Statutory Redundancy: Why Congress Should Overhaul the Endangered Species Act to Exclude Critical Habitat Designation

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STATUTORY REDUNDANCY: WHY CONGRESS SHOULD OVERHAUL THE ENDANGERED SPECIES ACT TO EXCLUDE CRITICAL HABITAT DESIGNATION

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Abstract: There is much debate concerning the enforcement of the critical habitat designation provisions of the Endangered Species Act. Most scholars argue that the Secretary of the Interior abuses the "not prudent" and "not determinable" exceptions to avoid making such designations when endangered or threatened species are listed. The Endangered Species Act of 1973 was enacted to achieve the dual goals of species conservation and species recovery, achieved primarily through ecosystem conservation. Section 7 of the Endangered Species Act requires all federal agencies to consult with the Secretary of the Interior to evaluate the consequences of proposed federal actions to ensure they neither jeopardize the existence of the endangered species nor destroy or modify a designated critical habitat. Because these standards overlap, the critical habitat designation provision should be excluded from the Endangered Species Act, since it serves as nothing more than a weapon for environmentalists to block land development. It forces the Department of the Interior to spend its time defending lawsuits, rather than listing more species and thoroughly analyzing federal actions that may jeopardize vital ecosystems.

INTRODUCTION

Enacted in 1973, the Endangered Species Act (ESA)1 was Congress's response to increasing public concern about the extent to which various species have been rendered extinct due to inadequate concern for conservation in the face of economic growth and development.2 To achieve its dual goals of species conservation and recovery, the ESA's purpose includes "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

* Articles Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2002-03.
2 Id. § 1531(a)(1).
such endangered species and threatened species.” Thus, the ESA governs the listing of endangered and threatened species and the designation of critical habitats for the conservation of listed species. But, must the ESA continue to mandate critical habitat designation to fulfill its underlying principle of species protection?

Long after its enactment, ecosystem protection continues to be one of the heralded purposes of the ESA. For example, in 1995, Secretary of the Interior Bruce Babbitt stated, “Make no mistake about it, the Endangered Species Act is as American as apple pie. It has preserved our rich and diverse natural heritage. It has ensured that the next generation of Americans can inherit a land as beautiful as the land we so love.” Despite such public sentiments of ecological preservation, many authors have criticized the Secretary of the Interior for abusing his discretionary authority and manipulating the statutory construction of the ESA to avoid critical habitat designation upon listing endangered or threatened species.

After the Fish and Wildlife Service (FWS) earned a reputation for routinely avoiding critical habitat designation, the courts stepped in to enjoin federal agency actions and order consistent critical habitat designation. Consequently, many developers and community leaders have claimed that the courts’ interpretation and enforcement of the ESA unnecessarily impedes property rights and land development.

One author summed up the situation by stating:

9 Id. § 1531(b).
10 Id. §§ 1533(a)(2), 1533(a)(3)(A).
14 See Salzman, supra note 6, at 335. Most recently, the ESA has been criticized after the National Wilderness Institute filed a suit to halt construction of the Woodrow Wilson Bridge, a multi-million dollar project meant to ease traffic in Washington, D.C., which has
The ESA has become the target of a highly charged rhetoric over the appropriate limits of federal "land ethic"-based regulation of private property. Using the news media as well as judicial and legislative advocacy, the property rights forces have succeeded in putting the ESA and its supporters where they have never been before—on the defensive.9

The protection of endangered and threatened species and the conservation of their ecosystems begins with listing species in need of protection.10 Perhaps it should end there as well. Once a species is listed, the ESA prohibits any person within the jurisdiction of the United States from "taking" that species of fish and wildlife.11 The FWS's regulations expanded the taking prohibition to also preclude possession or trade in the species.12 Since the ESA was promulgated to prohibit the taking of endangered species and to mandate affirmative actions by federal agencies to protect endangered species, Congress decided to define "critical habitat" as part of the 1978 amendments.13 "Critical habitat" is defined as habitat essential for conservation of a species that may require special management considerations.14 Critical habitats, therefore, may include areas found both inside and outside of the species' occupied geographic area.15

To facilitate the ESA's purpose to avoid harm to both listed species and their critical habitats, section 7 requires all federal agencies to consult with the Secretary of the Interior to evaluate the consequences of proposed federal actions so that they neither jeopardize the existence of an endangered species nor destroy or modify a designated critical habitat.16 These are recognized as overlapping standards because, as other authors have noted, there does not appear to have been approved by both the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. Editorial, Endangering the Beltway, WALL ST. J., Jan. 10, 2002, at A12.


11 See id. § 1538(a) (1)(C).


14 Id.

15 See, e.g., N.M. Cattle Growers v. United States Fish & Wildlife Serv., 248 F.3d 1277, 1282 (10th Cir. 2001).

be any case where a court found "adverse modification" of a critical habitat without also finding "jeopardy" to a listed species. Both courts and environmental agencies note this overlap to differing degrees, while often striving to find a valuable distinction when mandating critical habitat designation.

The FWS and the National Marine Fisheries Service (NMFS), in practice, also recognize the overlap, as they have designated only 152 critical habitats out of 1256 listed species, as of January, 2002. However, unlike the courts, environmental agencies, and numerous scholars, the FWS and the NMFS do not reach for a valuable distinction. Because of serious backlog issues, the FWS's Listing Priority Guidance has given designation the lowest priority among the listing activities performed by the FWS because of serious backlog issues. It has been recognized that the FWS has put off critical habitat designation until forced to do so by injunction.

When deciding that critical habitat designation is unnecessary when listing a species, the FWS primarily relies on the "not prudent" and "not determinable" exceptions. When citizens or environmental groups want to challenge the decision not to designate critical habitats, actions are brought to federal courts under the ESA's citizen suit provision and the Administrative Procedure Act (APA). The FWS's decisions under the ESA are reviewed by the courts as agency actions that are subject to the APA's standard of review. Accordingly, the court must determine whether the FWS's actions were "arbitrary, ca-

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18 See, e.g., Sierra Club v. United States Fish & Wildlife Serv., 245 F.3d 434, 441 (5th Cir. 2001); Greenpeace, 55 F. Supp. 2d at 1265.
21 N.M. Cattle Growers Ass'n, 248 F.3d at 1283.
pricous, an abuse of discretion, or otherwise not in accordance with the law,” or “without observance of procedure required by law.”

This Note examines the role of critical habitat designation in achieving the overall purpose of the ESA. Part I discusses the background of the ESA, including its enactment and subsequent amendments, the prohibition against “taking” listed species, and habitat protection, including the history of the definition of “critical habitat.” Part II is a review of the consultation process that federal agencies must adhere to, and the overlapping regulations that prohibit both jeopardy to the species and destruction of critical habitat. Part III reviews citizen enforcement actions, beginning with a discussion of the FWS’s practice and policy and the federal courts’ standard of review under the APA. Part IV suggests that because the courts stretch the APA’s standard of review, thus increasing litigation and decreasing the public’s perception of the value of the ESA, the only remedy to preserving the integrity of the ESA is through elimination of the critical habitat designation requirement altogether. This Note concludes with a discussion of how both species protection and ecosystem preservation are adequately achieved through the listing process and the jeopardy provision, without any need for critical habitat designation.

I. PURPOSE OF THE ENDANGERED SPECIES ACT

A. Enactment of the Endangered Species Act

Congress enacted the Endangered Species Act (ESA) in 1973 in response to its finding that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.”26 The ESA’s two predecessors, the Endangered Species Preservation Act of 196627 and the Endangered Species Conservation Act of 196928 provided some wildlife protection, but they neither prohibited the taking of endangered species nor mandated that all federal agencies affirmatively act to preserve endangered spe-

25 See 5 U.S.C. § 706(2)(A), (D); see also Fund for Animals, 903 F. Supp. at 105.
cies. In addition, both acts only protected species facing worldwide extinction and not those species solely within the United States. Based on the perceived shortcomings of the Acts of 1966 and 1969, the Senate established four requirements for the ESA to ensure adequate protection of endangered species.

The ESA of 1973 was passed: (1) to allow the Secretary of the Interior sufficient discretion in listing species that were either in immediate danger of extinction or likely to become endangered; (2) to provide protection throughout the nation for endangered species; (3) to give the Secretary of the Interior broader land acquisition authority; and (4) to involve current and encourage new state management programs for the benefit of endangered species.

The ESA of 1973 awarded legal status to endangered and threatened species by requiring federal agencies to conserve the species and to further species preservation. The ESA reflects congressional recognition of the benefits of species preservation, in place of land development, for “esthetic, ecological, educational, historical, and scientific value to the Nation and its people.” Like its predecessors, the general purpose of the ESA is to conserve and protect endangered and threatened species of flora, fauna, and the ecosystems in which they exist.

B. Listing an Endangered or Threatened Species

The ESA’s protection of endangered and threatened species and the conservation of their ecosystems begins with listing species in need of protection. The Secretaries of the Interior and of Commerce (collectively, “Secretary”) each have individual authority to list a species. The Secretary must decide whether to list a species based

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29 The 1966 Act did not include provisions that addressed land use, standard requirements for listing a species, takings of listed species, or constraints on federal agency actions that could potentially jeopardize the survival of a species. Endangered Species Preservation Act of 1966 § 2(b).
30 See Endangered Species Conservation Act § 3; see also George Cameron Coggins & Irma S. Russell, Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America, 70 GEO. L.J. 1433, 1450 (1982).
32 Id.
34 Id. § 1531 (a)(3).
35 Id. § 1531 (b).
36 See id. § 1533(a).
37 Id. § 1533(a)(1).
on the best available commercial and scientific information, but cannot consider the economic impact that may result from such listing.\textsuperscript{38} The Secretary determines whether a species is endangered or threatened based on: (1) the present or threatened destruction of its habitat; (2) its over utilization for commercial or other purposes; (3) disease or other predation; (4) inadequacy of existing regulatory mechanisms; and (5) other factors affecting the species’ continued existence.\textsuperscript{39}

\textbf{C. The Takings Prohibition}

Once a species is listed, section 9 of the ESA prohibits any person within the jurisdiction of the United States from “taking” that species.\textsuperscript{40} “Person” is defined as individuals, corporations, and other private entities; federal, state, local, and foreign officials, agents, departments, and instrumentalities; and any federal, state, or local government entity subject to the jurisdiction of the United States.\textsuperscript{41} To “take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”\textsuperscript{42} The United States Fish and Wildlife Service (FWS) has broadly defined “harm” to include any modification of habitat that actually kills or injures wildlife by “significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering.”\textsuperscript{43} The FWS interprets “harass” to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering.”\textsuperscript{44}

There are three different ways for private citizens to enforce the takings prohibitions of section 9.\textsuperscript{45} First, the Attorney General of the United States or private citizens may seek an injunction in federal court that would order the party violating the ESA to cease the pro-

\textsuperscript{38} \textit{Id.} § 1533(b) (1) (A).
\textsuperscript{39} 16 U.S.C. § 1533(a) (1).
\textsuperscript{40} \textit{Id.} § 1538(a) (1) (C); Endangered and Threatened Wildlife and Plants, 50 C.F.R. §§ 17.21(c), 17.31(a) (2002).
\textsuperscript{41} 16 U.S.C. § 1532(13).
\textsuperscript{42} \textit{Id.} § 1532(19).
\textsuperscript{43} 50 C.F.R. § 17.3.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} 16 U.S.C. § 1540(g) (1) (A).
scribed act. 46 Second, the Secretary may impose civil penalties of no more than $25,000 for each taking and no more than $12,000 for each violation of a regulation made pursuant to the ESA. 47 Finally, the United States can criminally prosecute knowing violators of the ESA with fines of up to $50,000, or prison terms of up to one year, or both. 48

In private citizen enforcement actions, plaintiffs bear the burden of proving a violation of the takings prohibition. 49 If the defendant claims either an exemption from the Act or a permit, then the defendant has "the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation." 50

There are exceptions to the takings prohibition. 51 Takings that are otherwise banned by section 9 are permitted under the section 10(a) provision for the granting of incidental taking permits by the FWS if such taking is only incidental to, the carrying out of an otherwise lawful activity. 52

If the permit applicant includes a Habitat Conservation Plan (HCP) that specifies the taking's impacts, the measures the applicant will take to mitigate those impacts, the available funding to implement the plan, alternatives to the proposed action, the reasons for foregoing the alternatives, and such other measures that the Secretary finds necessary and appropriate to the plan, then the Secretary shall issue the permit. 53 To approve the incidental taking permit application and the HCP, the FWS must find:

(1) the taking will be incidental; (2) the applicant will, to the maximum extent practicable, mitigate the impact of the taking; (3) the applicant will ensure that adequate funding for the plan will be provided; (4) the taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild; and (5) the necessary and appropriate measures required by the FWS will be met. 54

46 Id. § 1540(e) (6).
47 Id. § 1540(a).
48 Id. § 1540(b).
50 16 U.S.C. § 1539(g).
52 16 U.S.C. §§ 1538(a) (1) (C), 1539(a) (1) (B).
54 Id. § 1539(a) (2) (B).
D. Habitat Protection

Since the ESA was promulgated to prohibit endangered species takings and mandate affirmative actions from federal agencies to protect endangered species, Congress eventually found it necessary to define critical habitat.55 “Critical habitat” is now defined by the ESA as habitat essential for conservation of a species, and includes what is needed to prevent human activities from contributing to species endangerment and extinction.56 Critical habitat includes areas occupied by the species that have “physical or biological features essential to the conservation of the species and which may require special consideration and protection.”57

In addition, areas currently not occupied by the species, but “essential to the conservation of the species,” should also be designated as critical habitat.58 The ESA also defines “conservation” as “all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided . . . are no longer necessary.”59 Consequently, critical habitat designation may include areas found both inside and outside of the species’ occupied geographic area.60

E. The History of the Definition of “Critical Habitat” and the Duty of the FWS

1. The Definition of “Critical Habitat”

Although section 7 of the ESA always required the Secretary to promulgate regulations ensuring that federal agencies do not destroy or modify critical habitat, the term “critical habitat” was not defined by the FWS’s regulations until 1978.61 Critical habitat was first defined as “any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species.”62

This critical habitat definition was first tested in Tennessee Valley Authority v. Hill, in which the Supreme Court upheld the lower court’s

55 Id. § 1532(5)(A).
56 Id.
57 Id. § 1532(5)(a)(i).
58 Id. § 1532(5)(a)(ii).
59 16 U.S.C. § 1532(3).
60 See id.
61 McDonald, supra note 6, at 681.
decision to enjoin the construction of the Tellico Dam, after construc-
tion had been virtually completed and the dam was essentially ready
for operation, because it would destroy the critical habitat of a listed
species, the snail darter. Although the Court admitted that the ESA
produced a “curious” result, it stated that section 7 imposed an abso-
lute duty not to jeopardize species or modify designated critical habi-
tats.

After the Tellico Dam case, Congress enacted the 1978 amend-
ments to the ESA. The amendments are best known for their crea-
tion of a cabinet-level committee, the so-called “God Squad,” which
has the power to exempt a federal agency from section 7 when a cost-
benefit analysis reveals the rare case where other public interests out-
weigh the benefits of conserving a species. In addition to establish-
ing the committee, Congress amended the ESA to define critical habi-
tat as, “the specific areas within the geographical area . . . essential to
the conservation of the species . . .” Thus, Congress broadened the
definition of critical habitat from the regulatory definition’s standard
of “survival and recovery” to embrace the concept of “conservation.”
Although the ESA redefined critical habitat, the FWS still applies its
original regulatory standard focusing on what is necessary for the sur-
vival and recovery of each listed species. However, the Fifth Circuit
has held that, based on the “manifest inconsistency” between the
regulatory definition and Congress’s “unambiguously expressed in-
tent” in the ESA, the regulatory definition is facially invalid.

In addition to changing the regulatory definition of critical habi-
tat, Congress required the Secretary, “to the maximum extent pru-
dent and determinable,” to designate critical habitat concurrently
with the listing of a species as endangered or threatened. The Secret-
tary must designate and revise critical habitat based on the best avail-

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64 Id. at 172.
(1978).
66 16 U.S.C. § 1532(5)(A). The committee was created by the ESA for the sole purpose
of making final decisions on the applications for exemptions from the ESA. Id. § 1536(c).
69 See Sierra Club v. United States Fish & Wildlife Serv., 245 F.3d 434, 441 (5th Cir.
2001).
70 Id. at 443.
able scientific data and must consider how critical habitat designation will impact the economy and other relevant considerations.72

Thus, the Tellico Dam case was the catalyst that prompted Congress to replace the FWS’s regulatory definition of critical habitat with the first statutory definition, requiring the Secretary to designate critical habitat “to the maximum extent prudent and determinable” at the time of listing a species, and to make economic considerations a means to exclude areas from critical habitat designation.73 The “prudent and determinable” standard of the ESA gives rise to two exceptions to the general mandate that the Secretary must designate critical habitat at the time of listing a species.74 These exceptions are not defined by the ESA.75 Yet, they have been analyzed and defined in both regulations and case law.76

2. The “Not Prudent” Exception

The ESA does not define “prudent,” but the FWS has promulgated regulations explaining that critical habitat designation is “not prudent” in two situations.77 According to the regulations, critical habitat designation is “not prudent,” from a biological standpoint, when either: (1) “[t]he 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”; or (2) “[s]uch designation of critical habitat would not be beneficial to the species.”78 If the FWS determines that the critical habitat is “not prudent,” then such designation for a listed species is not required.79

The ESA also provides for an economic impact analysis, in addition to these biological considerations, when designating critical habi-

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72 Id. § 1533(b)(2). Once biological research and a cost-benefit analysis has begun, the FWS publishes the proposed critical habitat for public scrutiny and holds public hearings if requested. Id. § 1533(b)(5); Listing Endangered and Threatened Species and Designating Critical Habitats, 50 C.F.R. §§ 424.12–13 (2002). If the FWS promulgates a critical habitat, then a map of the habitat is placed in the Code of Federal Regulations. Endangered and Threatened Wildlife and Plants, 50 C.F.R. §§ 17.11–12, 17.95 (2002). If, however, the FWS decides that critical habitat designation is “not prudent” or “not determinable,” then the FWS must publish the reasons in the publication listing the species. 50 C.F.R. § 424.12(a).
75 Id.
76 Id.
78 50 C.F.R. § 424.12(a)(1)(i)–(ii).
79 See Missouri, 158 F. Supp. 2d at 987.
The Secretary is allowed to consider economic and other relevant impacts on the area being considered for critical habitat designation. This economic analysis applies only to critical habitat designations, while listing decisions are based solely on biological considerations.

When considering economic impacts, the Secretary must determine whether the land requires special management because of "physical and biological factors," which include: (1) space for individuals and population growth; (2) food, water, air, light, minerals, and other nutritional requirements; (3) shelter; (4) sites for breeding; and (5) areas that were protected from disturbance or were representative of the historical distribution of the species.

The Secretary may exclude a potential area from critical habitat designation if the benefits of exclusion outweigh the benefits of including the area as designated habitat. Congress gave the Secretary this discretion so that the potential designation of critical habitat would be different than if the designation was based solely on objective biological criteria.

Congress explained that the "not prudent" exception would occur only in rare circumstances. However, Congress has recognized that the "not prudent" exception is designed 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 interest of the species to do so." The only time the ESA demands critical habitat designation, and therefore forbids the use of the "not prudent" exception, is when failure to designate a critical habitat would result in the extinction of the species. Further, the ESA states that, except where the Secretary determines otherwise, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." Thus, habitat that is not currently occupied by the species shall not be designated as critical habitat unless the

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81 Id.
82 Id. § 1533(b)(1)(A).
83 50 C.F.R. § 424.12(b)(1)-(5).
86 Id.
87 See id.
89 Id. § 1532(5)(C).
Secretary determines that it is essential for the conservation of the species.\(^{90}\)

3. The "Not Determinable" Exception

In addition to the "not prudent" exception, the FWS regulations grant a one-year extension to designate critical habitat after listing a species when "critical habitat of such species is not then determinable."\(^{91}\) The FWS defined "not determinable" as occurring when either: (1) information to perform the required analyses of impacts from designation was lacking; or (2) the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.\(^{92}\)

If critical habitat is "not determinable" at the time the species is listed, the Secretary may extend the usual one-year limitation for publication of a final regulation designating critical habitat for an additional year.\(^{93}\) At the end of this resultant two-year limitation on the final designation of critical habitat, the ESA requires the Secretary to publish a final regulation "based on such data as may be available at that time."\(^{94}\)

Congress intended to hasten the listing process by allowing the Secretary to focus on biological data for listing purposes and then take an additional year, if necessary, to focus on science and economics for critical habitat designation.\(^{95}\) Although the amendments provide for an additional year when necessary, the Secretary is still expected to make the strongest possible attempt to determine critical habitat at the time of listing.\(^{96}\)

II. THE CONSULTATION PROCESS

A. Review of the Consultation Process of Section 7

To promote the ESA's purpose to avoid harm to both listed species and their critical habitats, section 7 requires all federal agencies

\(^{90}\) See id.


\(^{92}\) Id.


\(^{94}\) Id.


to consult with the Secretary to evaluate the consequences of proposed federal actions so that they neither jeopardize the existence of an endangered species nor destroy or modify a designated critical habitat.\(^{97}\)

The consultation process applies to any federal action.\(^{98}\) Federal agencies must consult with either the FWS or the National Marine Fisheries Service (NMFS), which shares the ESA's duties and regulations with the FWS, to determine whether the actions they authorize, fund, or carry out will violate the ESA.\(^{99}\) The agency must either request a list from the FWS of any listed species or proposed listed species that may be present in the potentially affected area, or give the FWS a prepared biological assessment where the federal agency lists present species.\(^{100}\)

If consultation results in a determination that a listed species or a proposed listed species is in the area, then the FWS will issue a biological opinion, which details how the agency action could potentially jeopardize the species or its critical habitat.\(^{101}\) To prepare the biological opinion, the agency must give the FWS the best scientific and commercial data available so that the FWS may make an accurate determination of potential jeopardy to the species or its habitat.\(^{102}\) The FWS will then issue either a jeopardy opinion or a no-jeopardy opinion.\(^{103}\) If the FWS issues a no-jeopardy opinion, then the agency may proceed with the development project.\(^{104}\) If, however, the FWS issues a jeopardy opinion, then the FWS will give the agency reasonable and prudent alternatives to avoid jeopardizing the species or its habitat.\(^{105}\)

Although the federal agency makes the final decision whether to proceed with the action, or to accept the FWS's alternatives, it could become the target of a suit if the agency acts contrary to the advice of


\(^{99}\) Endangered Species Committee Regulations, 50 C.F.R. § 402.10(a) (2002).

\(^{100}\) Id. § 402.12.

\(^{101}\) 16 U.S.C. § 1536(b)(3)(A). If the consultation indicates that there are no endangered or threatened species in the area, and the action is not defined as a "major construction activity," then the consultation process is completed, and the federal agency may continue with the project without having the FWS prepare a biological opinion. See 50 C.F.R. § 402.12. "Major construction activity" is defined as "a construction project . . . significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act." Id. § 402.02.

\(^{102}\) 50 C.F.R. § 402.14(d).

\(^{103}\) See id. § 402.14(h)(3).


the biological opinion.\textsuperscript{106} If the federal agency does not follow the FWS's alternatives, it may establish its own reasonably prudent alternatives to guarantee the continued survival of the species, so long as they do not violate section 7 of the ESA.\textsuperscript{107}

Courts agree with the FWS that the consultation process is not dependent upon critical habitat designation.\textsuperscript{108} Once a species is listed, the FWS must determine whether any and all federal agency activity will jeopardize the existence of that species.\textsuperscript{109} The only change that occurs to the consultation process when there has been critical habitat designation is that the FWS must also determine whether the activity will adversely affect the critical habitat.\textsuperscript{110}

B. Overlapping Standards: Jeopardy to the Species and Destruction of Critical Habitat

The ESA imposes a duty on all federal agencies, beginning with the consultation process, to ensure that their actions will not jeopardize a species or adversely modify its critical habitat.\textsuperscript{111} As other authors have noted, 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 species.\textsuperscript{112} A comparison of the regulations that define the legal standards for "jeopardize" and "destruction or adverse modification" reveals that there is considerable overlap.\textsuperscript{113}

To "jeopardize" the continued existence of a listed species is to "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of the listed species in the wild by reducing the reproduction, numbers, or distribution of that species."\textsuperscript{114} In comparison,

\begin{itemize}
\item \textsuperscript{107} See Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1193 (9th Cir. 1988). Like the FWS, however, the federal agency must use the best scientific and commercial data available when developing alternatives. See Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536(a)(2).
\item \textsuperscript{109} See 16 U.S.C. § 1536(a)(2).
\item \textsuperscript{110} See id.
\item \textsuperscript{112} See Houck, supra note 6, at 308; Smith, supra note 17, at 351.
\item \textsuperscript{113} See Endangered Species Committee Regulations, 50 C.F.R. § 402.02 (2002).
\item \textsuperscript{114} Id.
\end{itemize}
the "destruction or adverse modification" of a critical habitat is a "di­rect or indirect alteration . . . that appreciably diminishes [its] value . . . for both the survival and recovery of the listed species. Such examples include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical."115

Both courts and environmental agencies note this overlap to differ­ring degrees, while often striving to find a valuable distinction when mandating critical habitat designation.116 For example, in Greenpeace v. National Marine Fisheries Service, the court stated that although there is considerable overlap between the two regulations, the ESA establishes two distinct standards that must be considered.117 The court simply pointed to the language of the regulations and recited that "jeopardy" relates to overall existence of the species, while "adverse modification" relates to the effect on critical habitat, without explaining how they are distinct.118 The court concluded, therefore, that the FWS and the NMFS must analyze the two separately or provide an explanation for why the two could be treated together.119

Interestingly, environmentalist groups have argued that the regulations for "jeopardy" and "adverse modification" shape one standard for the consultation process since the regulations define both in terms of survival and recovery.120 For example, in Sierra Club v. United States Fish & Wildlife Service, the plaintiff concluded that the ESA contemplates two separate standards and, therefore, the regulations impermissibly created essentially one consultation standard.121 The Fifth Circuit disagreed and stated that the regulations are not equivalent simply because they are both framed in terms of survival and re-

115 Id.
116 See, e.g., Sierra Club v. United States Fish & Wildlife Serv., 245 F.3d 434, 441 (5th Cir. 2001); Greenpeace, 55 F. Supp. 2d at 1265.
117 55 F. Supp. 2d at 1265.
118 Id.
119 Id. Stronger language has been used when the regulatory definitions were not at issue before the court. The Tenth Circuit Court of Appeals has stated that "the standards are defined as virtually identical, or, if not identical, one (adverse modification) is subsumed by the other (jeopardy)." N.M. Cattle Growers Ass'n v. United States Fish & Wildlife Serv., 248 F.3d 1277, 1283 (10th Cir. 2001) (citing Am. Rivers v. Nat'l Marine Fisheries Serv., 1999 U.S. App. LEXIS 3860, at *5 (9th Cir. Jan. 11, 1999)).
120 Sierra Club v. United States Fish & Wildlife Serv., 245 F.3d 434, 441 (5th Cir. 2001).
121 Id. Sierra Club argued that the regulation violated a cardinal principle of statutory construction, which is "to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section." Id. (citing Bennett v. Spear, 520 U.S. 154, 173 (1997)).
covery. The court explained that while the "jeopardy" standard addresses the federal action's effect on the survival and recovery of the species, the "adverse modification" standard addresses the federal action's effect on the value of the critical habitat and, therefore, "[s]uch actions conceivably possess a more attenuated relationship to the survival and recovery of the species." The court concluded that the regulations do not eradicate the ESA's two distinct standards.

The Ninth and Tenth Circuits disagree whether any actual impact flows from critical habitat designation. In Douglas County v. Babbitt, the Ninth Circuit held that NEPA did not apply to critical habitat designation based on the reasoning that no actual impact flows from critical habitat designation. In Catron County Board of Commissioners, New Mexico v. United States Fish & Wildlife Service, the Tenth Circuit disagreed with both the holding and the reasoning of Douglas County, stating:

We . . . disagree with the [Ninth Circuit] that no actual impact flows from the critical habitat designation. Merely because the Secretary says it does not make it so. The record in this case suggests that the impact [from not applying NEPA] will be immediate and the consequences could be disastrous.

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122 Id. at 441.
123 Id. (emphasis added).
124 Id.; see also Conservation Council for Haw. v. Babbitt, 2 F. Supp. 2d 1280, 1287 (D. Haw. 1998) (holding that "the ESA clearly establishes two separate considerations, jeopardy and adverse modification, but recognizes . . . that these standards overlap to some degree").
125 Catron County Bd. of Comm'rs, N.M. v. United States Fish & Wildlife Serv., 75 F.3d 1429, 1436 (10th Cir. 1996); Douglas County v. Babbitt, 48 F.3d 1495, 1507–08 (9th Cir. 1995).
126 Douglas County, 48 F.3d at 1507–08.
127 Catron County, 75 F.3d at 1436; see also N.M. Cattle Growers Ass'n v. United States Fish & Wildlife Serv., 248 F.3d 1277, 1284 (10th Cir. 2001) (reaffirming Catron County and stating that the fact that the FWS says that no real impact flows from critical habitat designation does not make it so).
III. CITIZEN ENFORCEMENT ACTIONS

A. FWS Practice and Policy

As of May, 2002, there have been only 152 critical habitat designations out of 1846 listed plants and animals. The FWS gives designation the lowest priority among the listing activities it performs. It is widely recognized that the FWS has put off critical habitat designation until forced by court order.

The FWS explained the low ratio of critical habitat designations when it stated that critical habitat designation is an inefficient approach to conserve a species, due to the high costs. The FWS stated that critical habitat designation is "among that most costly and controversial classes of administrative actions" in the ESA. The FWS has listed the problems associated with critical habitat designation, which include: (1) at the time of the listing, little is known about the management measures needed for species recovery; (2) the requirement to consider the economic impacts of designation necessitates further understanding of the effects of designation; (3) designation must be promulgated according to formal rulemaking procedures that can take more than a year to complete; (4) since the range and habitat use of a species, as well as the understanding of such, do not

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The Service disagrees with the assertion that the proposed listing priority guidance is not based on sound biological considerations, and remains firm in its belief that designation of critical habitat generally provides little or no additional conservation benefits beyond those provided by the consultation provisions of section 7 and the prohibitions of section 9, while the cost of designation is generally high.

Id.

130 See, e.g., N.M. Cattle Growers, 248 F.3d at 1283.
132 Id.
133 Id.; McDonald, supra note 6, at 684.
134 Id.
135 Id.
remain constant, accurate designation would be impossible using the rulemaking process.\textsuperscript{136}

B. Federal Courts' Standard of Review

When citizens or environmental groups want to challenge the Secretary's decision not to designate a critical habitat, actions are brought to federal courts under the ESA's citizen suit provision.\textsuperscript{137} The FWS's decisions under the ESA are reviewed by the courts as agency actions that are subject to the standards of review under the Administrative Procedure Act (APA).\textsuperscript{138} The APA directs the courts to "compel agency action unlawfully withheld or unreasonably delayed."\textsuperscript{139} Accordingly, the court must determine whether the FWS's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "without observance of procedure required by law."\textsuperscript{140}

Although the court must be "thorough and probing" when reviewing the FWS's actions, it must refrain from questioning the wisdom of the decision unless there has been "a clear error of judgment."\textsuperscript{141} When reviewing the FWS's actions, the court should examine whether the agency acted within the scope of its legal authority, whether the agency explained its decision, whether the facts on which the agency purports to have relied have some evidentiary basis, and whether the agency actually considered the relevant factors.\textsuperscript{142} The federal courts are expected to recognize the FWS's expertise involving technical or scientific matters or decisions based on uncertain technical information.\textsuperscript{143} Because these cases involve

\textsuperscript{136} Id.
\textsuperscript{139} 5 U.S.C. § 706(1).
\textsuperscript{140} See 5 U.S.C. § 706(2)(A), (D); see also Fund for Animals, 903 F. Supp. at 105.
\textsuperscript{141} See Fund for Animals, 903 F. Supp. at 105; see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989). According to the Supreme Court, the reasoned basis for the agency's action should come from the agency, not the reviewing court. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). A decision of less than ideal clarity may be upheld, however, if the court can reasonably discern the agency's path to reaching that decision. Id.
\textsuperscript{143} See Fund for Animals, 903 F. Supp. at 105. The Supreme Court stated that when an agency's decision "requires a high level of technical expertise [the court] must defer to the
challenges to the FWS’s final decisions under the ESA, the courts’ reviews should remain limited to the administrative records.\textsuperscript{144}

In addition to applying the APA standard of review, the courts can look to congressional intent, and if the agency decision is contrary to that intent, then the courts may strike it down.\textsuperscript{145} When Congress has spoken on the precise question at issue, and the intent of Congress is clear, the courts must enforce the unambiguously expressed intent of Congress.\textsuperscript{146} If, however, Congress has not addressed the precise question at issue, then the courts cannot impose their own statutory construction and must defer to the agency’s permissible construction of the statute.\textsuperscript{147}

C. Courts’ Review of the “Not Prudent” Exception

1. Courts Uphold the “Not Prudent” Exception

The United States District Court for the District of Columbia upheld FWS’s decision to not designate a critical habitat in \textit{Fund for Animals v. Babbitt}, when the plaintiffs brought an action arguing that the FWS’s decision not to designate a critical habitat for the listed grizzly bear species was a violation of the ESA.\textsuperscript{148} The FWS explained that recovery zones were established for the conservation of the grizzly bear habitat, and that all federal agencies were required to consult with the FWS before taking any action within the recovery zones.\textsuperscript{149} The FWS reasoned that the critical habitat designation would be “not prudent” because the habitat was already receiving comparable protection and, thus, any designation would be redundant.\textsuperscript{150}

Additionally, the FWS suggested that the habitat actually was receiving better protection because the recovery zones encompassed informed discretion of the \ldots agency. [W]hen specialists express conflicting views, an agency must rely on the reasonable opinion of its own qualified experts, even if a court might find contrary views more persuasive." \textit{Marsh}, 490 U.S. at 377–78.

\textsuperscript{144} See \textit{Fund for Animals}, 903 F. Supp. at 105; see also \textit{Camp v. Pitts}, 411 U.S. 138, 142 (1973).


\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Id.} at 843.

\textsuperscript{148} 903 F. Supp. at 117.

\textsuperscript{149} \textit{Id.} The zones were regulated by the Interagency Grizzly Bear Guidelines, which were established by federal, state, and Canadian agencies. \textit{Id.} at 109. The habitat was classified by five Management Situations that recommended various actions to be taken within these areas to respond to various threats to the species. \textit{Id.}

\textsuperscript{150} \textit{Id.} at 117.
more land than a critical habitat designation would. Finally, the FWS explained that the current recovery zone management of the habitat had social acceptance, and that a critical habitat designation may lead to public backlash that would jeopardize the recovery process.

After applying the standard of review under the APA, the court agreed with the FWS. The court did not substitute its own judgment and concluded that the FWS "adequately explained the facts and policy concerns it relied on and plaintiffs have not demonstrated that these concerns and opinions are unlawful, arbitrary, capricious, or wholly irrational."  

2. Courts Reject the "Not Prudent" Exception

The Ninth Circuit federal appellate court reached the opposite result and ordered critical habitat designation in Natural Resources Defense Council v. United States Department of the Interior, after FWS cited the "not prudent" exception. The FWS listed the gnatcatcher, a species of small insectivorous songbirds, as a threatened species under the ESA. However, the FWS used the "not prudent" exception to not designate the critical habitat because: (1) the identification of the habitat would lead to increased takings; and (2) a critical habitat designation would not appreciably benefit the species because most of the habitat was on private land and, therefore, not subject to the ESA's section 7 prohibition relating to federal agency action. Natural Resources Defense Council sought an injunction to halt the construction of a toll road, and the court found that FWS violated the ESA by failing to designate a critical habitat for the gnatcatcher.

First, the FWS claimed that critical habitat designation would increase the degree of the threat to the gnatcatcher because publicly identifying its critical habitat would increase the risk that landowners would destroy the habitat to prevent their land from being designated

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151 Id.
152 Id.
153 Id.
154 Fund for Animals, 903 F. Supp. at 117.
157 58 Fed. Reg. at 16,756; see also Natural Res. Def. Council, 113 F.3d at 1123.
158 58 Fed. Reg. at 16,756; see also Natural Res. Def. Council, 113 F.3d at 1123.
as critical habitat. To support the argument that critical habitat designation would result in increased takings, the FWS cited eleven instances where landowners or developers had destroyed the gnatcatcher habitat, including two instances where destruction occurred despite the FWS's notification to local authorities that gnatcatchers were present at proposed development sites. The FWS reasoned, therefore, that publication of the critical habitat would lead to more instances of habitat destruction. The FWS concluded that publication of critical habitat "would likely make the species more vulnerable to [taking] activities." The court rejected the FWS's finding because it said that the FWS failed to compare the potential benefits with the potential threats of critical habitat designation and, therefore, the decision was improper.

Second, the FWS claimed that critical habitat designation could not appreciably benefit the species because most of the gnatcatcher population was on private land and, therefore, beyond the reach of the section 7 consultation requirement. The court reasoned that this conclusion was not provided for in the ESA because privately owned lands would be subject to the consultation requirement if there was future federal action. The court concluded that the FWS failed to make a rational connection between the administrative record and the decision reached.

Similarly, the court rejected the FWS's "not prudent" exception in Conservation Council for Hawaii v. Babbitt, where the FWS determined that there would be no critical habitat designation for 245 species of endangered and threatened plants. Only three out of 264 threatened or endangered plants in Hawaii had designated critical

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159 58 Fed. Reg. at 16,753, 16,756; see also Natural Res. Def. Council, 113 F.3d at 1125.
160 58 Fed. Reg. at 16,756; see also Natural Res. Def. Council, 113 F.3d at 1125.
161 58 Fed. Reg. at 16,756; see also Natural Res. Def. Council, 113 F.3d at 1125.
162 58 Fed. Reg. at 16,756; see also Natural Res. Def. Council, 113 F.3d at 1125.
163 See Natural Res. Def. Council, 113 F.3d at 1125. The court pointed to the FWS's own regulations where it stated that critical habitat designation would be "not prudent" only when the potential threats outweigh the potential benefits. Id. (citing Listing Endangered and Threatened Species and Designating Critical Habitat; Amended Procedures to Comply With the 1982 Amendments to the Endangered Species Act, 49 Fed. Reg. 38,900, 38,903 (Oct. 1, 1984) (to be codified at 50 C.F.R. pt. 424)). Although the Court criticized the FWS for never weighing the benefits of critical habitat designation against the benefits of exclusion, it noted that the destroyed habitat areas had been extensively analyzed in other studies of the gnatcatcher habitat prior to the listing of the species. Id.
165 Natural Res. Def. Council, 113 F.3d at 1126.
166 Id.
hastats.168 As in Natural Resources Defense Council, the FWS used the "not prudent" exception because: (1) designation of critical habitat would pose an increased threat to the species; and (2) designation would not benefit the species because much of the habitat was on private land.169 In addition, the FWS found that the plants on federal land would be sufficiently protected by the consultation requirement and the jeopardy provision of section 7, which prohibit federal agency actions that jeopardize the continued existence of the species.170

First, FWS found that designation of critical habitat would "increase the likelihood that individuals would illegally take or vandalize the plants."171 The court rejected this argument by stating that there was no evidence of prior takings specific to the species in question and, therefore, it was improper to assume that critical habitat designation would lead to takings.172 The FWS supported its finding with evidence that since plants were confined to smaller habitats and could not escape threats, critical habitat designation would increase takings.173 The court held that because the FWS failed to consider the benefits of critical habitat designation and could not compare them to the risks, the decision was improper.174

Second, the FWS determined that critical habitat designation would not be beneficial because section 7 does not apply to private lands.175 The court, once again, disagreed and reasoned that Congress did not limit critical habitat to federal lands and designation of private land would be beneficial because: (1) even if no current federal activity occurred on the private lands, such activity could occur in the future; and (2) designation would inform both public and private entities of the need to protect the area.176 The court held, therefore, that the FWS’s reliance on the fact that the species was located on private land failed to make the FWS’s decision rational.177

Finally, the FWS concluded that designation would provide no additional benefit beyond the consultation and jeopardy provisions in section 7, which are required for every federal action that may affect a

168 Id.
169 Id.
170 Id.
171 Id. at 1283.
172 See id. at 1284–85.
174 Id. at 1285.
175 Id.
176 Id. at 1285–86.
177 Id. at 1286.
listed species. The FWS noted that critical habitat designation would add only consideration of whether federal action would “result in the destruction or adverse modification” of the critical habitat itself. The FWS concluded that the critical habitat prong of section 7 would provide no additional species protection beyond the protection awarded by the jeopardy prong of section 7. The court rejected this argument stating that the FWS contradicted its own interpretation of the ESA and stated generally that critical habitat designation would have no effect on the consultation requirements.

The court reasoned that designation establishes a uniform protection, the absence of which would leave only the piecemeal protection of section 7 as federal projects arise. The court held, therefore, that the FWS acted arbitrarily, capriciously, and contrary to law because it failed to consider all the relevant factors. The court granted summary judgment and remanded to the FWS to reconsider the designation of critical habitats in light of the court’s decision.

D. Courts’ Review of the “Not Determinable” Exception

Unlike the more ardently debated “not prudent” exception, the courts reach a general consensus that the “not determinable” exception does not allow the Secretary to avoid critical habitat designation. The courts agree that the “not determinable” exception is not an automatic one year extension.

In Northern Spotted Owl v. Lujan, the court rejected the FWS’s determination that it needed an additional year because: (1) designation should coincide with listing of the species “absent extraordinary circumstances”; and (2) Congress expected FWS to make the “strongest attempt possible” to determine critical habitat within the designated time after listing. The court reasoned that before the “not determinable” exception can be invoked, the Secretary has an

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178 Id.
180 Conservation Council for Haw., 2 F. Supp. 2d at 1287.
181 Id.
182 Id. at 1288.
183 Id. at 1289.
184 Id. at 1288–89.
186 N. Spotted Owl, 758 F. Supp. at 625, 626.
187 Id. at 626.
affirmative duty to seek out and identify the biological and economic data necessary to designate critical habitat, prior to the final listing decision.\textsuperscript{188}

Furthermore, the "not determinable" exception cannot be used to buy additional time to implement an innovative protection program for listed species.\textsuperscript{189} In \textit{Butte Environmental Council v. White}, the defendant argued that adequate time was not provided by the "not determinable" exception, because the FWS was considering an "ecosystem approach" to critical habitat designation providing comprehensive protection for twenty-three species of shrimp, including the four listed species at issue.\textsuperscript{190} The FWS explained that the "ecosystem approach" would "more fully protect species in their habitat than the species-by-species approach that has been taken in the past."\textsuperscript{191}

The court rejected this reasoning and stated that the FWS could not deviate from the ESA's statutory mandate that critical habitat designation be concurrent with the listing of a species.\textsuperscript{192} Rather than acknowledging the Secretary's attempt to improve the means of ecosystem protection, the court criticized him and stated that "the mandatory language of the ESA does not support defendant's suggestion that the ESA allowed the Secretary to comply with statutory duties at his or her convenience, or that a heavy workload of the agency may excuse compliance."\textsuperscript{193}

\section*{IV. Analysis}

\subsection*{A. Congressional Intent}

Numerous authors have highlighted that the unambiguous congressional intent of the 1978 amendments was that the "not prudent" and "not determinable" exceptions are to be used in rare circumstances, repeating the familiar refrain that critical habitat designation must coincide with listing in order to guarantee conservation and re-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{188} \textit{Id.}
  \item \textsuperscript{190} \textit{Id.} (citation omitted).
  \item \textsuperscript{191} \textit{Id.}
  \item \textsuperscript{192} \textit{Id.}; see also \textit{Conservation Council for Haw.}, 24 F. Supp. 2d 1074, 1077–78 (D. Haw. 1998) (holding that "an additional, non-statutory stage in the process cannot be used as justification for contravening the express deadlines provided in the statute").
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covery of the species. It is clear that no matter how many authors point to congressional intent, and no matter how many federal courts order the designation of critical habitats, the FWS will continue to invoke the "rare" exceptions to avoid this duty. Since it is unlikely that endangered species protection reform is on the horizon, Congress should do all that it can to conserve funding, while furthering its original intent.

Congress enacted the ESA to prevent species extinction due to economic growth and development. To achieve its goals of species conservation and recovery, the ESA provides a means to conserve the ecosystems that such species depend on, supposedly through critical habitat designation. Courts analyzing congressional intent should consider the full history of the ESA; when passed in 1973, and when amended in 1978 and 1982.

According to the Senate Report, the ESA of 1973 was enacted to achieve four distinct objectives. First, to allow the Secretary of the Interior sufficient discretion in listing species that were either in immediate danger of extinction, or likely to become endangered. This objective is clearly achieved through the listing process for endangered and threatened species and the takings prohibition.

Second, the ESA was passed to provide protection throughout the nation for endangered and threatened animals. This objective has also been achieved through the takings prohibition, the consultation process, and the regulations prohibiting actions that will jeopardize the continued existence of the species.

Third, the ESA was passed to give the Secretary broader authority to regulate land acquisition. Although the Secretary has never been given the authority to acquire land under the ESA, he has considerable control over land once a species is either listed, or being considered for listing, through the takings prohibition.

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194 See Houck, supra note 6, at 235, 358; McDonald, supra note 6, at 700; Patlis, supra note 6, at 217; Salzman, supra note 6, at 339; Yagerman, supra note 6, at 855–56.
196 See id. § 1533(a) (3).
198 Id.
Finally, the ESA was meant to involve current state programs for the benefit of endangered species, while encouraging the development of new state programs. A few courts have recognized this intent by upholding recovery zone management schemes in place of critical habitat designation. Yet, such programs will rarely come before the courts' consideration so long as the battered and emasculated critical habitat designation requirement is favored over the jeopardy prohibition and the consultation process.

B. Congressional Intent Is Achieved Through the Jeopardy Provision and the Consultation Process

Although the ESA governs both the listing of endangered and threatened species and the designation of critical habitat for the conservation of listed species, ecosystem conservation has been achieved despite the lack of critical habitat designation for the majority of listed species. Therefore, there is no need to hold onto the critical habitat designation requirement, which only serves to create litigation and deplete already scarce funding for listing endangered and threatened species.

Federal agencies have a duty to ensure that their actions will not jeopardize a species or adversely modify their critical habitat. There appears to be no case law where a court has found "adverse modification" of the critical habitat without also finding "jeopardy" to the listed species, since these regulations have considerable overlap. Causing jeopardy to a species is to "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of the listed species in the wild by reducing the reproduction, numbers, or distribution of that species." In comparison, the "destruction or adverse modification" of a critical habitat is a change to the critical habitat that reduces the chances of survival or recovery of the listed species.

207 See Darin, supra note 6, at 231–32.
209 See Houck, supra note 6, at 303; Smith, supra note 17, at 351.
210 See Endangered Species Committee Regulations, 50 C.F.R. § 402.02 (2002).
211 Id.
Both courts and environmental agencies acknowledge this overlap, yet strive to articulate a valuable distinction without discussing how the standards effectively provide complementary, rather than duplicative, protection.\(^{212}\) The courts simply point to the language of the regulations and recite that “jeopardy” relates to overall existence of the species, while “adverse modification” relates to the effect on critical habitat, without explaining how they are distinct.\(^{213}\) In other words, the courts merely engage in an exercise in semantics declaring that “the standards are different because they are different,” so that the FWS and the NMFS cannot treat them as one.\(^{214}\)

The courts have gone so far as to explain that the restriction on “adverse modification” to critical habitat, in comparison to the “jeopardy” prohibition, is “a more attenuated relationship to the survival and recovery of the species.”\(^{215}\) This reasoning, however, seems to implicitly agree with the contention that there is really only one standard; that the weaker “adequate modification” provision is redundant because it merely echoes the sufficient “jeopardy provision.” The courts, however, continue to insist that the regulations do not eradicate the ESA’s two distinct standards,\(^ {216}\) so as not to emasculate an entire section of the ESA. Likewise, the courts will not allow the Secretary to assume the role of the legislature and declare that “no actual impact flows from critical habitat designation.”\(^ {217}\)

Environmentalists may agree that the “jeopardy” prohibition and the consultation process awards more than adequate protection for listed species without critical habitat designation. However, they may not want to agree openly because they recognize the ESA has become something more than it was intended to be—a weapon against land development.

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\(^{212}\) See, e.g., Sierra Club v. United States Fish & Wildlife Serv., 245 F.3d 434, 441 (5th Cir. 2001); Greenpeace, 55 F. Supp. 2d at 1260.

\(^{213}\) See Sierra Club, 245 F.3d at 441; Greenpeace, 55 F. Supp. 2d at 1260.

\(^{214}\) Sierra Club, 245 F.3d at 441; Greenpeace, 55 F. Supp. 2d at 1260; see discussion supra note 119.

\(^{215}\) Id. (emphasis added).

\(^{216}\) Id. “[T]he ESA clearly establishes two separate considerations, jeopardy and adverse modification, but recognizes . . . that these standards overlap to some degree.” Conservation Council for Haw. v. Babbitt, 2 F. Supp. 2d 1280, 1287 (D. Haw. 1998).

\(^{217}\) Catron County Bd. of Comm’rs, N.M. v. United States Fish & Wildlife Serv., 75 F.3d 1429, 1436 (N.M. 1996); see also N.M. Cattle Growers Ass’n v. United States Fish & Wildlife Serv., 248 F.3d 1277, 1284 (10th Cir. 2001) (reaffirming Catron County and stating that the fact that the FWS says that no real impact flows from critical habitat designation does not make it so).
C. Courts Abuse the APA Standard

The federal courts have established that the FWS can invoke neither the “not prudent” nor the “not determinable” exception to avoid critical habitat designation simply because there are alternative means of protection.\textsuperscript{218}

Because the Secretary may avoid critical habitat designation only if the economic benefits of exclusion outweigh the benefits of including the area as a designated habitat,\textsuperscript{219} the only time the ESA mandates critical habitat designation, thus forbidding the use of the “not prudent” exception, is when failure to designate a critical habitat would result in a species’ extinction.\textsuperscript{220} Unless the Secretary determines otherwise, critical habitat shall not include the entire area that could \textit{potentially} be occupied by the species.\textsuperscript{221} Here, the Secretary can designate critical habitat not occupied by the species if it is essential for that species’ survival.\textsuperscript{222}

However, the courts have rejected the FWS’s use of the “not prudent” exception, \textit{not} by relying upon congressional intent and the record that critical habitat designation should occur in only the rarest of circumstances,\textsuperscript{223} but by criticizing the FWS’s factual findings, supported by evidence, to raise the standard of critical habitat designation from discretionary to mandatory.\textsuperscript{224} It is important to note that Congress followed its “rarest of circumstances” language with the recognition that the “not prudent” exception is designed 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 interest of the species to do so.”\textsuperscript{225}

\textsuperscript{218} See Natural Res. Def. Council v. United States Dep’t of the Interior, 113 F.3d 1121, 1127 (9th Cir. 1997); Conservation Council for Haw., 2 F. Supp. 2d at 1287.
\textsuperscript{221} 16 U.S.C. § 1532(5)(A) (ii).
\textsuperscript{223} H.R. REP. No. 95-1625, at 17, \textit{reprinted in} 1978 U.S.C.C.A.N. 9453, 9466–67. The House Report states that “[t]he committee intends that in most situations, the Secretary will, in fact, designate critical habitat at the same time that a species is listed as endangered or threatened.” \textit{Id.}
\textsuperscript{225} \textit{Id.}
The courts review the FWS's decisions under the ESA as agency actions that are subject to the APA standards of review. Therefore, the courts get involved only when FWS acts unlawfully or with unreasonable delay, meaning that the court must determine whether the FWS's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "without observance of procedure required by law."

Although the court must be "thorough and probing" when reviewing the FWS's actions, it must refrain from questioning the FWS's expertise involving technical or scientific matters or decisions based on uncertain technical information. Thus, because critical habitat designation is a technical matter, the courts should only examine whether the FWS acted within the scope of its legal authority and substantiated its decision with evidence in the record, while considering all the relevant factors.

In addition to the APA standard of review, courts can reject an agency decision on the grounds that it is contrary to congressional intent. When congressional intent is clear, courts must enforce the law based on that unambiguously expressed intent. If, however, congressional intent is unclear, then courts must defer to the agency, rather than impose their own statutory construction.

While Congress envisioned an ESA where the Secretary would list species and designate critical habitat at the same time, it could not predict the amount of time and money needed to complete both simultaneously. However, Congress was sure to stipulate that the duty is

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228 See id. § 706(2)(A), (D); see also Fund for Animals, 903 F. Supp. at 105.
229 See Fund for Animals, 903 F. Supp. at 105; see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989). The Supreme Court has stated that, under APA review, the reviewing court should not provide a reasoned basis for the agency's action. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). However, it should uphold a decision of less than ideal clarity if the court can reasonably discern the agency's path to reaching a decision. See id.
232 Id.
233 Id. at 843.
clearly discretionary. Particularly in light of drastic budget cuts and increased litigation, the FWS needs to exercise its discretion more than ever if it wants to continue with its primary functions of listing species and ensuring their protection through the consultation process and the jeopardy provision.

D. Adequate Protection for Both Species and Their Ecosystems

The stated goal of the ESA is not only the protection of listed species, but also the conservation of the ecosystems upon which all species depend for survival. The contention is not that the ESA does not, or should not, safeguard habitats of endangered species. The ESA protects critical habitats by: (1) requiring federal agencies to abide by the consultation process to “insure that the agency action is not likely to . . . result in the destruction or adverse modification of critical habitat”; and (2) forbidding habitat modification that would result in a “taking” of the species that is prohibited by section 9. The combination of these two safeguards adequately protect species and their critical habitats without actually designating a single critical habitat.

Even those who criticize the courts’ misguided application of the APA standard assert that there are still instances where critical habitat designation would greatly benefit the species. However, those who hold on to such beliefs assume that the consultation process—if changed to prevent only “jeopardy” to the existence of a listed species and not modification to a designated critical habitat—would inadequately protect migratory species, such as sea turtles. Yet, the consultation process applies to all listed species in the area, and not only those that are present in the area at the very moment of the proposed federal action. The regulations do give federal agencies the option

237 Id. § 9, § 1538(a)(1)(B); Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.3 (2002).
238 See Smith, supra note 17, at 368 (citing U.S. Fish and Wildlife Service, Endangered Species Listing Handbook 89 (1989)) (“The designation of critical habitat [may be beneficial] for the species such as sea turtles where there is a need to formally identify and protect testing beaches through Section 7 even when the turtles are absent.”).
239 See id.
240 See Endangered Species Committee Regulations, 50 C.F.R. § 402.02 (2001) (defining “listed species” as “any species of fish, wildlife, or plant which has been determined to be endangered or threatened under Section 4 of the Act”); id. § 402.12 (provid-
either to list present species themselves, by preparing a biological assessment, or to request a list from the FWS.\(^{241}\) However, this potential problem is easily corrected by amending the regulations to mandate that federal agencies request a list from the FWS in every instance. Thus, the fear that federal agencies will abuse the consultation process and overlook listed species that temporarily migrate away from the area is effortlessly corrected. That fear alone is not enough to carry on with the entire critical habitat designation requirement.

**CONCLUSION**

According to the current ESA, critical habitat should be designated in all but the rarest of circumstances. The FWS will continue to invoke these exceptions to avoid such designation. Thus, the federal courts can look forward to a steady stream of suits seeking to compel critical habitat designation. In order to stop and defend these lawsuits—and then to compel compliance via the inevitable injunctions—the FWS will have to cutback on its other duties, including listing endangered and threatened species, and rigorously enforcing the “jeopardy” provision and the consultation process. Therefore, Congress should eliminate the critical habitat designation requirement post haste.

Congress should reanalyze the intent of the ESA by looking to the four distinct objectives from 1973 to realize that both species and ecosystem conservation can be achieved without critical habitat designation. Because congressional intent is achieved through both the consultation process and the no-jeopardy provision, there is no need to preserve the critical habitat designation requirement, which only impedes the protection of endangered and threatened species.\(^{242}\)

The federal courts have rarely, if ever, considered the congressional intent argument that critical habitat designation should occur in all but the rarest of circumstances because, in this context, the congressional intent considers a totality of designations, or lack thereof, while the courts must apply the APA standard of review on a case-by-case basis. Because a court cannot claim that the one case they are reviewing does not fall within the rarest of circumstances—the

\(^{241}\) See 50 C.F.R. § 402.12.

\(^{242}\) See Darin, *supra* note 6, at 231–32.
court would have to look beyond the case at issue to do so—they rely upon the APA’s “arbitrary, capricious, or abuse of discretion” standard to overrule the FWS’s factual findings and expert analysis. Since the courts will continue to impose their own statutory construction, rather than defer to the agency’s reasonable application of its statutory obligations, Congress must address the issue.

The ESA should safeguard the habitats that all species depend on for survival—and it does just that without critical habitat designation. Therefore, Congress should focus on relieving the strain on the federal courts, improving the public perception of the ESA, and preventing the needless expenditure of the FWS’s funds. It can accomplish this by placing greater importance on listing species and preventing federal actions that will harm those species in general, rather than agonizing over enforcement of a superfluous requirement that serves merely to appease environmentalists who desire another weapon against land development.