



Endangered Species Committee Newsletter

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Paul S. Weiland, Editor**

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U.S. FISH AND WILDLIFE SERVICE PROPOSES MAJOR REVISION TO BULL TROUT CRITICAL HABITAT DESIGNATION

**Jason T. Morgan
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“We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made . . . The cycle of litigation appears endless . . .”

—U.S. Fish & Wildlife Service, Final Rule Designating Bull Trout Critical Habitat (2005)

On January 13, 2010, the U.S. Fish and Wildlife Service (FWS) issued a proposed rule to revise its 2005 designation of critical habitat for threatened bull trout (*Salvelinus confluentus*). 75 Fed. Reg. 2270. The proposal represents a dramatic increase in river miles and lake and reservoir acres designated as critical habitat under section 4 of the Endangered Species Act (ESA). The proposed critical habitat is located in Montana, Idaho, Oregon, Washington, and Nevada.

One of the primary goals of the ESA is to protect threatened or endangered species by conserving the ecosystems upon which those species depend. To that end, section 4 of the ESA requires FWS to designate critical habitat at the same time that it lists a species as threatened or endangered. Unlike the decision to list a species, which is based solely on biology, the designation of critical habitat requires a careful consideration of economic impacts, impacts to national security, and other impacts relevant to specifying any particular area as critical habitat.

The proposed rule’s large-scale revision of critical habitat is typical of the Service’s litigation-driven critical habitat designations. Indeed, FWS has a checkered past with critical habitat designations, often refusing to designate critical habitat at all unless forced to do so by litigation. The Service’s unwillingness to designate critical habitat results from its “long held policy position” that critical habitat designations are “unhelpful, duplicative, and unnecessary” (*see New*

Mexico Cattle Growers Ass’n v. U.S. Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001)), and funding limits imposed by Congress via the annual appropriations process.

Critical habitat designations do not create wildlife preserves, but instead provide benefit through the section 7 consultation process. That process requires federal agencies to ensure that any action, authorized, funded, or carried out by a federal agency, will not adversely modify or destroy critical habitat. But section 7 also requires federal agencies to ensure that those same actions do not jeopardize the continued existence of the species. Thus, FWS commonly reasons, much of the benefit as well as the burden of a critical habitat designation is coextensive, and thus duplicative, of the original listing decision.

The proposed revisions to the 2005 bull trout critical habitat designation highlight the Service’s uneasy relationship with the critical habitat process. In 2005, FWS designated critical habitat for five bull trout evolutionary significant units (ESUs), including approximately 3,828 miles of streams and 143,218 acres of lakes in Idaho, Montana, Oregon, and Washington, and 985 miles of shoreline paralleling marine habitat in Washington. This designation was significantly smaller than the area proposed in 2004, and reflected the Service’s determination in 2005 that many of the areas occupied by the bull trout did not meet the definition of critical habitat because they were already adequately managed, or that the economic benefits of excluding critical habitat outweighed the environmental benefits of designation.

The Alliance for the Wild Rockies, Inc., and the Friends of Wild Swan sued the Service over the 2005 bull trout designation alleging that the Service’s exclusions were improper or otherwise failed to consider the best scientific and commercial data available. During the pendency of that suit, allegations emerged that a Department of the Interior political appointee had improperly influenced a number of critical habitat designations, including the bull trout designation. Rather than litigating the issue, FWS asked for a voluntary remand to revise the rule. The currently proposed revisions are a marked departure from the previous rule. In the new rule, FWS is proposing to designate 22,679 miles of streams

(compared to 3,828 in 2005), including 929 miles of currently unoccupied habitat, and 533,426 acres of lakes and reservoirs (compared with 143,218 acres in 2005). Thus, the proposed revisions would dramatically increase the area designated vis-à-vis the 2005 rule.

The proposed rule also apparently retreats from the Service's previous conclusion that certain areas do not meet the definition of critical habitat because they are already adequately managed. At the same time, the proposed rule leaves open the possibility of excluding significant areas covered by habitat conservation plans or other conservation agreements under the economic balancing required by section 4 of the ESA.

Along with the proposed revisions, FWS produced a draft economic analysis to evaluate the economic impacts of the critical habitat designation. That analysis estimates the annualized incremental cost to be \$5 million to \$7 million. Much of that cost is attributable to federal agency costs of considering critical habitat, as well as potential dam modification to improve bull trout passage. Despite the Service's assurances that much of the cost will be borne by federal agencies, the proposed rule also explains that timber operations, farming, energy projects, and a host of other activities may impact bull trout critical habitat, and that those areas may require special management as a result.

The Service's original 2005 designation prognosticated that a court-ordered remand, such as the one that occurred here, would "in turn foster a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations." Once the Service issues its final rule, the regulated community will decide whether the Service's prediction was correct.

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