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Court rulings may refute FWS stance that critical habitat is useless

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PORTLAND, Ore. -- The Fish and Wildlife Service's implementation of one of the Endangered Species Act's most controversial provisions -- critical habitat designations -- has been struck two major blows by federal courts in recent months. In rulings at both the district and appellate court level, judges have declared FWS's view of critical habitat focuses too narrowly on survival of species rather than broader aims at recovery.

The rulings -- both from California courts -- could once and for all invalidate FWS's long-held argument that critical habitat offers no measurable benefit to species. They could also force the agency to change the way it analyzes the economic implications of critical habitat designations, which until now have analyzed the consequences of every aspect of ESA, not just critical habitat.

Earlier this month, and within just three days of each other, two judges -- one from the U.S. District Court for Northern District of California and the other from the 9th U.S. Circuit Court of Appeals, which covers nine Western states and more than one-quarter of the country's land mass -- issued opinions saying FWS had illegally interpreted the landmark ESA. More specifically, the courts said Congress intended the law's critical habitat provisions to advance the goal of species recovery, as opposed to simple survival. As such, FWS may be forced to rewrite its regulations to reflect the full scope of the law.

The rulings are not the first that order FWS to revisit the critical habitat issue, but the 9th Circuit opinion is viewed by many as more sweeping and influential than previous rulings. That is because more endangered and threatened species inhabit the West than any other region of the country.

The high species count in the West is a function of both its size and its biodiversity. California and Hawaii, for example, have some of the highest biodiversity in the United States given their complex ecosystems. As such, the government is under considerable pressure to preserve what is left of those ecosystems to avoid a new major wave of extinctions. Scientists have predicted that the next major die off of species -- on par with the Mesozoic Era extinctions of 100 million to 200 million years ago -- could come in the next century.

Now the courts have weighed in, making clear what they think ESA requires of the government in protecting species habitat. At the heart of the issue are definitions used by FWS to determine whether specific actions will "jeopardize" species or result in "adverse modification" of a species' habitat area. While the courts have found FWS's interpretation of the jeopardy standard to be legal, they have ruled repeatedly that its interpretation of "adverse modification of critical habitat" is flawed.

That is because regulations developed by FWS over the years have muddled the law's language on critical habitat and its relationship to species recovery.

The service defines destruction or adverse modification of critical habitat as, "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of the species," according to the Code of Federal Regulations. While this may sound well and good -- "both survival and recovery of the species" -- the regulation goes on to instruct FWS to concern itself only with actions that affect both species survival and the "likelihood of recovery." As a result, the recovery goal loses much of its momentum, as does the law's main vehicle for aiding recovery -- the establishment of critical habitat.

In the words of the 9th Circuit justices, "To define 'destruction or adverse modification' of critical habitat to occur only when there is appreciable diminishment of the value of the critical habitat for both survival and conservation fails to provide protection of habitat when necessary only for species' recovery." [emphasis not added]

District Court Judge Susan Illston states clearly in her opinion how the regulations should read. "The court finds that the proper definition of 'destruction or adverse modification' is: a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for either the survival or the recovery of a listed species." [emphasis not added].

FWS officials said they were unable to respond to specific questions about interpretations of ESA because the agency is still contemplating what actions they may or may not take based on the rulings. But stakeholders on both sides of the issue -- principally environmentalists and developers -- say the agency has no choice but to rewrite the regulations.

Environmentalists, like John Kostyack of the National Wildlife Federation, say the courts make it clear what the regulations should say to comply with the law -- that "adverse modification" means destroying or modifying habitat that species need for either survival or recovery or both. In addition, they say the designation of critical habitat should reflect the full intent of the law by considering what is needed for the recovery of a species, in addition to considering survival.

On the flip side are groups like the National Association of Home Builders, which argue that the courts are pushing FWS to review and refine its ESA policies, not overhaul them. Duane Desidario of NAHB agreed that critical habitat regulations should be rewritten, but he warned the service to make sure it only designates land that is "essential" to the recovery of the species, as required by ESA.

"While we agree that the Fish and Wildlife Service needs to reconsider its regulations ... we would caution everybody to understand it's not going to benefit the species if you landlock or make into a no-touch zone an area that has degraded habitat," Desidario said.

Rather, he said the service should establish critical habitat only in areas where regulators know with near certainty that such a designation is essential for species recovery. Desidario acknowledged that such determinations always involve a margin of error, but he said that margin should be very small.

Nevertheless, developers would like to see some changes to ESA, and Desidario pointed to a bill from Rep. Dennis Cardoza (D-Calif.) that would make the critical habitat changes NAHB seeks, including a provision allowing FWS to use additional discretion when making critical habitat decisions (Greenwire, July 22). But most environmental groups oppose the bill.

Kostyack of NWF said he thinks the regulatory change demanded by the courts would spark a profound

shift in the way FWS treats critical habitat. By requiring FWS to consider critical habitat as a road to recovery, not just survival, the courts essentially invalidate FWS's long-held argument that critical habitat offers the same protections as listing a species and thereby provides no value to listed species (Greenwire, May 29).

But environmentalists say FWS advances that argument on flawed logic. One reason critical habitat has been largely useless, they say, is because FWS views it only in the context of species survival while ignoring ESA's co-mandate for recovery.

"The administration can no longer stick to this argument that critical habitat is redundant. It lost all credibility on that argument," Kostyack said.

Kostyack also said economic analyses of critical habitat may change dramatically as FWS retools its interpretation of the law. ESA requires the service to analyze the economic impact of designating critical habitat and, where appropriate, scale back the designations. For many years, the service viewed critical habitat as having no economic impact since it imposed no additional burden on property owners beyond what was set by the initial listing of a species.

But after industry groups challenged the FWS's rationale in court, the 10th Circuit Court of Appeals ordered the agency to conduct a full economic analysis for each habitat designation. FWS interpreted that to mean identification of every economic downside to a listing decision, a broader concept than just critical habitat. At the same time, environmentalists say FWS routinely ignored in their analyses the benefits of ESA protection, such as more abundant wildlife, improved recreational opportunities or better water quality.

Since the courts have now established a firm differentiation between the law's listing provision and its critical habitat provision, Kostyack said FWS should do a better job evaluating the costs and benefits in its economic analyses.

But others doubt whether the new regulations will have any effect on the ground, especially for private landowners who have struggled for years to meet the law's convoluted rules and regulations.

Reed Hopper of the Pacific Legal Foundation said he does not think rewriting the regulations will have any practical effect because FWS has always implemented the critical habitat standard quite narrowly. FWS has always tried to dissuade landowners from modifying critical habitat areas, he said, and that is not likely to change just because the agency views its critical habitat mandate separately from its listing mandate.

"Since the government has always given it a stricter interpretation than the rule indicates on its face, it's unlikely that this ruling would cause any significant change in practice in federal regulation of critical habitat," Hopper said. He added that regulators have "consistently threatened prosecution of landowners who merely modify critical habitat, even if it doesn't appreciably diminish the value of the habitat."

While some of those threats materialize as lawsuits or agency enforcement actions, many more are simple verbal warnings, Hopper said. Meanwhile, securing incidental take permits to perform certain actions on private land designated as critical habitat is very pricey, running in the tens of thousands of dollars, according to Hopper.