

LEGAL ASPECTS OF CRITICAL HABITAT DETERMINATIONS

ROBERT D. JACOBSEN, Branch of Management Operations, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240

Abstract: The Endangered Species Act of 1973 is the strongest legislation ever enacted to protect species faced with extinction. Section 7 of that Act requires all federal agencies to ensure that their actions do not jeopardize the continued existence of legally designated *endangered* or *threatened* species or result in destruction or modification of their critical habitats. *Critical habitats* are determined by the U.S. Fish and Wildlife Service to delineate those areas of air, land, and water that are essential to the survival and recovery of listed species. Critical habitats are not refuges, *de facto* wilderness areas, or areas in which little or no activity can be undertaken. Rather, critical habitats are delineated so that federal agencies can be aware of the essential habitats of listed species and can take special care to plan and carry out their activities in ways that will not adversely impact endangered or threatened species or their habitats.

The Endangered Species Act of 1973 passed by the 93rd Congress and signed into law on 28 December 1973 is the strongest legislation ever enacted to conserve and preserve endangered and threatened animals and plants. Under the Act, the Secretary of the Interior is required to take certain actions to insure the survival of native and foreign fish, wildlife, and plants. He is directed by the Act to protect species that he determines are either in danger of extinction (endangered) or likely to become so in the foreseeable future (threatened). The Secretary has delegated his authorities under the Act to the U.S. Fish and Wildlife Service (FWS).

Protection is initiated by listing a species as either *endangered* or *threatened* throughout all or a portion of its range. Once listed as endangered, all prohibitions contained in Section 9 of the Act come into force. With certain exceptions, it becomes illegal to harass, hunt, pursue, or take any endangered species or engage in interstate or foreign commerce in such species.

A species may be listed as threatened rather than endangered if biological data indicate that the species is not on the brink of extinction but is likely to become so if certain environmental conditions or human practices are not modified. When a species is listed as threatened, as is the case with the grizzly bear (*Ursus arctos*), the Secretary is directed by the Act to establish appropriate regulations that will provide for protection and management based on the needs of the species.

Before discussing the legal aspects of critical habitat, the following background information on the listing of the grizzly bear may be appropriate. In February 1974, the Secretary of the Interior was petitioned by the Fund for Animals to list the grizzly bear in the lower 48 states as an endangered species. Based on the criteria in the Act for determining the classification, the evidence available to FWS did not support listing as endangered but did support listing as threatened. On 2 January 1975, the proposal to list the grizzly as threatened was

published in the *Federal Register*, and on 28 July 1975, final regulations were published.

The regulations on the grizzly bear permit federal or state employees to take grizzlies for purposes of human safety and elimination of livestock depredations. Killing problem bears is permissible, but reasonable effort must first be made to live-capture and translocate them. Grizzlies may also be taken for scientific and research purposes. In addition, within the Bob Marshall Ecosystem of Montana, exclusive of Glacier National Park, bears may be hunted in accordance with Montana law. However, no more than 25 grizzlies can be killed in northwestern Montana for whatever reason — defense of human life, nuisance control, sport hunting, or other taking.

When species have been listed as endangered or threatened, Section 7 (*Interagency Cooperation*) provides further protection. Section 7 requires federal agencies, assisted by the Secretary of the Interior, to conduct programs for the conservation of listed species and to insure that activities authorized, funded, or engaged in by them neither jeopardize the continued existence of endangered or threatened species nor result in the destruction or modification of their habitats, which the Secretary, after appropriate consultation with the affected states, has determined to be critical. Section 7 does not apply to non-federal entities engaged in activities that do not involve or require federal authorization or funding.

The Fish and Wildlife Service has taken a number of steps to implement Section 7 of the Act. On 22 April 1975, FWS's concept of critical habitat was published in the *Federal Register*. This concept stated, in part, that critical habitat for any endangered or threatened species could be the entire habitat or any portion thereof, if and only if any constituent element is necessary to the normal needs or survival of that species. The following vital needs are relevant in determining criti-

cal habitat for a given species: (1) space for normal growth, movement, or territorial behavior; (2) nutritional requirements such as food, water, and minerals; (3) sites for breeding, reproduction, or rearing of offspring; (4) cover or shelter; and (5) other biological, physical, or behavioral requirements. The concept further stated that not all actions are detrimental to critical habitat. There may be many kinds of activities that can be carried on within the critical habitat of a species without causing a reduction in numbers or distribution or otherwise adversely affecting the species.

In April 1976, FWS provided the federal agencies with "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." The guidelines were developed by FWS in cooperation with the National Marine Fisheries Service (NMFS) of the Department of Commerce and with the assistance of an *ad hoc* interagency committee of representatives from 11 federal agencies. These guidelines are intended to assist the federal agencies in adjusting their internal procedures to meet the requirements of Section 7 and serve as a starting point for the development of Section 7 regulations. They were not published in the *Federal Register* and are not considered mandatory.

Contained in the Section 7 guidelines are "working" concepts that can be used to clarify key terms in Section 7, procedures for determining critical habitat, and the process used by FWS in providing consultation and assistance, as required by Section 7, to the other federal agencies.

The following "working" concepts clarify terms used in Section 7 in relation to critical habitat:

"Critical Habitat" means any air, land, or water area including any elements thereof which the Secretary, through the Director, FWS, or NMFS, has determined is essential to the survival of wild populations of a listed species or its recovery to a point at which the measures provided pursuant to the Act are no longer necessary (hereinafter referred to as recovery). Determinations will be published in the *Federal Register*.

"Destruction or (Adverse) Modification" means any act which would have a deleterious effect upon any of the constituent elements of Critical Habitat which are necessary to the survival or recovery of such species, and such effect is likely to result in a decline in the numbers of the species.

- (1) Constituent elements of Critical Habitat include, but are not limited to land, air, and water

area, physical structure and topography, flora, fauna, climate, human activities, and the quality and chemical content of soil, water, and air.

- (2) The requirements for survival or recovery of listed species include space for normal growth, movement or territorial behavior; nutritional requirements such as food, water, minerals; sites for breeding, reproduction, or rearing of offspring; cover shelter; or other biological, physical, or behavioral requirements.

"The procedures for determining Critical Habitat are as follows:

- (1) The Fish and Wildlife Service will seek consultation, as appropriate, with the affected States in which the species occurs.
- (2) The Service will request biological information, assistance and recommendations from the affected Federal land-managing agencies prior to publishing the proposed determination in the Federal Register.
- (3) The Fish and Wildlife Service will publish the proposed determination of Critical Habitat in the *Federal Register*, along with notifying the affected Federal land-managing agencies in writing, of the proposal and the reasons for it.
- (4) The governors of the affected States will be notified in writing of the proposal and allowed 90 days in which to comment.
- (5) A public comment period of at least 60 days will be provided at the time of publication.
- (6) After review of comments and incorporation of appropriate changes to the proposal, a final determination of Critical Habitat will be published in the *Federal Register*."

Provisions are available for emergency determinations of critical habitat when impending federal actions would in all likelihood destroy habitat essential to the listed species. The emergency determination will remain in effect for 120 days during which regular procedures for determination of critical habitat should be completed.

The consultation and assistance process included in the Section 7 guidelines is intended to provide federal agencies with the opinions of FWS on biological subjects. Such opinions will address federal actions with respect to their probable impact, adverse or otherwise, on a listed species or its critical habitat. When FWS

opinions are received, the federal agency involved will have the responsibility of deciding upon the course of action to take in light of its Section 7 obligations. It is not the prerogative of FWS to condemn these actions or to veto activities and programs adversely affecting listed species and their habitats.

On 26 January 1977, proposed Section 7 regulations were published in the *Federal Register* by the FWS. The proposed regulations are similar to the Section 7 guidelines, with some important exceptions. Instead of "working" concepts of key terms used in Section 7, definitions for "Critical Habitat," "destruction or adverse modification," and "jeopardize the continued existence of" are included. Time limits are placed on FWS to respond to requests for consultation from federal agencies. FWS must complete the entire consultative process within 120 days unless special circumstances require a longer period of negotiation.

Of major concern to many people living in or near critical habitat areas and to the federal and state agencies having jurisdiction over these areas is what happens after such areas are determined to be critical habitat. This concern is particularly acute with respect to the FWS's proposal to determine critical habitat for the grizzly bear. Obviously, this concern stems from the stringent requirements of Section 7.

It must be reemphasized that Section 7 does not apply to state or private actions unless these actions require federal sanction. Section 7 clearly applies only to federal agencies, and only to the extent that a federal agency judges its actions to be in conflict with or contrary to the requirements of that section.

The Fish and Wildlife Service is obligated under the Endangered Species Act to specify for all federal agencies operating within the area of a listed species exactly which lands are essential to the species. Critical habitat delineation is intended to help federal agencies in the decision-making process. In this regard, it is similar to the National Environmental Policy Act (NEPA). The environmental impact evaluation process of NEPA is intended to provide federal agencies with information upon which decisions can be based. The function of critical habitat designation is to delineate the habitat necessary for the survival and recovery of a species. Without this information, federal agencies cannot determine whether their programs or actions are compatible with the requirements of Section 7.

The Fish and Wildlife Service does not have authority to tell another agency what it can or cannot do within the critical habitat of a listed species. FWS provides biological advice and opinions upon request, but

the final decision rests with the federal agency contemplating the action.

Designation of critical habitat does not signify an inviolate sanctuary. It does not always demand a wilderness or a pristine, undisturbed area. It does not mean a refuge or federal acquisition of private lands to be used as such. For example, critical habitat determination for the grizzly, of and by itself, will not prohibit any kind of land use or activity in the area. The determination is simply an expressed recognition of the land, water, and air space that are essential to the normal needs and survival of the grizzly and other species. This determination is not restricted to key areas but includes sufficient habitat in which a species can survive and recover to the point where it can be removed from the list.

It is impossible for FWS to predict the decisions of another federal agency in regard to specific types of activities in critical habitat areas. These decisions will be made by the affected federal agency on a case-by-case or program-by-program basis. As stated, the Fish and Wildlife Service will, upon request, provide counsel and opinions on biological matters in a manner helpful to inquiring agencies, with documentation of the entire process.

The Fish and Wildlife Service holds the opinion that the designation of critical habitat will cause little or no disruption in anyone's daily life, livelihood, or recreational pursuits. We know that many people believe otherwise, but this belief is due in part to misunderstanding of the purpose of critical habitat determinations. Unfortunately, many rumors and highly emotional publicity have circulated on the matter. For example, it has been asserted that these determinations will curtail hunting of game animals on lands within the proposed critical habitat areas. This assertion is absolutely unfounded. The states are responsible for regulating hunting of game animals. Furthermore, Section 7 of the Endangered Species Act applies only to federal agencies and only to animals listed under the Act. Hunting of game on federal lands is normally carried out in accordance with state laws and regulations.

Many people have voiced concern that the economy of the region will be adversely impacted by the grizzly critical habitat determination. For example, some believe that timber harvesting will be curtailed. Decisions of the federal land-managing agencies cannot be predicted, of course, but it is believed that timber harvesting and other resource development can be undertaken in ways that will not jeopardize the grizzly. It may or may not require some changes in present practices.

The Fish and Wildlife Service is now in the process of determining critical habitat for the grizzly. Here, in brief, is a description of what we have accomplished and what remains to be done.

A draft proposal was sent to appropriate state and federal agencies in August 1976. It was developed after many meetings and discussions with state and federal representatives, and with private individuals and organizations knowledgeable in grizzly bear habitat needs. On the basis of comments received in the draft proposal, FWS published a proposed rulemaking in the *Federal Register* on 5 November 1976. The proposal presents the preliminary judgement of FWS as to which lands occupied by the grizzly are essential to its normal needs and survival in the lower 48 states. After publication of the proposal, a minimum period of 90 days (ending on 9 February 1977) was provided for comment. In addition, recommendations of the governors of Idaho, Montana, Washington, and Wyoming were solicited and public hearings were held in those states and in Washington, D.C.

Approximately 2 months will be required for review

and evaluation of information received from the proposed rulemaking and testimony at the public hearings. Publication of a final determination of critical habitat for the grizzly bear will probably not take place before April or May 1977, and could take longer. At this stage, it is not possible to predict what the boundaries of the critical habitat will be. As the proposal now stands, the boundaries have been drawn to encompass all occupied habitat of the grizzly. Obvious problems arise with such gross delineation, but from a biological standpoint, it is difficult to treat a single component of any of the ecosystems apart from the others. A large, free-ranging animal such as the grizzly bear does not observe human administrative or political boundaries.

The Fish and Wildlife Service will ensure that a final determination of grizzly critical habitat is based on the best scientific evidence available. It should be pointed out that neither the listing of the grizzly as threatened nor the delineation of critical habitat are actions that are permanent. The rules and regulations can and will be modified at any time that sufficient evidence warrants a change.