Ms. Jamie Rappaport Clark
Executive Vice President
Defenders of Wildlife

Testimony
Before the Committee on Resources
United States House of Representatives

Hearing on H.R. 2933, "The Critical Habitat Reform Act of 2003"
April 28, 2004

Mr. Chairman, Mr. Ranking Member and members of the Resources Committee, thank you for the opportunity to testify today on H.R. 2933, the "Critical Habitat Reform Act of 2003." I am Jamie Rappaport Clark, Executive Vice President of Defenders of Wildlife. Defenders of Wildlife is a 501(c)(3) non-profit organization with more than 475,000 members and supporters; our mission is the protection of all native wildlife, fish and plants and the habitat that sustains them.

Before I address the specifics of H.R. 2933, I would like to say two things.

First, as a rule, Defenders of Wildlife generally does not support piecemeal reauthorization of the Endangered Species Act. Reauthorization is best considered in the context of the Act's entire framework in order to ensure all aspects of threatened and endangered species conservation are adequately addressed.

Second, let's take a step back and put the issue at hand today in context. What we are really talking about today is the kind of world that we will be leaving to our children. The greatest gift one generation leaves another is a better world. And it is the hope of all parents that the world they leave their children is as rich and diverse as the one they inhabit today. This is the lasting legacy that bonds one generation to the next. And in America, that legacy has always included a deep and abiding appreciation for the natural world.

Whether one is a hiker or a hunter, a fisherman or environmentalist, liberal or conservative, we have all benefited from our nation's rich and abundant environment and the conservation legacy passed on to us by those who came before. And we bear a responsibility – a duty – to ensure that some measure of what we have received is there to be enjoyed by tomorrow's children.

Unfortunately, we have not always succeeded in protecting that legacy. Often we have sacrificed tomorrow's bounty for today's gains. Some of these failings are reversible, others are not. The most permanent of them is extinction.

In 1973, our nation's government embraced this truth and passed the Endangered Species Act. The bill sailed through both the House and Senate by wide bipartisan majorities. And it was a Republican President, Richard Nixon, whose signature made the Act law.

Our leaders then realized what the years since have only confirmed: that we owe it to future generations to be good stewards of the environment – and that good stewardship entails the prevention of species extinction. This is a weighty responsibility – once species are gone, we cannot bring them back.

The Endangered Species Act is the safety net for wildlife, plants, and fish on the brink of extinction. In so many ways, Congress was prescient in the original construction of the Endangered Species Act when it included the protection of habitat as one of its key components. After all, the very best way to protect species is to conserve their habitat. Indeed, today, loss of habitat is widely considered by scientists to be the primary cause of species extinction and endangerment.

More than 30 years ago Congress recognized the impact habitat loss was having on wildlife and plants when it enacted the Endangered Species Act with the express purpose of "provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." And while the Act has successfully prevented hundreds of species from going extinct, the fact is that loss of habitat continues to threaten scores of plants and animals, including many that are already protected under it. It is clear that if we are to recover currently listed species and prevent additional species from becoming endangered or threatened, we simply must do a more effective job of conserving the ecosystems (i.e., habitats) wildlife and plants depend on for their survival.

Any proposed changes to the Endangered Species Act or its implementation, whether legislative or administrative, must ultimately be judged against that standard: will it improve and ensure the conservation of habitat? When measured against this standard, H.R. 2933, the "Critical Habitat Reform Act of 2003," fails miserably. Despite its title, there is in reality nothing reforming about H.R. 2933 and certainly not if one considers meaningful reform of the Endangered Species Act to be that which further improves the conservation of endangered and threatened species and provides a sure pathway to species recovery. Rather, H.R. 2933 would effectively eliminate one of the Act's central habitat protections – the designation and protection of "critical habitat" – and replace it with absolutely nothing. In other words, H.R. 2933 not only fails to improve the conservation of habitat under the Endangered Species Act, it actually would make the situation worse by effectively eliminating any protection for much if not most of the habitat endangered and threatened species need to recover.

As currently required under the Endangered Species Act, the designation of critical habitat could provide several potential benefits for endangered and threatened species. I emphasize "could" and say "potential" because for most currently listed species, critical habitat has never even been designated, much less protected, and because, as discussed in

greater detail below, the current Administration is now perversely using critical habitat as a tool to undermine, rather than advance, species conservation.

But let us start by examining some basic truths about critical habitat designation as envisioned in the Endangered Species Act.

- First, defined as that habitat which is "essential to the conservation" of endangered and threatened species, the designation of critical habitat should be important because it identifies, both geographically and in terms of physical and ecological features, that habitat an endangered or threatened species needs to recover. Thus, critical habitat should serve as an important recovery planning tool.

- Second, the designation of critical habitat is the only provision under the Endangered Species Act that expressly requires the protection of unoccupied habitat, which is particularly important for migratory species. Since the single greatest cause of species endangerment is loss of habitat, most listed species will not recover to the point where the Act's protections are no longer necessary unless the loss of habitat is not only stopped, but is actually reversed and sufficient areas are conserved to enable the species' current population to expand.

- Third, by encompassing unoccupied habitat, critical habitat also benefits species by often ensuring that federal actions with the potential to impact listed species habitat are reviewed by the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service pursuant to the Act's section 7 consultation provision. The section 7 consultation requirement is absolutely essential to ensuring that federal agencies do not undermine the conservation of listed species and, instead, actively utilize their existing authorities to promote species' recovery and survival.

- Finally, the designation of critical habitat is important because it triggers a substantive regulatory protection for species' habitat – the prohibition on federal actions which are likely to result in the "destruction or adverse modification" of critical habitat.

Defenders of Wildlife opposes H.R. 2933 as much for what it does not do as for what it does. H.R. 2933 would fundamentally and significantly weaken the protection of habitat under the Endangered Species Act by effectively making the designation and protection of habitat discretionary. With only two exceptions, current law requires the designation of critical habitat at the time an endangered or threatened species is listed. More importantly, the designation of critical habitat can be excused entirely only in the rare situation where it would actually harm the species. H.R. 2933, on the other hand, by requiring critical habitat only "to the maximum extent practicable, economically feasible, and determinable," would effectively make the designation of critical habitat the exception, rather than the rule, and turn what is now a mandatory requirement into one that is almost entirely discretionary with the Secretary. Because it is the current Administration's position that the designation of critical habitat is <u>never</u> "practicable" or

"economically feasible," H.R. 2933 would effectively write the designation and protection of critical habitat out of the Act, thereby condemning species already in a precarious state to further decline and possible extinction.

H.R. 2933 would also move the designation of critical habitat from the time of listing to the time a recovery plan is approved by the Secretary and eliminate any enforceable deadline regarding critical habitat. Making the designation of "recovery" habitat part of or at least concurrent with the development of a recovery plan makes sense and is something Defenders supports, but only if the Endangered Species Act is amended to provide for an enforceable recovery planning deadline. Currently, the Act does not impose a deadline for the development of recovery plans. Accordingly, by requiring the designation of critical habitat "concurrently with the approval of a recovery plan" but without imposing a deadline for such plans, H.R. 2933 would not only greatly diminish if not eliminate meaningful enforcement of this provision, it would further delay development of any "blueprint" for species recovery.

H.R. 2933 also fails in that it neglects to address at all the grave problems regarding this Administration's implementation of the Endangered Species Act's critical habitat provisions which are severely undermining the conservation of endangered and threatened species habitat. Congress plainly intended the designation of critical habitat to be a central tool in achieving the Endangered Species Act's goal of conserving endangered and threatened species. At the same time, Congress also provided that the Secretary take "into consideration the economic impact, and any other relevant impact" of designating critical habitat. This Administration, however, has turned the critical habitat provision entirely on its head; instead of a tool for conserving endangered and threatened species, the designation of critical habitat has become a mechanism for actually eliminating any meaningful protection for habitat deemed essential to species conservation.

We have seen, for example, areas determined by Fish and Wildlife Service biologists to be essential to a species conservation excluded from or eliminated as officially designated critical habitat, only to then have other federal agencies, including the U.S. Army Corps Engineers, refuse to even consult with the Fish and Wildlife Service under section 7 of the Endangered Species Act regarding actions that will destroy and fragment such habitat. In a case involving the endangered cactus ferruginous pygmy-owl, this Administration has taken the extreme position that a federal agency has no obligation to even consult with the Service under section 7 of the Act unless its actions will directly impact habitat that is either occupied by an endangered species or formally designated as critical habitat, even though the agency's action will result in the destruction of habitat determined by the Fish and Wildlife Service to be important to the species' survival and recovery.

This pattern is becoming increasingly worrisome as this Administration continues to exclude vast areas of essential habitat using flawed, one-sided economic analyses and other arbitrary reasons. For example, this Administration has steadfastly refused to consider the economic benefits associated with the designation of critical habitat, and

even has gone so far as to delete from its published analysis a section on the economic benefits of designating bull trout critical habitat included in the original analysis by the Fish and Wildlife Service's own economic consultant. This is not only bad economics, but it highlights in stark terms this Administration's real agenda regarding critical habitat and species conservation under the Endangered Species Act.

Under this Administration, the designation of critical habitat is no longer about protecting species and guiding species recovery, but instead has become simply a political opportunity to assault the Endangered Species Act, to make a mockery of the importance of habitat to species recovery and to make baseless assertions that "the Endangered Species Act is broken." For example, despite continually complaining in press releases that its priorities are being dictated by court-ordered critical habitat designations rather than science, in reality, this Administration has failed to develop its own priorities at all regarding the backlog of overdue critical habitat designations.

As the General Accounting Office recently found, "[t]he Service has been aware of problems with its critical habitat program for a number of years," and has previously "announced its intention to streamline the process for designating critical habitat to be more cost-effective," and to develop a much less labor-intensive process for describing the areas proposed for designation as critical habitat." GAO, Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designations 35, 36 (August 2003). Yet, according to GAO, "no additional guidance or revisions were issued, and the Service continues to follow the same unworkable system" for designating critical habitat. Id. (emphasis added). Thus, this Administration's repeated claim that critical habitat is broken is spurious given that it has done absolutely nothing to administratively address the critical habitat backlog or reform the process. Plainly, this Administration seems much more interested in publicly criticizing the ESA and fomenting controversy than it is in meaningful reform.

This Administration's implementation of critical habitat designation and H.R. 2933 have moved the focus of the debate from where it rightfully belongs, and it is time to take the discussion to a different level: how can we move forward to keep the conservation of endangered and threatened species and their habitats the central focus of the Endangered Species Act so we can meet our responsibility to leave a rich and abundant natural legacy to future generations?

In keeping with this view, any meaningful reauthorization of the Endangered Species Act's critical habitat provision should encompass the following elements.

1. First and foremost, critical habitat's original intent and purpose of identifying and protecting habitat needed for species' conservation (i.e., recovery) must be maintained. There must be a transparent and scientifically rigorous process for identifying, both geographically and ecologically, a species' recovery habitat. For example, the current distinction between occupied and unoccupied habitat makes no sense from

a scientific or species conservation standpoint and should be eliminated. In addition, once identified, there must be regulatory protection for such habitat. The Act's current prohibition on federal actions that are likely to result in the "destruction or adverse modification" of critical habitat, is, on its face, a reasonable standard, but one that must be defined to reflect the ultimate goal of recovery.

2. The designation of critical habitat should become part of, or at least occur concurrent with, the development of a recovery plan, provided that the recovery planning process becomes subject to an enforceable deadline.

3. Species recovery must be the primary focus and goal of identifying and protecting critical habitat. The current Administration's fixation on speculative analyses of the potential economic costs of designating critical habitat as a means to effectively eliminate protections for habitat species need to recover is incompatible with this goal. Economic considerations should play a role in determining how best to protect habitat and achieve species recovery, rather than as a means to effectively foreclose even the chance of recovery, as is the case now.

4. Incentives must be provided to encourage private landowners to conserve habitat determined to be important to species' recovery.

5. Finally, a scientifically-based and rational system or set of criteria for addressing the current backlog of species without critical habitat or any other meaningful habitat protections, together with adequate funding to administer the program, must be developed.

In closing, let me say that the Endangered Species Act, with its central tenet of habitat protection, continues to stand as one of our nation's most important and effective instruments for preserving and restoring the conservation legacy we pass onto our children. We must never forget the central purpose of the Act and the extraordinary foresight of the Act's original authors, foresight that saw the wisdom in both species conservation AND habitat protection. Thank you.