

**Public Comment on Regulations for Designating Critical Habitat
Docket No. FWS-HQ-ES-2019-0115**

**Property and Environment Research Center (PERC)
Bozeman, Montana**

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Summary

- Critical habitat designations on private land can discourage property owners from maintaining or restoring habitat for listed species.
- Clarifying when areas will be designated as “critical habitat” under the Endangered Species Act can reduce conflict and build landowner goodwill for conserving and recovering many listed species.
- Ultimately, the decision to include or exclude areas in critical habitat designations should be guided by one factor above all others: the effect of the designation on landowners’ incentives to conserve and restore habitat.

Introduction

The Property and Environment Research Center (PERC) respectfully submits this comment supporting the U.S. Fish and Wildlife Service’s proposed rule to clarify its process for excluding land from critical habitat under the Endangered Species Act. PERC is a nonprofit 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 conducts original research that applies free market principles to resolve environmental disputes in a cooperative manner.

The Service is right to clarify how critical habitat areas will be excluded under section 4(b)(2) of the Endangered Species Act. Identifying the criteria for critical habitat exclusions can help reduce conflicts over critical habitat designations on private lands.

As the recent Supreme Court case *Weyerhaeuser v. Fish and Wildlife Service*¹ demonstrates, critical habitat designations on private lands can penalize landowners for the presence of habitat features on their property, in effect discouraging landowners from conserving or restoring habitat for species listed under the Endangered Species Act or those that may be listed in the future. This approach gets the incentives wrong for conservation, benefiting neither landowners nor the

¹ 139 S. Ct. 361 (2018).

imperiled species who depend on private lands for habitat² and rely on human intervention for conservation and recovery.³

To address critical habitat's "private-land problem," the Service's final rule should make clear that, in weighing the benefits of inclusion against the benefit of exclusion, the Service must carefully consider the effect of its decision on landowners' incentives to conserve and restore habitat. Designations that make habitat features a significant liability for private landowners may, perversely, incentivize preemptive habitat destruction rather than protection. In such cases, the Service should exclude the land from critical habitat and look to other regulatory and market-based tools that provide better incentives.

Critical habitat designations on private land can discourage property owners from maintaining or restoring habitat for listed species.

Ideally, a critical habitat designation would help protect essential habitat and recover imperiled species. But in the case of private land, critical habitat designations can penalize property owners and discourage them from maintaining or restoring habitat, benefiting neither landowners nor imperiled species. The effects can be particularly damaging when species rely on great human effort for conservation and recovery.

Critical habitat designations empower the U.S. Fish and Wildlife Service to further regulate a landowner's use of property whenever that use requires a federal permit, which can lower the market value of private land that has been designated. A recent study by U.C. Berkeley economist Max Auffhammer and colleagues examined 13,000 real estate transactions for land within or near critical habitat for two listed species, finding that a designation could decrease the value of vacant lands by up to 78 percent.⁴ Consequently, a critical habitat designation on private land can create both real and perceived burdens on private landowners, pitting their interests against those of listed species.

As a result of these punitive impacts for property owners, landowners can be deterred from actively providing habitat for endangered species. From the typical landowner's perspective, restoring or maintaining habitat or potential habitat for a listed species becomes an unattractive proposition if it could result in a critical habitat designation that could lower the property's value and bring regulatory restrictions. Relatedly, most listed species will not recover if simply "left alone"; they instead depend on conservation interventions. A 2010 study of all recovery plans for

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

³ J. Michael Scott et al., *Conservation-reliant species and the future of conservation*, 3 *Conservation Letters* 91 (2010).

⁴ Maximilian Auffhammer et al., *The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions*, 96 *Land Econ.* 188-206 (2020).

endangered or threatened species estimated that 84 percent of listed species require “some form of conservation management for the foreseeable future,” with 51 percent of listed species reliant on active habitat management.⁵ Given the number of listed species that rely on private lands or depend on human conservation efforts, a regulatory approach that private landowners perceive as punitive will not benefit and may ultimately harm listed species.

Clarifying when areas will be designated as “critical habitat” under the Endangered Species Act can reduce conflict and build landowner goodwill for conserving and recovering many listed species.

Restoring or maintaining habitat and participating in recovery of endangered species can be daunting even when undertaken by a landowner with significant resources, expertise, and dedication to the cause. When a landowner feels their private property has been inappropriately or unduly designated as critical habitat, expecting them to contribute to significant conservation efforts seems futile. The challenge for the Service in designating critical habitat, therefore, is to avoid turning listed species and their habitats into liabilities for typical landowners. This challenge is crucial given that many imperiled species depend upon landowner goodwill.

The Service has proposed that an area shall be excluded from critical habitat designation if the benefits of excluding a particular area outweigh the benefits of specifying that area as part of the critical habitat, as long as the exclusion will not lead to the extinction of the species. This approach will ensure that impacts to landowners are considered in critical habitat designations. Consequently, the approach can reduce ill will and distrust between landowners and the federal government by excluding lands from a designation where the costs to the landowner are higher than any potential conservation benefits. Explicitly recognizing these costs can be meaningful for landowners and make them more likely to partner with the Service for conservation.

Additionally, the rule can help ensure that federal resources are spent effectively in areas that can significantly contribute to species recovery. If the costs of designating critical habitat severely outweigh the conservation benefits, and exclusion would not drive a species to extinction, then that is a signal that resources could be better spent elsewhere. The reality is that the Service’s resources are finite. The proposed rule will help the agency prioritize critical habitat areas that will maximize conservation benefits while effectively and efficiently spending federal resources.

In the case of the dusky gopher frog, the subject of *Weyerhaeuser*, the Fish and Wildlife Service designated 1,544 acres of private land in Louisiana as critical habitat despite the fact that the land contained only one of the three habitat features required for the frog to live and reproduce.⁶ The agency estimated that, depending on mitigation or curtailment of development that might be

⁵ *Supra* n. 3.

⁶ 77 Fed. Reg. 35,135 (June 12, 2012).

required, the designation could decrease the value of the land by up to \$34 million.⁷ In addition, the landowners had no desire to participate in conservation or recovery of the frog on the land, which was under commercial timber management, rendering the designation fruitless in terms of tangible benefits to the species.⁸ Under this 4(b)(2) proposed rule, it is unlikely that this private land would have been designated critical habitat, and the Service's resources could have instead been spent on areas that directly benefit the conservation of the frog or been channeled to other listed species.

Decisions about whether to include or exclude areas from critical habitat should ultimately be guided by whether the designation will create good or bad incentives for landowners to conserve and restore habitat.

It is important to bear in mind that designating land as critical habitat is not the only way to pursue habitat conservation and restoration goals. In many circumstances, designating land as critical habitat may entail significant opportunity cost: complicating or foreclosing other, more effective means to incentivize habitat conservation and restoration. Therefore, when deciding whether to include or exclude an area from a designation, the Service should be guided by whether such designation is the best means to incentivize landowners to conserve and restore habitat.

As discussed above, landowners are crucial partners for species recovery through their provision of habitat. The proposed rule can help clarify how critical habitat designations are made, and require careful analysis of burdens imposed on landowners and the best means of pursuing species recovery. In order to truly advance species recovery, the incentives have to align to promote habitat conservation on private lands.⁹

If designating an area as critical habitat would impose substantial costs on landowners, the Service may be able to achieve greater conservation benefits by purchasing the land outright or working with a landowner on a recovery project while compensating them for lost value. Congress envisioned such purchases playing a significant role in conserving and recovering species. The Endangered Species Act directs the secretaries of the interior and agriculture to develop a program to conserve endangered and threatened species, to be implemented through the acquisition of land or interests in land.¹⁰ The statute also provides that funds available under the Fish and Wildlife Act of 1956, the Fish and Wildlife Coordination Act, the Migratory Bird Treaty Act, and the Land and Water Conservation Fund that may be used to implement this

⁷ Id. at 35,140.

⁸ See Tate Watkins, "If a Frog Had Wings, Would It Fly to Louisiana?" *PERC Reports* (Summer 2018), <https://www.perc.org/2018/07/13/if-a-frog-had-wings-would-it-fly-to-louisiana/>

⁹ See Jonathan Wood, *The Road to Recovery*, PERC Policy Report (2018), <https://www.perc.org/2018/04/24/the-road-to-recovery/>

¹⁰ 16 U.S.C. § 1434(a).

program.¹¹ The federal government can also fund the acquisition of land or interest in land through grants to states under Section 6 of the Endangered Species Act.¹² The Supreme Court has identified the statute's purchase provisions as particularly useful for protecting and improving areas that are not yet occupied by protected species.¹³

These authorities have been used successfully to encourage conservation and proactive recovery efforts. In early 2020, for instance, the U.S. Fish and Wildlife Service issued a \$9 million grant to the Alabama Department of Conservation and Natural Resources to purchase and conserve nearly 5,000 acres of habitat for the Red Hills salamander, which has been listed as threatened since 1977.¹⁴ According to the Service and state wildlife agencies, the protection of such a large, intact area of habitat is a significant step toward achieving the Service's proposed recovery goal for the species, which is to have conservation agreements protecting half of the species' available habitat.¹⁵

Another market approach, which could serve as a supplement to critical habitat designations or an alternative when costs to landowners are high, is to compensate private landowners for achieving habitat restoration or species recovery benchmarks. Rather than focusing on inputs (amount of land conserved), rewarding outputs (contributions to species recovery) can maintain landowner flexibility and encourage innovative solutions that deliver measurable results.

The Fish and Wildlife Service has recently taken a similar approach in response to public concerns about the release and recovery of predator species. Through the Mexican Wolf/Livestock Coexistence Council, the federal government, states, conservation groups, and landowners have developed a program to compensate ranchers for the presence of endangered Mexican gray wolves, as opposed to compensating only for lost livestock.¹⁶ Consequently, ranchers and other landowners may see a financial gain from increases to the wolf population, thereby reducing conflict.

In order to restore and conserve the private habitat necessary for species recovery, the incentives must be right for landowners. Critical habitat designations are just one tool among several available to the Service to protect valued habitat. The proposed rule rightly requires the Service to balance burdens imposed on landowners when deciding whether to include or exclude areas from critical habitat designations. PERC submits that, in striking this balance, the Service should

¹¹ *Id.*

¹² 16 U.S.C. § 1435. See U.S. Fish and Wildlife Serv., *Grants*, <https://www.fws.gov/endangered/grants/index.html>.

¹³ See *Babbitt*, 515 U.S. at 703 (“The Secretary may also find the Section 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species.”).

¹⁴ See Alabama Dept. of Conservation and Nat. Res., Press Release, *Public-Private Partnership Conserves Red Hills Salamander Habitat in South Alabama* (Mar. 26, 2020), https://www.courierjournal.net/online_only/article_df9d5852-6f90-11ea-8326-4f8bff5ec778.htm.

¹⁵ See Proposed Recovery Plan (2019), https://ecos.fws.gov/docs/recovery_plan/Red%20Hills%20Salamander%20Recovery%20Plan%20Amendment.pdf.

¹⁶ See Mexican Wolf/Livestock Coexistence Council, *2014 Strategic Plan*, https://www.fws.gov/southwest/es/mexicanwolf/pdf/MWLCC_Final.pdf.

ultimately be guided by what approach would create the best incentives for private landowners to conserve and restore habitat. Unduly burdensome critical habitat designations, rather than benefiting species, may make habitat features a significant liability and incentivize their destruction. In such cases, it makes sense to exclude the area from critical habitat and rely on other regulatory and market-based tools to promote species recovery.