

Slide 7: Critical Habitat Designation

Slide 8: Physical and Biological Features

What are those physical and biological features to which the Act's definition of critical habitat refers? The answer to this aspect of critical habitat is in our regulations.

They are features essential to the conservation of a species, and are comprised of "primary constituent elements."

The Act itself uses the term "physical and biological features" in Part 3(5)(a). "Primary constituent elements" are outlined in the Act's implementing regulations, in 50 CFR 424.12 (b). The two phrases refer to the same aspects of a species' habitat. 50 CFR 424 is where you'll find guidance on how to apply Congress's intent in designating critical habitat. The link is provided here.

In all critical habitat designations, physical and biological features need to be identified as specifically as possible, based on our knowledge of the species. Specificity helps in implementing critical habitat; it also helps educate the public. Remember: our intent with critical habitat is to promote recovery.

Here's an example: it's not sufficient to cite that water is an essential element of critical habitat for a freshwater mussel. We need to specify, if we can, preferred depth or velocity of stream flow ... water temperature ... water quality ... and other requirements needed for conservation of this species.

Nesting grounds aren't simply needed for conservation of a bird species. We should specify such requirements as: surrounding vegetation type, the minimum size of the nesting ground, and exclusion of certain predators and invasive plant species, for example.

Slide 9: Special Management or Protection

Areas under consideration for critical habitat may be under threat. Special management or protection might be needed. For example, removal of exotic species and predators, or protection of a special land feature such as sand or gravel needed for breeding or feeding habitat may be necessary.

Experience tells us it's often the case that special management or protections are required, and designation of critical habitat is when those recommendations come into play.

Slide 10: Critical Habitat Designation

We are required to use the best scientific data available when we designate critical habitat. It's that basic and that simple.

Certain military lands are excluded from critical habitat designation. Section 4(a)(3)(B)(i) of the Act is where you'll find this exemption.

It reads: “The Secretary ... shall not designate critical habitat on any lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under Section 101 of the Sikes Act.”

If military lands already are under an approved integrated natural resources management plan and that plan benefits the species for which we are designating critical habitat, those lands are exempt from any critical habitat designation.

For example, Miramar Marine Corps Air Station in San Diego provides an excellent example of how the Defense Department has planned for and protected endangered species habitat. As a result, it has been exempted from critical habitat designations for multiple species. The military undertakes many beneficial conservation actions – controlling invasive species, avoiding impacts to wetlands and vernal pools, managing fire, and establishing important wildlife corridors.

We only complete a critical habitat designation after we take economic impacts and national security into consideration. Critical habitat is the only part of Section 4 where economics is considered. That said, there is no directive in the Act that provides relief from critical habitat if such a designation is “disproportionately expensive.”

Other sections of the Act consider economics in decision-making for issuing permits or choosing reasonable project alternatives but consideration of economics are not a regulatory requirement.

Exclusion of areas from critical habitat is done through a balancing analysis. Do the benefits of excluding an area from critical habitat outweigh the benefits of inclusion? We must think about the species and the partnerships that will likely benefit the species. Partnership agreements and conservation plans and programs that have demonstrated successful conservation for a species and its habitat can very much be considered at this stage.

When critical habitat is designated, the Service describes activities that would not be protective of the key physical and biological features of the critical habitat, and we also describe activities that might be affected by designation.

Slide 11: Rulemaking Process

We publish notices of critical habitat designations in the Federal Government’s newspaper, the Federal Register.

The rulemaking process informs the public of proposed actions by the Fish and Wildlife Service and National Marine Fisheries Service. It also explains how we made our decisions. The public and interested parties may raise issues or provide additional information that should be included in our deliberations.

The economic analysis part of the critical habitat process follows separate tracks in the two agencies. In the Fish and Wildlife Service, there's a separate comment period for the economic analysis. It helps identify potential economic impacts that may be caused by critical habitat. For example, if critical habitat causes restrictions on public trails or waterways, a vendor that profits from such user access may be affected.

The economic analysis starts after the proposed rule is published with a description of the areas that are proposed for designation. That way, we're able to use information from the initial comment period to inform our economic analysis.

The National Marine Fisheries Service generally provides the economic analysis at the same time that it publishes a proposed critical habitat rule.

During any formal rulemaking process, a comment period for at least 60 days is required. After all of the information received by either agency is considered, a final rule is published in the Federal Register.