

1996a). Four historical populations in Tennessee are presumed extirpated (Jones 1991; Tennessee Department of Environment and Conservation (TDEC) 2000).

#### Previous Federal Action

Federal government actions on this species began with passage of section 12 of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*). Please refer to the final listing rule for a complete description of Federal actions concerning this species between the inception of the Act and the proposed listing rule in 1994.

On January 3, 1994, we published a rule in the **Federal Register** (59 FR 53) proposing to list *Arabis perstellata* (inclusive of the two varieties, *Arabis perstellata* var. *ampla* and *Arabis perstellata* var. *perstellata*) as endangered. In that proposed rule, we had made a determination that designation of critical habitat was not prudent because such a designation would not be beneficial to the species, but rather could further threaten the species. On January 3, 1995 (60 FR 56), we published our final rule to list *Arabis perstellata* as endangered. In the final rule, consistent with our determination in the proposed rule, we found that a critical habitat designation was not prudent.

On July 22, 1997, we finalized the *Arabis perstellata* Recovery Plan (Service 1997). The recovery plan established the criteria that must be met prior to the delisting of *Arabis perstellata*. The recovery plan also identified the actions that are needed to assist in the recovery of *Arabis perstellata*.

On October 12, 2000, the Southern Appalachian Biodiversity Project filed suit against us, challenging our not prudent critical habitat determinations for *Arabis perstellata* and 15 other federally listed species (*Southern Appalachian Biodiversity Project v. U.S. Fish and Wildlife Service, Babbitt, & Clark* (CN 2:00-CV-361 (E.D. TN))). On November 8, 2001, the District Court of the Eastern District of Tennessee issued an order directing us to reconsider our previous prudency determinations and submit a new prudency determination and proposed critical habitat designation, if prudent, for *Arabis perstellata* to the **Federal Register** no later than May 26, 2003, and a final decision not less than twelve months after the new prudency determination.

This proposal is the product of our reevaluation of our 1995 determination that critical habitat designation for *Arabis perstellata* was not prudent. It reflects our interpretation of recent

judicial opinions on critical habitat designation and the standards placed on us for making a prudency determination. If additional information becomes available on the species' biology and distribution, and on threats to the species, we may reevaluate this proposal to designate critical habitat, including proposing additional critical habitat, proposing the deletion or boundary refinement of existing proposed critical habitat, or withdrawing our proposal to designate critical habitat.

#### Critical Habitat Disclaimer

Designation of critical habitat provides little additional protection to species. In 30 years of implementing the Act, we have found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of scarce conservation resources. The present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation rather than biology, forces decisions to be made before complete scientific information is available, consumes enormous agency resources that would otherwise be applied to actions of much greater conservation benefit, and may impose large social and economic costs. We believe that rational public policy demands serious attention to this issue in order to allow our limited resources to be applied to those actions that provide the greatest benefit to the species most in need of protection.

#### Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987. *Env. Manage.* 11(4):429-437) stated, "Because the ESA can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 306 species or 25 percent of the 1,211 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,211 listed species through conservation mechanisms such as listing, section 7

consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. We believe that it is these measures that may make the difference between extinction and survival for many species.

#### Procedural and Resource Difficulties in Designating Critical Habitat

With a budget consistently inadequate to fund all of the petition review, listing determinations, and critical habitat designation duties required of us by statute, we have in the past prioritized our efforts and focused our limited resources on adding species in need of protection to the lists of threatened or endangered species. We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat designations once they are made. These lawsuits have subjected us to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves us with little ability to prioritize our activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, our own proposals to list critically imperiled species, and final listing determinations on existing proposals are significantly delayed. Litigation over critical habitat issues for species already listed and receiving the Act's full protection has precluded or delayed many listing actions nationwide.

The accelerated schedules of court-ordered designations have left us with almost no ability to provide for adequate public participation or ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.