

**Public Comment on Revision of the Regulations for
Listing Species and Designating Critical Habitat
FWS-HQ-ES-2018-0006**

submitted by

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Summary

- While designations of critical habitat in unoccupied areas comprise a relatively small portion of all designated areas, they can be especially controversial.
- If designating an unoccupied area as critical habitat is not likely to yield conservation benefits, it could be more beneficial for both imperiled species and landowners for agencies to focus designations on areas likely to yield conservation benefits.

Introduction

The Property and Environment Research Center (PERC) respectfully submits this comment to the the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. PERC is a nonprofit conservation research institute located in Bozeman, Montana, that explores market-based solutions to environmental problems. Founded in 1980, PERC's mission is to improve environmental quality through markets, entrepreneurship, and property rights. PERC's staff and associated scholars conduct original research that applies free-market principles to resolving environmental disputes in a cooperative manner.

Too often, the Endangered Species Act has failed to align incentives in ways that spur landowners to actively participate in species recovery. Private landowners must play an essential role in recovery of endangered species because they provide such a significant amount of habitat for listed species.¹ The Fish and Wildlife Service has estimated that about half of endangered species rely on private lands for 80 percent of their habitat.² Yet property owners who provide habitat for imperiled species can face negative consequences from the statute, whether through land-use restrictions, costly permitting requirements, or regulatory uncertainty. From a private landowner's perspective,

¹ See Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC Report (1995).

² See U.S. Fish & Wildlife Service, *Our Endangered Species Program and How It Works with Landowners* (July 2009), available at <https://www.fws.gov/endangered/esa-library/pdf/landowners.pdf>.

any of these can threaten the economic viability of working lands or the property value of residential or commercial lands.

The relative lack of success in recovering endangered species is borne out by the 45-year record of the Endangered Species Act. Most listed species remain on the precipice of extinction, perhaps never plunging off, but never walking back a safe distance from the edge either. Of the nearly 1,700 domestic species ever listed under the act, only 11 have gone extinct, yet just 42 have recovered.³ That record is partly due to the biological reality that species recovery can be extremely difficult. But improving that record will require more cooperation with the landowners who provide such a large portion of endangered species habitat.

While certain landowners may be willing to play an active role in endangered species recovery, the liabilities that can come from the presence of an imperiled species, or from a critical habitat designation on private land, lead some to adopt a “shoot, shovel, and shut up” attitude. And even for landowners who do not go so far as to illegally take at-risk species, other consequences of the Endangered Species Act’s reach can be similarly unproductive for conservation. For instance, property owners have preemptively destroyed habitat in an effort to keep endangered species off of their land.⁴ Rather than providing incentives to participate in recovery, the act can serve as a source of conflict among landowners, environmentalists, states, and the federal government.

In particular, decisions regarding unoccupied areas designated as critical habitat are likely to be more controversial than other decisions, and in some cases may even be counterproductive to conservation. When considering the proposed reforms to unoccupied critical habitat designations, the Fish and Wildlife Service and National Oceanic and Atmospheric Administration should take the following observations into consideration:

1. While designations of critical habitat in unoccupied areas comprise a relatively small portion of all designated areas, they can be especially controversial.

Designations of unoccupied habitat account for less than 1 percent of total areas designated as critical habitat in recent years.⁵ Yet such designations can be especially controversial, as demonstrated by the forthcoming Supreme Court case over the critical habitat designation for the dusky gopher frog.

³ U.S. Fish and Wildlife Service Environmental Conservation Online System. *For more background, see* Johnathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act’s Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC Policy Report (April 2018), available at <https://www.perc.org/2018/04/24/the-road-to-recovery>.

⁴ See Dean Lueck & Jeffrey Michael, *Preemptive Habitat Destruction under the Endangered Species Act*, 46 J. Law & Econ. 27 (2003); Daowei Zhang, *Endangered Species and Timber Harvesting: The Case of Red-Cockaded Woodpeckers*, 32 Econ. Inquiry 150 (2004); List, et al., *Is the Endangered Species Act Endangering Species?*, NBER Working Paper 12777 (2006).

⁵ Environmental Policy Innovation Center, *Endangered Species Act 2018 Administrative Reform: Initial Perspectives on Proposed Regulatory Changes* (July 2018), available at <http://policyinnovation.org/wp-content/uploads/2018/07/ESA-proposals-report.pdf>.

A 2011 designation by the Fish and Wildlife Service declared approximately 1,500 acres of private property in southeastern Louisiana as critical habitat for the frog. The agency determined that the presence of ephemeral ponds, a crucial habitat element for the frog to breed, warranted the critical habitat designation. Yet in its current condition, the area in question cannot support the frog, and the species has not been documented in the state of Louisiana for more than 50 years. The agency also acknowledged that the area is “poor-quality terrestrial habitat for dusky gopher frogs” without significant modifications. That’s because the area is part of a dense timber plantation, while the frog requires an open-canopied ecosystem.⁶

The acrimony of the case is demonstrated by Edward Poitevent, a member of the family who owns the property in question:

Our land is not suitable for the frog. We know that. The government and Fish and Wildlife Service have said that you don’t have the elements for it. So to make it suitable you’d have to rip up every tree on 1,544 acres, replant all of it with the right tree, make sure the ponds are still there, and make sure you burn it every year. Who is going to pay for that? They don’t care. It’s not their job. Their job is to find a habitat. The consequences are not their problem.⁷

The family has rezoned its property for eventual development, but the critical habitat designation could jeopardize those plans on all or part of the 1,544 designated acres. The Fish and Wildlife Service estimates that the designation could cost the family a maximum of \$34 million in foregone development value.⁸

Unfortunately, there seems to be little chance that the conflict and ill will generated through the affair will ultimately be offset by conservation benefits for the dusky gopher frog. The landowners have made it clear that they have neither the inclination nor the resources to establish proper frog habitat on the property, and the Fish and Wildlife Service admits that its authority to designate habitat cannot compel anyone to take any further steps toward species recovery.

2. If designating an unoccupied area as critical habitat is not likely to yield conservation benefits, it will likely be more beneficial for both imperiled species and landowners to focus designations on areas likely to yield conservation benefits.

It is clearly wasteful for an agency to spend its valuable and limited time and funding in areas that stand little chance of promoting conservation. If the resources spent on the unoccupied designation and resulting litigation of the dusky gopher frog case were instead spent on conservation efforts, the species could have realized at least some level of conservation benefits. The case demonstrates

⁶ 77 Fed. Reg. 35,133 (June 12, 2012).

⁷ See Tate Watkins, *If a Frog Had Wings, Would It Fly to Louisiana?*, PERC Reports 37 No. 1 (Summer 2018), available at <https://www.perc.org/2018/07/13/if-a-frog-had-wings-would-it-fly-to-louisiana/>.

⁸ 77 Fed. Reg. 35,140 (June 12, 2012).

how a critical habitat designation of unoccupied land that stands little chance of promoting recovery can be counterproductive to conservation.

The proposal to designate unoccupied an area as critical habitat only if “there is a reasonable likelihood that the area will contribute to the conservation of the species” is a sensible one. By focusing resources on areas where conservation is likely, agencies are not only likely to realize more conservation benefits and promote more species recoveries, but they will also avoid conflicts with landowners that undermine the potential for conservation.

If the unoccupied critical habitat for the dusky gopher frog designated in Louisiana is essential for the future of the species, it’s clear in retrospect that a different approach by the Fish and Wildlife Service would have had a much better chance of benefiting the species. Rather than proposing a critical habitat designation with no prior input by the private landowners, the agency could have proposed a collaborative species recovery effort involving the area in question. Perhaps such an effort could have been in conjunction with a third-party conservation group like the Nature Conservancy, which has worked to recover the dusky gopher frog for more than a decade in southern Mississippi.⁹

Private landowners often provide key habitat, or potential habitat, for imperiled species. By being more circumspect when designating unoccupied areas as critical habitat, the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration are more likely to minimize conflict with landowners, thereby channelling resources away from such conflict and toward conservation.

Conclusion

While some parties will no doubt lament any type of higher threshold for designating critical habitat, it’s clear that the designation of unoccupied habitat in the most prominent such case to date is likely to provide little to no conservation benefits for the dusky gopher frog. When a species has not been documented in an area for years or decades, and when an area in its current condition is not fit for the species, it is sensible to focus limited agency resources where conservation is feasible and likely. Such an approach could result in agencies fostering more good will with landowners, thereby increasing the likelihood that private property owners collaborate in future species recovery efforts.

⁹ See Watkins, *If a Frog Had Wings, Would It Fly to Louisiana?*, available at <https://www.perc.org/2018/07/13/if-a-frog-had-wings-would-it-fly-to-louisiana/>.