



**DEPARTMENT OF THE ARMY**  
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT  
600 ARMY PENTAGON  
WASHINGTON DC 20310-0600

REPLY TO  
ATTENTION OF

DAIM-ED

S: 2 Mar 06  
JAN 4 2006

MEMORANDUM FOR

OACSIM (DAIM-BD), 600 ARMY PENTAGON, WASHINGTON, DC 20310-0600  
US ARMY MATERIEL COMMAND (AMCPE-I), 9301 CHAPEK RD, FT BELVOIR,  
VA 22060-5527

NATIONAL GUARD BUREAU (NGB-ARE), ARMY NATIONAL GUARD READINESS  
CENTER, 111 SOUTH GEORGE MASON DR, ARLINGTON, VA 22204-1382  
INSTALLATION MANAGEMENT AGENCY (IMAH-END), 2511 JEFFERSON DAVIS  
HWY, TAYLOR BUILDING (NC3), ARLINGTON, VA 22202-3926

SUBJECT: Army Guidance on Critical Habitat

1. References:

- a. [The Endangered Species Act, as amended by The National Defense Authorization Act of 2004, codified at 16 USC 1533\(b\)\(2\) and 1533\(a\)\(3\)\(B\).](#)
- b. [Memorandum, DAIM-ED-N, 05 Mar 01, subject: Army Policy and Guidance on Critical Habitat Designations.](#)
- c. [AR 200-3, Natural Resources - Land, Forest, and Wildlife Management, 28 Feb 95, paragraph 11-8\(c\).](#)
- d. [Title 50 Code of Federal Regulations Part 402, Interagency Cooperation - Endangered Species Act Of 1973, As Amended.](#)
- e. [Memorandum, HQ, US Fish and Wildlife Service to Regional Directors, 9 Dec 04, Subject: Application of the "Destruction or Adverse Modification" Standard under Section 7\(a\)\(2\) of the Endangered Species Act.](#)
- f. [US Fish and Wildlife Service and National Marine Fisheries Service, March 1998, Final Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultations and Conferences.](#)
- g. [US Fish and Wildlife Service and National Marine Fisheries Service, Final Policy for the Evaluation of Conservation Efforts \(PECE\) When Making Listing Decisions Under the ESA of 1973, as amended, Federal Register Volume 68 No. 60 Page 15100, March 28 2003, Policy on Role of Habitat.](#)

DAIM-ED

SUBJECT: Army Guidance on Critical Habitat

2. [Enclosure 1](#) provides guidance on three Critical Habitat (CH) elements: (1) Endangered Species Act amendment concerning CH designations ([reference 1a](#)), (2) [new US Fish and Wildlife Service Section 7 interpretations of destruction or adverse modification of CH](#), and (3) revisions of current CH designations on Army lands.
3. This guidance replaces reference 1b and supplements reference 1c or subsequent regulations. References 1e-1g are posted or linked on the US Army Environmental Center (USAEC) website (<http://aec.army.mil/usaec/natural/natural01.html>).
4. Addressees are directed to:
  - a. Implement this new guidance.
  - b. Review [enclosure 2](#) (List of Proposed or Planned CH Designations) and notify this office NLT 2 Mar 2006 if any installations with potential for designation of CH do not have an INRMP that provides a benefit to the species.
  - c. Contact this office prior to installation submittal of a request to the US Fish and Wildlife Service or National Oceanic & Atmospheric Administration - Fisheries to revise current CH designations and prior to commenting on CH designation per reference 1c.

FOR THE ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT:

2 Encls

CHRISTOPHER E. SCHUSTER  
Colonel, GS  
Director, Environmental Programs

Army Guidance on Endangered Species Act (ESA) Critical Habitat (CH)  
Designations and Consultations  
December 2005

1. **Introduction.** This guidance is issued to respond to changes in the ESA CH designation process, court rulings which changed the way US Fish and Wildlife Service (FWS) considers effects on CH, and the process for revisions to current CH designations.

2. **Endangered Species Act amendments concerning CH designations - participation in ESA Section 4 listing process.**

a. The 2004 amendments to the ESA include two provisions to exclude designation of CH on lands used by the Army:

(1) Section 4(a)(3)(B) is not discretionary and mandates that the Secretaries of Interior and/or Commerce exclude designating CH on "...any lands or other geographical 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 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which CH is proposed for designation."

(2) Section 4(b)(2), is discretionary. The amendment allows the Secretaries of Interior and/or Commerce to specifically preclude designation of CH on a military facility if they conclude that the benefits of such designation are outweighed by the impact on national security. Such exclusion could not occur if failure to designate an area as CH would result in the extinction of the species.

b. Army installations shall manage listed species pursuant to Army policy in order to avoid the need for CH designation. Installations shall participate in the CH rule-making process. It is imperative that installations comment on the Integrated Natural Resources Management Plan (INRMP) and the mission, economic, and other relevant impacts for any CH being proposed for designation on the installation. Though CH proposed on non-essential lands of an installation may not impact mission, there is no guarantee such lands may not be mission-critical in the future. The ability to maintain flexibility in use of our land is paramount to the Army's mission to organize, train, and support a land combat force. When commenting, installations should include discussions of both exclusions unless the 4(a)(3)(B) exclusion is not available.

(1) Section 4(a)(3)(B) - INRMP provides a "benefit" to the species. To ensure exclusion of proposed CH now and possibly into the future, an installation's INRMP should provide for the benefit of listed species through the enhancement and/or restoration of habitat utilized by federally-listed species occurring on or near the

installation.<sup>1</sup> Benefit currently means those management/conservation actions or inactions that are necessary to sustain population levels onsite and support the recovery of the listed species on or contiguous to the installation. Installations should review the INRMP to confirm it provides a benefit to the species using the guidance in [attachment 1](#)<sup>2</sup>. When commenting on proposed designation of CH, installations should:

(a) Provide information on population size and acres of habitat utilized by the listed species.

(b) Address the benefits of planned management/conservation activities or policies on listed species. Clearly identify those actions specifically being implemented to benefit the listed species.

(c) Include a summary of the benefits that the INRMP and other management documents (i.e., Master Plan, Pest Management Plan, and Integrated Training Area Management Plan) will provide the listed species.

(d) Include information that provides assurance that the INRMP will be implemented. This includes assurance that projects designed specifically to benefit listed species on installations where CH is planned for designation are programmed and funded, and that capable persons are available and have authority to implement the INRMP.

(2) Section 4(b)(2) - impacts outweigh benefits. A CH exclusion is possible when the installation can demonstrate that national security, economic, or other relevant impacts outweigh the benefits to the species even if an installation does not have an approved INRMP, or the INRMP has not been found to provide a benefit to all applicable species. When commenting on proposed designation of CH, installations should:

(a) Emphasize the impacts to national security. Identify potential adverse mission impacts of a CH designation by providing information on the specific military missions that could be affected, the changes to those activities that may be required as a result of CH designation, and the overall influence such mission restrictions could have on military readiness. Major Army Command (MACOM) Integrated Training Area Management (ITAM) coordinators will provide information that supports the adverse impacts on training. Installation ITAM personnel and biologists shall support the MACOM ITAM coordinators in developing this information, and it will be coordinated

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<sup>1</sup> INRMPs should address species at risk, candidate species, and proposed species; however, this guidance is not intended as a complete guide for INRMPs. This guidance is focused on CH which may only be designated for listed species.

<sup>2</sup> Attachment 1, "Special Management or Protection" is the US Fish and Wildlife Service (FWS) available guidance for determining if an INRMP provides a benefit to listed species. It was used prior to the Endangered Species Act amendments, so "special management or protection" is the term which roughly describes "benefit" to the species. New guidance is being drafted by FWS; when complete, US Army Environmental Center will provide notification in the semi-monthly Federal Register Review.

with the installation range operation organization. Discuss the following that are applicable:

- National security
- Training, soldier training days, time, place, intensity
- Installation importance Army-wide
- Economic cost
- Project delay
- Opportunity cost

(b) Emphasize the economic or other relevant impacts that outweigh the benefits to the species.

(c) Demonstrate current actions being taken by the installation for conservation. For example, installations should discuss actions being taken as a result of an Endangered Species Management Component of the INRMP, Biological Opinion (BO), Biological Assessment/Biological Evaluation (BA/BE), INRMP, and/or Army Compatible Use Buffer.

c. Coordination/Responsibilities.

(1) Office of the Director of Environmental Programs (ODEP) with support from US Army Environmental Center (USAEC).

(a) Maintain master list of proposed and current CH designations that impact Army lands.

(b) Notify commands of proposed CH. The Federal Register Review distributed by USAEC on a semi-monthly basis for current and upcoming listing actions will be used to aid in this notification.

(c) Review installation comments in coordination with Army Staff and proponent command.

(d) Provide supplemental comments that are coordinated with Army Staff.

(2) Installation Management Agency, Army National Guard, Army Materiel Command, and Base Realignment and Closure Division (BRACD).

(a) Facilitate effective delivery of the installation comments to ODEP for review.

(b) Establish and implement a process for obtaining MACOM ITAM Coordinator review and comments on national security, economic impacts, and INRMP benefits.

(c) Participate in the ODEP review as required or capable.

(d) Notify ODEP of any installations within areas identified as potential CH which do not have an INRMP that provides a benefit to the species.

(e) BRACD installations are likely to be unique. BRACD should work directly with ODEP to determine procedures.

(3) Installation (all comments must be communicated by chain of command).

(a) Work closely with FWS or National Oceanic and Atmospheric Administration - Fisheries (NOAA-F) before and during the CH designation rulemaking process to ensure that FWS/NOAA-F understands mission requirements and impacts, and that they recognize installation management is moving the species toward recovery without CH designation. Ideally CH will not even be proposed on installations due to this close interaction and advance understanding of installation situations.

(b) Comment on the record (usually written) on all proposed CH designations that have the potential to impact land use on the installation.<sup>3</sup>

(c) Work together with the installation Public Works Directorate, Range Control/Training Directorate, Office of the Staff Judge Advocate, ITAM offices, and Natural Resources Staff.

(d) Prepare a summary of costs related to both impacts from proposed CH designation and estimated conservation management costs to preclude proposed CH designation.

(e) Send all planned comments and cost summaries through the chain of command to ODEP for review prior to submitting to FWS or NOAA-F.

### **3. FWS determination of destruction or adverse modification of CH - ESA Section 7 consultation.**

a. The following has impacted the way FWS looks at CH effects:

(1) In August 2004, courts in the 9<sup>th</sup> Circuit<sup>4</sup> invalidated the FWS regulatory definition of "destruction or adverse modification" of critical habitat at 50 Code of Federal Regulations (CFR) 402.02. Because the court found that the FWS had relied on the definition to make the adverse modification determinations when issuing BOs, the BOs in those cases were invalidated. This logic means that all BOs involving CH are potentially invalid, and the Federal actions that rely on those BOs are vulnerable to challenge.

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<sup>3</sup> The FWS proposal process is at 50 CFR 424.16.

<sup>4</sup> *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Circuit, 2004).

(2) In response to the 9th Circuit ruling, and similar rulings in other jurisdictions, it is expected that FWS will revise the regulatory definition and focus much more on the conservation and recovery aspects of any destruction or adverse modification determination. FWS released interim guidance to field offices that provides the information to be analyzed when determining whether a destruction or adverse modification of CH will result from a Federal action. The FWS interim guidance is attached ([attachment 2](#)).

b. BA/BE analysis of effects of species recovery. Installations need to provide the FWS with sufficient information concerning species conservation and recovery related to CH. The interim FWS guidance provides an analytical framework that will be used to assess effects that a Federal action will have on designated CH and proposed CH when consultation occurs under Section 7(a)(2) or when a conference is requested per ESA Section 7(a)(4). The FWS sets out the following framework for the BA/BE:

(1) "Status of the Species/CH" analysis will discuss the entire designated CH area in terms of the biological and physical features that are essential to the conservation of the species. The analysis will identify and discuss:

(a) The primary constituent elements (PCE)<sup>5</sup> essential for the conservation of the species, as identified in the final rule (if PCEs are not in the final rule, then informally consult with FWS officials to identify the PCEs).

(b) Current condition of the PCE and factors responsible for the condition.

(c) Conservation role of the individual CH units.

(2) "Environmental Baseline"<sup>6</sup> will contain:

(a) The current condition of the CH units in the action area, factors responsible for that condition, and a description of the conservation role of the individual CH units.

(b) A description of the relationship of the affected CH units to the entire designated or proposed CH with respect to the conservation of a listed species.

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<sup>5</sup> Primary constituent elements are physical or biological features essential to the conservation of a species for which its designated or proposed critical habitat is based on, such as space for individual and population growth, and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. [ESA §3(5)(A)(i); 50 CFR §424.12(b)]

<sup>6</sup> The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early Section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. [50 CFR §402.02]

(3) "Effects of the Action" on the designated or proposed CH should describe effects on the PCEs and the influence of those effects on the function and conservation role on the affected CH unit(s).

(4) "Cumulative Effects" of the Federal action in conjunction with future, non-federal actions reasonably certain to occur in the action area should describe how the PCEs are likely to be affected and, as above, how those effects will influence the function and conservation role of the CH unit(s).

(5) "Conclusion" will provide an explanation as to the overall effect of the proposed action on designated CH for affected species and determine whether or not the action is likely to appreciably diminish the value of the CH to support both survival and recovery of the species.

c. Throughout the BA/BE, proponents should avoid any reference to the current definition of "destruction or adverse modification" found at 50 CFR 402.02. The BA/BE shall include the following standard text as part of the Conclusion:

**"The Army did not draw on the regulatory definition of *destruction or adverse modification* of critical habitat at 50 CFR 402.02 with respect to the conclusions and analysis made in this biological assessment. Instead, the Army has incorporated into the critical habitat effects analysis the conservation of species principals found in the statutory provisions of the ESA."**

d. The cover letter will reiterate the conclusion made in the BA/BE.

e. Installations that were issued BOs from FWS, in which the FWS concluded that no destruction or adverse modification was expected as a result of a Federal action, should review the affected BOs to determine whether the Section 7 consultation needs to be re-initiated. Any such reviews should be coordinated with the local Staff Judge Advocate. If the determination is made that re-initiation of Section 7 consultation is advisable (i.e. the FWS employed the invalidated regulatory standard, and the BO with its underlying administrative record does not demonstrate a substantial and independent focus on the value of remaining CH to conservation and recovery of the species), then any such re-initiation shall be staffed with ODEP (DAIM-ED) IAW AR 200-3 using the chain of command. It is advisable to consult within the chain of command prior to preparation of re-initiation documents.

#### **4. Revision of CH designation - ESA Section 4 listing process.**

a. Section 4(a)(3)(B) of the ESA affords FWS and NOAA-F the discretion to revisit critical habitat designation - "...may, from time-to-time thereafter as appropriate, revise such designation [of critical habitat]". Section 4(b)(3)(D) of the ESA establishes a process to review and make findings on petitions to revise a critical habitat designation.<sup>7</sup>

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<sup>7</sup> The FWS petition regulation is at 50 CFR 424.14(c).

b. Army installations with an INRMP that satisfies the 4(a)(3)(B) criteria to be exempt from critical habitat, and/or that determine the national security and/or economic impacts of designated critical habitat are significant to the point that exclusion of the property outweighs the benefit of upholding critical habitat onsite, may request FWS or NOAA-F to revise critical habitat for the applicable species and eliminate the designation on installation land.

c. Installations must contact ODEP, using the chain of command, in advance of making requests for revision of CH so that the opportunity may be assessed and a joint effort may be planned.

## Special Management or Protection

Special management or protection is a term that originates in the definition of *occupied* critical habitat in section 3 of the Act. For occupied habitat one first determines whether the area contains the physical and biological features essential to the conservation of the species and their area has or needs additional special management or protection. Additional special management is not required if adequate management or protection is already in place. If *unoccupied* areas are determined to be essential to the conservation of the species, we would include such unoccupied areas only where special management or protection is required.

The question then becomes, what is adequate special management or protection?

Adequate special management or protection is provided by a legally operative plan that addresses the maintenance and improvement of the primary constituent elements important to the species and manages for the long term conservation of the species. We use the following three criteria to determine if a plan provides adequate special management or protection:

- 1. The plan provides a conservation benefit to the species.** The cumulative benefits of the management activities identified in a management plan, for the length of the plan, must maintain or provide for an increase in a species' population, or the enhancement or restoration of its habitat within the area covered by the plan [i.e., those areas deemed essential to the conservation of the species]. A conservation benefit may result from reducing fragmentation of habitat, maintaining or increasing populations, insuring against catastrophic events, enhancing and restoring habitats, buffering protected areas, or testing and implementing new conservation strategies.
- 2. The plan provides assurances that the management plan will be implemented.** Persons charged with plan implementation are capable of accomplishing the objectives of the management plan and have adequate funding for the management plan. They have the authority to implement the plan and have obtained all the necessary authorizations or approvals. An implementation schedule (including completion dates) for the conservation effort is provided in the plan.
- 3. The plan provides assurances that the conservation effort will be effective.** The following criteria will be considered when determining the effectiveness of the conservation effort. The plan includes (1) biological goals (broad guiding principles for the program) and objectives (measurable targets for achieving the goals); (2) quantifiable, scientifically valid parameters that will demonstrate achievement of objectives, and standards for these parameters by which progress will be measured, are identified; (3) provisions for monitoring and, where appropriate, adaptive management; (4) provisions for reporting progress on implementation (based on compliance with the implementation schedule) and effectiveness (based on evaluation of quantifiable parameters) of the conservation effort are provided; and (5) a duration sufficient to implement the plan and achieve the benefits of its goals and objectives.

United States Department of the Interior  
Fish and Wildlife Service

[Application of the “Destruction or Adverse Modification” Standard under Section 7\(a\)\(2\) of the Endangered Species Act](#)

## ***Proposed or Planned Critical Habitat Designations***

<b>Species</b>	<b>Installations Potentially Affected</b>
Kootenai River white sturgeon	Current CH in Boundary County, ID. No known Army installations in County.
3 FL beach mice	Critical habitat is being proposed in Baldwin County, Alabama, and Escambia, Okaloosa, Walton, Bay and Gulf Counties, Florida. No Army installations known in Counties.
Laguna Mountains skipper	Critical habitat is being proposed in San Diego County, CA. No known Army installations in County.
Yaedon's piperia	Yaedon's piperia is recorded as onsite Presidio of Monterey, Monterey County, CA.
Wintering piping plover	Installations Potentially Affected (w/in Counties where CH currently occurs) - Morehead City (USAR), Military Ocean Terminal Point (SE), Fort Stewart (SE), Lt. Max R. Stover (USAR), Clearwater Aviation Support Facility (USAR), Rattlesnake Point (USAR), Mississippi AAP (AMC), Doyle Overton Hickory (USAR), Corpus Christi (SW). Other installations along the coast from NC to TX.
Northern spotted owl	Fort Lewis, Camp Rilea, Camp Adair, 70 <sup>th</sup> RRC sites – all record owl as onsite or contiguous
Alabama beach mouse	Current CH in Baldwin County, AL. No known Army installations in County.
Holmgren and Shivwits milk-vetches	Species range in Washington County, UT and Mohave County, AZ. St. George Army is within Washington County.
Suisun thistle and soft birds beak	Species range in Contra Costa and Solano Counties, CA. Found in coastal salt or brackish tidal marshes. Parks RFTA (SW) and Mare Island, PFC Bacciglieri Armed Forces Reserve Center and Rio Vista LTA (USAR) are within Counties.
Spikedace and Loach minnow	Both species are recorded as contiguous to Fort Huachuca. Notice states that there are no lands owned by DoD. Florence Military Reservation and a few smaller ARNG sites (i.e., Casa Grande Range, WAATS-Silverbell) are within Counties where CH is being proposed.
Graham's Penstemon	Recorded in Rio Blanco County, CO; and Carbon, Duchesne and Uintah Counties, UT.
Braunton's milk-vetch and Lyon's pentachaeta	Critical habitat proposed in Los Angeles, Orange and Ventura Counties, CA. No Army property identified.
Willow monardella	Critical habitat proposed in San Diego County, CA. No Army property identified.
Fender's blue butterfly, Kincaid's lupine and Willamette daisy	Critical habitat proposed in Benton, Douglas, Lane, Linn, Marion, Polk and Yamhill Counties, OR; Lewis County, WA. No Army property identified for CH.