



NAHB
NATIONAL ASSOCIATION
OF HOME BUILDERS



TESTIMONY OF
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ON BEHALF OF THE
NATIONAL ASSOCIATION OF HOME BUILDERS

BEFORE THE
UNITED STATES HOUSE
COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTTIVES

HEARING ON
H.R. 2933, THE CRITICAL HABITAT REFORM ACT OF 2003

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Chairman Pombo, Ranking Member Rahall, and members of the House Resources Committee, I am pleased to share with you today the views of the National Association of Home Builders (NAHB) on H.R. 2933, “the Critical Habitat Reform Act of 2003”, introduced by Congressman Dennis Cardoza (D-CA), and on the process of critical habitat designation under the Endangered Species Act (ESA). I appreciate the opportunity to appear before the committee today to share the building industry’s views on this important legislation.

My name is Donald B. Walters, Jr., and I am a homebuilder and developer from Flagstaff, Arizona, and the current President of the Northern Arizona Building Association. As founder and President of Primary Systems Services Group, I oversee a full service general contracting corporation involved in home building, development, and commercial construction. My family has lived in Arizona’s Verde Valley since the 1860s, and my company and I have a deep appreciation and respect for the land in which we live and build. This appreciation and philosophy guide my company and the work that we do.

Mr. Chairman, NAHB represents over 215,000 member firms involved in home building, remodeling, multifamily construction, property management, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Our members are committed to environmental protection and species conservation, however, oftentimes well-intentioned policies and actions by regulatory agencies result in plans and programs that fail to strike a proper balance between conservation goals and needed economic growth. In these instances, our members are faced with significantly increased costs attributed to project mitigation, delay, modification, or even termination.

NAHB’s members are citizens of the communities in which they build. They seek to support the economy while providing shelter and jobs; partner to preserve important historical, cultural and natural resources; and protect the environment, all while creating and developing our nation’s communities. As such, NAHB supports the Services efforts to protect and conserve species that are truly in need of protection. NAHB believes, however, that a vital component of any conservation effort is to ensure the proper balance of each species’ needs with the needs of the states and communities in which it is located.

Because the ESA requires the Services to consider this balance, NAHB supports the designation of critical habitat when it is completed within the confines of the ESA. Unfortunately, as a result of the failure to either: a) designate critical habitat or b) properly conduct the analyses required under the ESA, critical habitat designations have become increasingly driven by litigation and inaccurate or incomplete science and data.

The problems and difficulties experienced by private landowners with respect to critical habitat are well documented and numerous. The General Accounting Office (GAO) has repeatedly visited the critical habitat issue, and has twice raised concerns with the U.S. Fish and Wildlife Service for its failure to issue guidance on critical habitat designations (U.S. General Accounting Office. *Fish and Wildlife Service uses best available science to make listing decisions, but additional guidance needed for critical habitat designations*. GAO-03-803. Washington, D.C., August 29, 2003.) Although FWS has repeatedly examined the issue, and has at times solicited comments on the critical

habitat designation process, there has been no definitive guidance on critical habitat in recent years. Without such guidance the building industry has been faced with uncertainty and delay in moving forward with many projects.

In seeking a legislative solution to the current crisis regarding critical habitat, H.R. 2933 proposes several important reforms to the process by which the Services designate critical habitat under the ESA. NAHB supports the majority of reforms H.R. 2933 proposes. However, we do reserve concerns over provisions in the bill linking critical habitat designations to the recovery planning process.

The following comments to the committee address, in turn, four sections of H.R. 2933, including the aforementioned concurrent designation of critical habitat with the approval of a recovery plan; the exemption of Habitat Conservation Plans (HCPs) and other management plans from critical habitat designations; the mandated consideration of direct, indirect, and cumulative economic impacts when designating critical habitat; and the establishment of statutory definitions for two key terms relating to critical habitat under the ESA.

I. Concurrent Designation of Critical Habitat with the Approval of a Recovery Plan

H.R. 2933 proposes to link the designation of critical habitat to the approval of a recovery plan. Some advocates of this position believe that, if critical habitat is pushed back to the recovery planning stage, the Services will have more time to compile the scientific and economic data they need to make fully informed and fair designations. Although well intentioned, NAHB does not believe that this will solve the current litigation crisis that ensnarls the designation of critical habitat, and may unintentionally create a new litigation threat for the Services while placing a higher regulatory burden on the regulated community.

First, NAHB is concerned that by linking critical habitat designation to recovery planning, the inherently discretionary nature of the recovery planning process could be supplanted by the mandatory nature of critical habitat designation. The Services could effectively be exposed to greater legal liability, and possibly faced with a new breed of lawsuits focusing on compelling the issuance of recovery plans. As the ESA does not currently mandate any set timelines for the completion of a recovery plan, it would be up to the eventual judge to set one. The litigation cycle that currently entraps the ESA would only shift from compelling the issuance of critical habitat under set timelines to the completion of recovery plans under set timelines.

A second concern with coupling the recovery planning process with critical habitat designation is a blurring of the important distinctions between the guidance of recovery plans and the regulations of critical habitat. Indeed, while U.S. Fish and Wildlife Service staff have relied upon recovery plans as the basis for their regulatory actions in some cases, numerous courts have determined that recovery plans are non-binding guidance -- documents that impose requirements on federal agencies *only*. See, e.g., *Fund for Animals v. Rice*, 85 F.3d 535 (11th Cir. 1996); *Oregon Natural Resources Council v. Turner*, 863 F.Supp. 1277 (D Or. 1994); *Defenders of Wildlife v. Lujan*, 792 F.Supp. 834 (D.D.C. 1992); *National Wildlife Fed'n v. National Park Serv.*, 669 F.Supp. 384 (D. Wyo. 1987)

By way of example, Fish and Wildlife field staff in Arizona have used recommendations from working drafts of the recovery plan for the Cactus Ferruginous Pygmy-Owl as justification for density requirements in proposed critical habitat areas. See, e.g., *Biological Opinion on the Effects of the Countryside Vista (Blocks 5 and 6) Development in Marana, Arizona (July 11, 2000)*. Accordingly, the potential for further abuse of regulatory authority is of significant concern to NAHB.

The third and final concern with tying critical habitat designations to the recovery planning stage is that such a change may raise the standard for the designation and sweep broader areas into the regulatory net than Congress intended. While economic and other “real world” considerations are mandated under the critical habitat designation process, there are no such requirements for the drafting of recovery plans. Further, the ESA currently defines critical habitat as “specific” areas that are found to be “essential” for conservation. This has traditionally been interpreted as a smaller area than that which may lead to a species’ “recovery.” Quite simply, if critical habitat were tied to a recovery plan, the boundaries of critical habitat would likely coincide with the larger area of “recovery habitat.”

Mr. Chairman, NAHB stands ready to work with bill sponsors and the committee to address these concerns with H.R. 2933 in an effort to ensure that the potential for future problems with critical habitat designations are lessened not expanded.

II. Exemption of Habitat Conservation Plans (HCPs) and Other Management Plans From Critical Habitat Designations

NAHB supports the exclusion of HCPs and other species management and conservation plans from critical habitat designations and believes that, in doing so, the Services provide powerful incentives to private landowners to continue entering into such agreements. Accordingly, NAHB supports provisions of H.R. 2933 that automatically exempt HCPs and other management plans from critical habitat designations.

Nationwide, private landowners represent a vital component to ensuring species conservation and preservation. True progress in species conservation and recovery can only be accomplished with the active and creative cooperation of this integral constituency. One way to gain their support is through the creation and implementation of incentive-based policies and programs such as HCPs, Safe Harbor Agreements, Conservation Banking, and the No Surprises Rule. These programs, however, can only be effective if they provide certainty and predictability to the landowners who choose to participate.

Under the ESA, the Services are obligated to consider whether “special management considerations” in the form of critical habitat are warranted for these specific areas. To demonstrate compliance with this mandate and determine whether any such additional management considerations are needed, NAHB believes that the Services are obligated to consider and review all private, local, state, regional, and federal protections, including all applicable management plans and conservation agreements to assess the conservation benefits they provide. If a specific area is already managed for the conservation of a particular species, that area is clearly not in need of *additional* protections or management considerations, and

therefore fails to meet the very definition of critical habitat and must be excluded from the designation.

Unfortunately, recent litigation surrounding the Mexican Spotted Owl has challenged this logical progression (*See Center for Biological Diversity v. Norton*, Civ. No. 01–409 TUC DCB), and threatens to undercut the attractiveness and usefulness of the full range of conservation tools and management options available to land managers, private landowners, and developers, resulting in a far-more onerous and far-less effective ESA.

Ultimately, in areas covered by HCPs, Safe Harbor Agreements, and other management plans and conservation programs, the designation of critical habitat only serves to add another layer of review and bureaucracy while failing to afford any additional protections for listed species. It also serves as a disincentive in those instances where voluntary measures are underway. Needless red tape is not a substitute for commonsense conservation policy, and may even result in detrimental impacts to threatened and endangered species.

Accordingly, NAHB appreciates the Services recognition of landowner contributions in this regard, and notes as a matter of reference that the Fish and Wildlife Service for one has exempted approved HCPs from critical habitat designations (FWS has exempted HCPs from several recent critical habitat designations including; the La Graciosa thistle on March 17, 2004 (69 FR 12560) and the Santa Anna Sucker February 26, 2004 (69 FR 8847). In conjunction with § 4(b)(2) of the Act, the Fish and Wildlife Service has cited this very logic in its exclusion of HCPs and other properly managed lands in, amongst others, the proposed designation of critical habitat in Arizona for the Cactus Ferruginous Pygmy-Owl. In that proposal, the Service even went so far as to “encourage landowners to develop and submit management plans and actions that are consistent with pygmy-owl conservation that [the Fish and Wildlife Service] can evaluate and that may remove the necessity of critical habitat regulation.” (67 FR 71042)

As these exemptions are more a matter of administration policy and interpretation, and therefore subject to change, NAHB supports the provisions of H.R. 2933 that will codify these practices.

III. Consideration of Direct, Indirect, and Cumulative Economic Impacts when Designating Critical Habitat

For years, NAHB has questioned and challenged the assumption by the Services that all costs are borne at the time of species listing and as a result there is only an incremental economic impact attributed to the designation of critical habitat. Indeed, the 10th Circuit Court has itself rejected this so-called baseline approach, reemphasizing “the congressional directive that economic impacts be considered at the time of critical habitat designation” (*New Mexico Cattle Growers Assn. v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001)).

The Services should base their decision on whether to exclude areas under § 4(b)(2) of the ESA on economic analyses that are sound and complete, fully addressing the direct, indirect, and cumulative impacts of critical habitat designation. As such, NAHB supports provisions of H.R. 2933 that would provide this direction to the Services.

By merely examining the administrative costs of Section 7 consultations and the costs associated with project modifications as a result of those consultations, economic analyses conducted for critical habitat routinely and significantly underestimate the true costs imposed by the designation.

As pointed out in a report entitled, “The Economic Costs of Critical Habitat Designation: Framework and Application to the Case of California Vernal Pools Report” prepared for California Resource Management Institute by D. Sunding, the Fish and Wildlife Service’s attempt at quantifying the impact of critical habitat for four vernal pool species of crustaceans and eleven vernal pool species of plants in California and Southern Oregon underestimated true costs by 7 to 14 times.

By way of further example, the Fish and Wildlife Service’s study for the economic impact of critical habitat for the Cactus Ferruginous Pygmy-Owl in my state of Arizona was not so much a study of the economic impact of the proposed designation, but a study of the costs of designation on certain concerned industries. No attention was paid to any effect on the local economy, local governments, or tribes; and regional economic impacts, tax revenues, secondary impacts, and increased housing prices were all excluded because they were assumed to be minimal.

It is obvious that the Services have repeatedly failed to accurately and fully account for the economic impact of critical habitat designations. NAHB believes that H.R. 2933 recognizes and reaffirms the statutory requirement of the Services under § 4(b)(2) of the ESA to examine the economic impacts of critical habitat and to exclude any specific geographical area from a designation if the benefits of exclusion outweigh the benefits of inclusion, and supports these provisions.

IV. Establishment of Statutory Definitions for Key Terms Relating to Critical Habitat under the ESA

Although critical habitat is clearly defined in §3(5)(a) of the ESA, NAHB believes the Services have traditionally misread and misinterpreted the Act’s requirements. Accordingly, NAHB supports provisions of H.R. 2933 that restate and reemphasize the definitions of “geographical area occupied by the species” and “essential to the conservation of the species,” two key, interrelated terms relating to the critical habitat process.

The ESA dictates two distinct classes of habitat that may be designated as critical habitat: (1) those areas “within the geographic area occupied by the species” and, (2) those areas “outside the geographic area occupied by the species.” Congress intended that, as a benchmark, critical habitat could encompass areas “occupied” by the species. Under § 3(5)(A) of the ESA, “unoccupied” areas may also be designated --but only where the Secretary specifically determines that the unoccupied area is “essential to conservation.”

NAHB believes that the Services have only limited and exceptional authority to designate “unoccupied” areas as critical habitat. The current implementing regulations also evince a clear priority for designating occupied areas as critical habitat in the first instance. The Services’ regulations state that areas outside of a species’ occupied habitat may be included in the critical

habitat designation *but* “only when a designation limited to its present range would be inadequate to ensure the conservation of the species.” 50 C.F.R. §424.12(e).

Despite this directive, in practice the Services have often treated unoccupied areas as occupied to avoid its obligation to make affirmative findings that the unoccupied area is “essential for conservation.” The absence of such an affirmative finding, however, does not permit the Services to arbitrarily define which areas may or may not be occupied simply on the basis of habitat characteristics, as seen in the designation of critical habitat for the Alameda Whipsnake. As ruled in that case, (*HBA of No. Calif. v. U.S. Fish & Wildlife Service* (1:01-Cv-05722 E.D. Calif., May 9, 2003), an area cannot be labeled as occupied simply because it is deemed essential to the conservation of the species and contains necessary primary constituent elements. As the courts have ruled, such is “an insufficient basis to designate land as occupied critical habitat” and nullifies “the distinction between occupied and unoccupied land, a distinction Congress expressly included in the ESA.” *Id.* at 29.

Likewise, NAHB believes Congress’ intent in crafting the ESA is being incorrectly interpreted by the Services when 1.2 million acres were proposed as being “within the geographic area occupied” by the pygmy-owl, a species that, in 2002, numbered 18 individuals. (*FR 67 71035*). Experience has shown that it can oftentimes be very difficult for the general public to determine whether or not they are in an area labeled by the Services as “occupied.” Only after extensive litigation did FWS provide NAHB with site-specific data on where pygmy-owls were located across federal, state, and private lands.

In the end, it is clear that, although already defined in the ESA, “geographical area occupied by the species” and “essential to the conservation of the species” are two terms that have traditionally been misread and misinterpreted. NAHB supports the provisions in H.R. 2933 that seek to correct these past failures.

Conclusion

Mr. Chairman, in closing, I would like to express NAHB’s appreciation for your longstanding leadership on the issues surrounding ESA reform, and for holding this important hearing today. On behalf on NAHB, I would also like to thank Congressman Dennis Cardoza for his leadership in introducing H.R. 2933.

Chairman Pombo, and members of the Committee, I thank you for your consideration of NAHB’s views on this matter, and hope that as a result of the discussion on this and other ESA reform bills, endangered species conservation in this country becomes less about litigation and gridlock and more about common-sense conservation policies and programs. With the notable exception of linking critical habitat and recovery planning, NAHB believes that H.R. 2933 makes great strides in this direction. NAHB strongly urges the Committee to fully consider both the intentional and unintentional consequences of any ESA reform, so that these hard-fought efforts may leave species conservation better off in the end. I’d be happy to answer any questions you may have for me.