis. We will, however, consider the extent to which such consultation would produce an outcome that has economic or other impacts, such as by requiring project modifications and additional conservation measures by the Federal agency or other affected parties."

The Services' draft policy indicates a preference for designating federal lands, with language addressing the more specific question of national and homeland security exclusions (considerations of which the Services give "great weight"). This is a reasonable approach to evaluate potential federal land exclusions, but the policy could create stronger conservation incentives for federal agencies.

For example, the Services could consider a similar approach to federal land exclusions that are provided for Department of Defense installations. Under an amendment made to the ESA a decade ago, if the Secretary of Interior decides that a resource management plan provides a benefit to affected species, the military base will not be designated as Critical Habitat. Applying this same standard to all federal lands would create a stronger incentive for more agencies to live up to the requirements of section 7(a)(1) of the ESA. This section of the ESA requires agencies to use their programs to conserve threatened and endangered species – i.e. to provide an overall benefit to recovery. For example, if the U.S. Forest Service develops conservation strategies under section 7(a)(1) to guide recovery efforts for endangered bats and those strategies are added as requirements under relevant national forest management plans those actions would contribute to species recovery, not just avoid jeopardy. Section 7(a)(1) has always been a neglected part of the ESA. While the law says that all federal agencies must use their authority to carry out programs to recover species, there is no mechanism to force that action and there has been little compliance with it in 40 years. Offering Critical Habitat exclusions for federal lands in exchange for binding commitments to species' recovery in management plans on excluded land management units is a tradeoff that would benefit endangered and threatened species.



If federal lands that are part of an agricultural operation are managed under a conservation agreement to the same high conservation standard as private lands managed under an approved agreement or plan, **consider additional exclusions to cover those Federal lands**

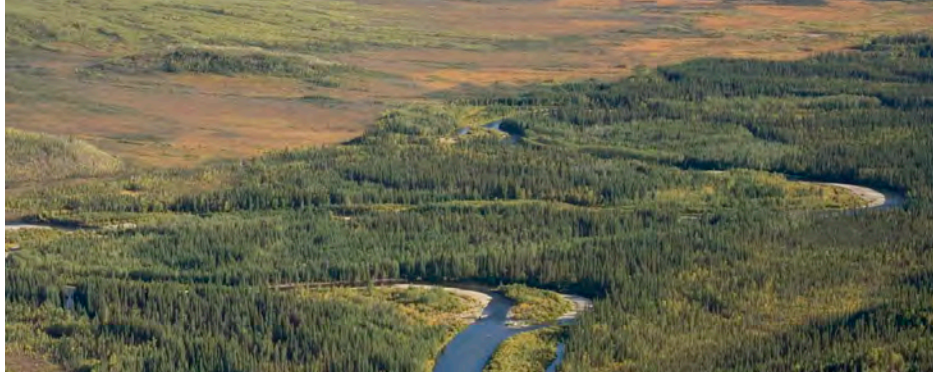
The draft policy misses a particularly important opportunity with regard to federal lands that are used as part of a private land-based agricultural operation that is covered by an SHA, CCAA or other agreement. If federal lands that are part of a ranching operation are managed to the same (or higher) conservation standards as those on private lands, the exclusion policy should give similar consideration to excluding those federal lands when considering exclusions for connected private ones.

The ability to offer such an incentive, would provide a reasonable basis to negotiate higher standards than are possible through a section 7 process with greater benefit to species. A Candidate Conservation Agreement (without assurances) is one example of the kind of agreement that could be used to negotiate public land commitments that match private ones covered by a CCAA. Moreover, doing so would create more certainty for the large number of ranchers and other landowners who depend upon both federal and private lands for their living and who are or could be participants in SHAs, CCAAs or HCPs.

Conclusions

Exclusions from Critical Habitat are more important than ever because of the draft regulations proposed in May 2014 that offer a new definition of 'destruction and adverse modification,' of Critical Habitat. Coupled with first-ever compliance by an Administration with legal requirements to designate Critical Habitat at the time of a species' listing, critical habitat is being designated with increasing frequency and will be enforced to the higher standard proposed. Stronger exclusion policy with clear criteria that limit agency discretion in how (but not whether) they carry out an exclusion analysis will increase private land and public land commitments to endangered species recovery.

This policy is one of the best opportunities the Obama Administration has to create a strong new incentive under the ESA without any need for action by Congress. Many landowners fear a Critical Habitat designation. Stronger exclusion policy provides a tool to benefit species and eliminate much of that fear. The result would be a better outcome for America's wildlife.



Rule 1

Rule 1: New definition of Adverse Modification *(RIN: 1018-AX88)*

The ESA requires that projects with a federal nexus (i.e. those on federal land, requiring a federal permit, receiving discretionary federal funding, etc.) must not result in destruction and adverse modification to Critical Habitat. Since 1986, the Services have tried to defend a set of similar interpretations of 'adverse modification' that essentially made it match the other ESA standard of 'jeopardy.' Courts have repeatedly thrown out the Services' interpretation based on the conclusion that if Congress had wanted 'jeopardy' and 'destruction or adverse modification' to mean the same thing, Congress would have just used one term. In the new regulation proposed in May 2014, the Services are moving toward a definition that would incorporate considerations of species' recovery into destruction or adverse modification review that would make it distinct from a jeopardy analysis.

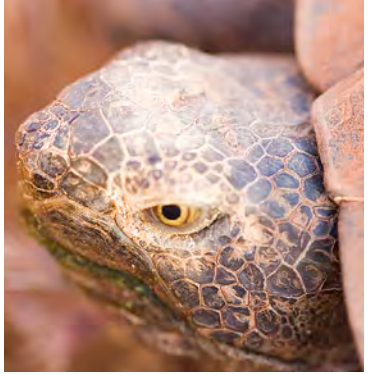
The proposed definition is:

"Destruction or adverse modification" means a direct or indirect alteration that appreciably diminishes the conservation value of Critical Habitat for listed species.

Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.

In proposing this definition, the agencies are still trying to ensure that the change in how Critical Habitat will be applied is modest. First, the definition retains a standard - 'appreciable diminish' – that allows the agencies significant discretion to decide that the impacts of some projects do not constitute adverse modification, even though they harm habitat. Second, they speak of the future by identifying changes to a place that would preclude or delay the future development of features that support species' recovery.

If adopted as proposed, this change in definition will likely improve the ability of Critical Habitat to provide benefit to species recovery by facilitating the designation of currently unoccupied or unsuitable habitat that is needed for future recovery.



APPENDIX

The following suggested amendments to section 3 of the draft policy provide specific language related to the recommendations made above.

When we undertake a discretionary exclusion analysis, we will always consider areas covered by an CCAA/SHA/HCP[11], and ~~generally~~ exclude such areas from a designation of Critical Habitat if incidental take caused by the activities in those areas is covered by a permit under section 10 of the Act and the CCAA/SHA/HCP meets the following conditions:

(1) The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the CCAA/SHA/HCP, Implementing Agreement, and permit.

(2) The species for which Critical Habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.

(3) The CCAA/SHA/HCP specifically addresses that species' habitat ~~(not just providing guidelines)~~ and meets the conservation needs of the species ~~in the planning area~~ appropriate to the plan or agreement.

(4) The benefits of exclusion outweigh the benefits of inclusion.

~~We generally will not rely on CCAAs/SHAs/HCPs that are still under development as the basis of exclusion from a designation of critical habitat.~~

An approved CCAA/SHA/HCP that meets the criteria (1) through (3) above and that was designed to make an overall contribution to recovery of a covered species will be assumed to meet criteria (4).

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