

Critical Habitat Myths and Facts

Recognizing that habitat loss threatens 85% of all endangered species,¹ Congress created the “critical habitat” provision of the Endangered Species Act stating that *“if the protection of endangered and threatened species depends in large measure on the preservation of the species’ habitat, then the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.”*²

The federal government (with some exceptions) is required to map out, publicize, and protect all areas essential to the recovery of endangered species. These are called critical habitats. Federal agencies are prohibited from approving or carrying out actions which reduce the ability of critical habitats to recover endangered species. They are not required to apply such high standards outside critical habitat. Critical habitat is the only provision of the ESA which unambiguously protects habitat in and of itself.

Critical habitat is opposed by some industry groups because it sets clear boundaries and rules. They prefer a discretionary regulatory environment where political pressure can be more effectively wielded. With their supporters in Congress and the administration, these groups are waging an orchestrated misinformation campaign to convince Congress to riddle critical habitat with loopholes and make its protection discretionary.

Myth #1: Critical Habitat Does Not Benefit Endangered Species

Though providing no scientific evidence, opponents claim that critical habitat does not benefit endangered species. The Bush administration has forced the U.S. Fish and Wildlife Service to act as a propaganda tool for this message by making it reprint an anti-critical habitat “disclaimer” in every critical habitat decision and press release. Numerous peer-reviewed scientific studies, however, show that critical habitat works. They are never mentioned by the opposition. The most recent and comprehensive analysis of U.S. Fish and Wildlife Service and National Marine Fisheries Service data shows that species with critical habitat are twice as likely to be recovering as species without it. The administration’s “no benefit” claims are especially disingenuous because it forced the Fish and Wildlife Service to delete critical habitat benefit studies for several species and on January 13, 2005 broadly banned agency biologists and economists from documenting or discussing critical habitat’s benefits.⁴

Myth #2: Critical Habitat Does Not Establish a Recovery Management Standard

Citing a 1986 Reagan administration policy, opponents assert that critical habitat only comes into play when a species’s survival is threatened. They say federal agencies are permitted to approve and carry out harm to critical habitat which undermines recovery. This policy, however, has been ruled illegal by no less than eight federal judges since 2001. The administration has recently acknowledged that the policy is illegal, but has delayed development of a new policy to avoid its recovery duties.

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Myth #3: The U.S. Fish and Wildlife Service “Delayed” Critical Habitat for Over 1000 Species For Need of Additional Scientific Research, Activist Lawsuits Employed Unreasonable Legal Timelines to Prematurely Force Critical Habitat for These Species

The ESA allows critical habitat designation to be delayed for one year if the agency is unable to identify essential recovery habitats. The Fish and Wildlife Service invoked this delay just 125 times for the 1,322 species under its jurisdiction. But it issued *final decisions* barring 1,116 species from ever getting critical habitat. Thus 90% of all critical habitat denials were permanent decisions, not “delays”. These decisions became nearly universal after the illegal 1986 anti-critical habitat policy. Environmental lawsuits in the late 1990s struck down the policy, overturned critical habitat denials for hundreds of species, and have greatly improved habitat protection. 84% of these suits targeted substantial decisions to exclude critical habitat, only 16% concerned ESA timelines.

Myth #4: Critical Habitats are Being Rushed Through Before Completion of Recovery Plans

There is a natural affinity between recovery plans and critical habitat because the former identify recovery goals and strategies while the latter identifies habitat areas needed for recovery. To justify elimination of the critical habitat requirement and timelines, opponents routinely assert that timeline litigation has forced most critical habitats to be designated before recovery plans have been completed. Dead wrong. 86% of all critical habitats were designated after or at the same time as recovery plans. In the past 15 years the percentage has increased to 89%. The administration’s use of this argument is especially disingenuous because it has repeatedly overruled the Fish and Wildlife Service’s attempts to incorporate recovery plan goals and strategies into critical habitat designations. Indeed, on January 13, 2005 it prohibited the U.S. Fish and Wildlife Service from referring to recovery plans when designating critical habitat.⁴ These are not the actions of an administration concerned with promoting more integration of recovery plans and critical habitat.

Myth #5: There is No End in Sight to Critical Habitat Litigation

Following the illegal 1986 anti-critical habitat policy, the U.S. Fish and Wildlife Service essentially shut down its designation program. By the late 1990s it had accrued a backlog of approximately 444 species which were deprived of critical habitat and not yet barred from litigation by the six year statute of limitations. An orderly legal campaign set out to protect the habitat of all these species. As of March, 2005 it has won the designation of critical habitat for 345 species, obtained settlement agreements to designate 54 more, and is actively litigating on behalf of nine others. This leaves approximately 36 species which have not yet been litigated but will be soon. In short, the U.S. Fish and Wildlife Service developed a large, but discrete backlog and has worked through most of it in the past five years. Indeed, the number of critical habitat designations dropped dramatically from 2003 to 2004 and will remain at approximately the same moderate level through at least 2008. The anti-litigation complaints of critical habitat opponents are disingenuous as well as misleading because they fail to mention or seek action barring the voluminous industry-based litigation to strike down critical habitats. Their plan is to strike down existing critical habitats through legal settlements with the administration, then take away the ESA’s requirement to re-establish the protection zones.

¹ Wilcove, D.S., D. Rothstein, J. Dubow, A. Phillips and E. Losos. 1998. Quantifying threats to imperiled species in the United States. *BioScience* 48: 607-615.

² U.S. Congress. 1976. House Committee on Merchant Marine and Fisheries, HR Rep. No. 887, 94th Congress, 2nd Sess. at 3 (1976).

³ Taylor, M. F., K. F. Suckling, R. Rachlinski. 2005. The effectiveness of the Endangered Species Act: A quantitative assessment. *BioScience* 55: 360-367.

⁴ U.S. Department of Interior. 2005. Lessons Learned in Recent Critical Habitat Rules. Position paper dated January 13, 2005.