



## Comment on the Proposed Rescission of the Exclusion Rule

Property and Environment Research Center (PERC)

Bozeman, Montana

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### Main Points:

- Critical habitat designations can make habitat features a liability for private landowners, thereby discouraging conservation.
- Ultimately, the decision to include or exclude areas in critical habitat designations should be guided by the effect a designation would have on landowners' incentives to conserve and restore habitat.
- Neither the current rule nor its predecessor is fully consistent with this principle and, therefore, the Fish and Wildlife Service should modify its approach to account for private-landowner incentives.

The Property and Environment Research Center (PERC) respectfully submits this comment to the Fish and Wildlife Service regarding the proposed rescission of its recently finalized rule governing designation of critical habitat (Exclusion Rule).<sup>1</sup>

PERC's research has found that critical habitat designations can make habitat features a significant liability for private landowners, which can discourage them from conserving, maintaining, or restoring such features.<sup>2</sup> The Endangered Species Act directs the Service to account for these perverse incentives by requiring it to consider the economic and other impacts of designations and allowing areas to be excluded unless an exclusion would cause the species extinction.<sup>3</sup> Ultimately, a decision to designate private land as critical habitat should be guided by the effect a designation will have on a landowner's incentive to conserve and restore habitat. Neither the current rule nor the prior policy, which the Service proposes to restore, are fully consistent with this principle. Therefore, to promote conservation and

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<sup>1</sup> Docket No. FWS-HQ-ES-2019-0115. *See* Fish and Wildlife Serv., Exclusion Rule, 85 Fed. Reg. 82,376 (Dec. 18, 2020) (current rule); Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7226 (Feb. 11, 2016) (prior policy).

<sup>2</sup> *See* Jonathan Wood & Tate Watkins, *Critical Habitat's "Private Land Problem": Lessons from the Dusky Gopher Frog*, 51 *Envtl. L. Rep.* 10,565, 10,569–73 (2021).

<sup>3</sup> 16 U.S.C. § 1533(b)(2).



reduce conflict, the Service should reform its process for designating critical habitat to ensure that designations create the right incentives for private landowners.

## **The Property and Environment Research Center**

PERC is a nonprofit research institute located in Bozeman, Montana, that develops market-based solutions to environmental problems. Founded in 1980, PERC's mission is to improve environmental quality through markets, entrepreneurship, and property rights. PERC and its affiliated scholars have produced extensive research on the Endangered Species Act, including research showing how critical habitat designations affect landowner incentives.<sup>4</sup> PERC scholars have given congressional testimony on the importance of state and private conservation and how federal regulation can discourage this work.<sup>5</sup> And PERC has regularly participated in the rulemaking process and litigation to emphasize the importance of property rights and incentives to effective conservation.

## **Incentives Matter**

For much of the Endangered Species Act's history, the Services designated critical habitat only sparingly. As Martha Williams, Principal Deputy Director and nominee to be the Director of the Fish and Wildlife Service, and her coauthors have explained, critical habitat designations have "very little impact" on conservation.<sup>6</sup> Critical

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<sup>4</sup> See *Critical Habitat's "Private Land Problem"*, *supra* n.2. See also Jonathan 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>; Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* (2011); Terry Anderson & Reed Watson, *An Economic Perspective on Environmental Federalism: The Optimal Locus of Endangered Species Authority*, in *The Endangered Species Act and Federalism: Effective Conservation through Greater State Commitment* (2011); Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC Policy Series (1995), <https://www.perc.org/sites/default/files/Endangered%20Species%20Act.pdf>.

<sup>5</sup> See, e.g., Jonathan Wood, Testimony before the Senate Committee on Environment and Public Works on the "Recovering America's Wildlife Act" (Dec. 8, 2021), available at CITE; Brian Yablonski, Testimony before the U.S. House Comm. on Natural Res. Forum on the 30 by 30 Initiative (May 6, 2021), available at <https://perc.org/2021/05/06/private-land-stewardship-is-the-next-frontier-of-conservation-and-a-critical-component-to-achieving-30-by-30/>; Catherine E. Semcer, Testimony before the U.S. House Comm. on Natural Res. Hearing on Wildlife Trafficking (Apr. 28, 2021), available at <https://perc.org/2021/04/28/increase-economic-opportunity-to-curtailed-poaching-and-reduce-illegal-wildlife-trade/>; Jonathan Wood, Testimony before the U.S. House Comm. on Natural Res. Hearing on the "Tribal Heritage and Grizzly Bear Protection Act" (May 15, 2019), available at <https://perc.org/2019/05/15/grizzly-bear-recovery-and-management/>.

<sup>6</sup> See David J. Hayes, Michael J. Bean, Martha Williams, *A Modest Role for A Bold Term: "Critical Habitat" Under the Endangered Species Act*, 43 *Env'tl. L. Rep.* 10,671, 10,672 (2013).

habitat designations provide only conditional regulation of designated land. If an activity adversely impacting habitat would coincidentally require a federal permit, a designation triggers more searching review of that permit.<sup>7</sup> Otherwise, the landowner remains as free after the critical habitat designation to engage in activities that purposefully or incidentally harm habitat features as she was before.<sup>8</sup> The federal government does not generally regulate private land use.<sup>9</sup> Therefore, the odds that an activity that incidentally harms habitat will require a federal permit is low in many circumstances.

The most common exception is where the Endangered Species Act itself creates the federal-permit requirement, by incidentally regulating habitat through regulation of activities that directly affect members of the species.<sup>10</sup> According to a study by the Environmental Policy Innovation Center, the Fish and Wildlife Service designated nearly 206 million acres of critical habitat between 2007 and 2017.<sup>11</sup> Only 0.6 percent of this area was unoccupied critical habitat.<sup>12</sup> Minimizing designation of unoccupied areas makes sense in light of the limitations of critical habitat. Without members of a species present, the ESA would not require a federal permit for habitat destruction or adverse modification. So the likelihood that a designation would benefit habitat is substantially reduced.<sup>13</sup>

Unfortunately, discussion of critical habitat designation is often narrowed to a false dichotomy between economic cost and conservation benefit. The truth is that critical habitat designations that impose significant economic costs shape the incentives for landowners to maintain or restore habitat, thus creating significant *conservation*

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<sup>7</sup> See 16 U.S.C. § 1536.

<sup>8</sup> *Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,571.

<sup>9</sup> See *Solid Waste Agency of North Cook Cnty. v. U.S. Army Corps of Engnr's*, 531 U.S. 159, 174 (2001).

<sup>10</sup> See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702-03 (1995) (Section 9's reference to "harm" can be interpreted to forbid adverse modification of habitat that "actually" injures or kills a member of a species).

<sup>11</sup> Environmental Policy Innovation Center, *Endangered Species Act: 2018 Administrative Reform 7* (2018), available at <https://www.policyinnovation.org/publications/endangered-species-act-2018-administrative-reform>.

<sup>12</sup> See *id.*

<sup>13</sup> See *Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,572.

costs. It's these costs that have too often been given short shrift in the Service's critical habitat designations.<sup>14</sup>

Critical habitat designations immediately lower property values through a phenomenon known as critical habitat's "stigma effect." Prospective purchasers recognize designations as a significant regulatory risk and lower the price they're willing to pay accordingly. Studies of the stigma effect have found that designations reduce land values by as much as 73 percent.<sup>15</sup>

While the stigma effect makes habitat features a liability for private landowners, a critical habitat designation may impose no obstacle to the destruction or adverse modification of those features.<sup>16</sup> This can create a perverse incentive for landowners to degrade or destroy habitat (either purposefully or incidental to another use) to reduce their regulatory risks, including that federal permitting authority may expand or the land may become occupied by the species in the future.<sup>17</sup> Evidence suggests that critical habitat designations increase development pressures, unless countered by increases in recovery spending.<sup>18</sup>

The dusky gopher frog critical habitat designation that spawned *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*<sup>19</sup> exemplifies this incentive problem. While there was some dispute over whether one or more ponds on the property constituted breeding habitat,<sup>20</sup> most of the designation constituted uplands that did not contain the resources or conditions necessary to support the species. Instead, the Fish and

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<sup>14</sup> See *Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,569–71.

<sup>15</sup> Maximilian Auffhammer, et al., *The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions*, 96 *Land Econ.* 188, 206 (2020). The Services may believe this effect is irrational. See Hayes, Bean, & Williams, *supra* n.6, at 10,673. Even if that were so, it wouldn't matter. The mere fact that designations decrease land values, regardless of the rationality, creates the perverse incentive. See *Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,570 and n.71.

<sup>16</sup> See *Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,571–73.

<sup>17</sup> See *id.* at 10,571–72; Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 *J.L. & Econ.* 27 (2003) (finding that private landowners preemptively destroy habitat to exclude red cockaded woodpeckers and preempt the regulatory burdens that would accompany them). See also Adam J. Eichenwald et al., *U.S. Imperiled Species Are Most Vulnerable to Habitat Loss on Private Lands*, 18 *Frontiers Ecology & Env't* 439 (2020).

<sup>18</sup> See *Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,571.

<sup>19</sup> 139 S. Ct. 361, 368–69 (2018).

<sup>20</sup> 77 Fed. Reg. at 35,123.

Wildlife Service expressed its “belie[f]” that habitat conditions could be established “with reasonable effort.”<sup>21</sup>

The Nature Conservancy’s difficult work to create or restore habitat in Mississippi substantially undercuts this belief.<sup>22</sup> The private conservation organization has spent nearly two decades creating and maintaining habitat on its land and working to establish a dusky gopher frog population, a project requiring significant scientific expertise and financial investment.<sup>23</sup>

For landowners to undertake a similar effort would require a strong incentive to make it worthwhile. Instead of providing such incentive, the critical habitat designation in *Weyerhaeuser* penalized the landowners by lowering the value of the property.<sup>24</sup> This predictably led to conflict between the landowners and the Service rather than collaboration on conservation. As one Nature Conservancy employee involved in that organization’s effort to recover the dusky gopher frog explained, “It’d be cool if private landowners could do something like this and get credit for it—or at least not get penalized for it.”<sup>25</sup>

Encouraging landowners to actively maintain or restore habitat requires a fundamentally different approach. Rather than making habitat features a liability, these features must be made an asset for landowners. There are many ways to do this through voluntary and market-based means.<sup>26</sup> However, they all depend on goodwill between the Services, conservation interests, and landowners—goodwill that can be undermined, not fostered, by critical habitat designations.<sup>27</sup> Many landowners, including those who value conservation, view federal regulation as an unwanted and burdensome intrusion on private property rights.<sup>28</sup>

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<sup>21</sup> *Id.* at 35,135.

<sup>22</sup> See *Critical Habitat’s “Private Land Problem”*, *supra* n.2 at 10,568.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* at 10,569. See also *Weyerhaeuser*, 139 S. Ct. at 368 n.1.

<sup>25</sup> See *Critical Habitat’s “Private Land Problem”*, *supra* n.2 at 10,568.

<sup>26</sup> See *id.* at 10,573–75.

<sup>27</sup> See *id.* at 10,572.

<sup>28</sup> See Megan E. Hansen et al., *Cooperative Conservation: Determinants of Landowner Engagement in Conserving Endangered Species*, Center for Growth and Opportunity at Utah State University, Policy Paper No. 2018.003 (2018); Lauren K. Ward et al., *Family Forest Landowners and the Endangered Species Act: Assessing Potential Incentive Programs*, 116 J. Forestry 529 (2018).

## **The Service Must Account For Private Landowners' Incentives**

The ESA directs the Service to designate critical habitat for listed species. However, unlike other provisions of the law, the critical habitat provisions expressly require the Service to carefully analyze the costs and benefits of designating particular areas, except in the rare circumstance where excluding an area “will result in the extinction of the species concerned.”<sup>29</sup> Thus, an area can only be designated based on a comparison of the costs and benefits of the designation, with the Service expressly authorized to exclude any area where the costs exceed the benefits.<sup>30</sup>

The perverse incentive discussed above is directly relevant to the Service's consideration of both sides of this ledger. On the cost side, the Service must consider how imposing costs on private landowners will affect those landowners' incentive to conserve, maintain, or restore habitat features. If landowners are encouraged to preemptively destroy habitat, to prevent habitat features from developing, or to forgo habitat restoration, these are direct conservation costs of the designation that must be accounted for. But there is also an opportunity cost to consider. Reducing the value of land someone may rely on for income—to provide for their retirement or to send their kids to college, for example—can alienate a potential partner in species recovery. If such designation reduces the likelihood that a landowner will work with the Service or conservationists in the future, this cost must be accounted for.

On the benefit side, the Service must carefully consider the likelihood that a designation will result in any conservation benefit. Often, the Service concludes that designations will have very little benefit because, for instance, a federal permit is unlikely to be required for activities that incidentally degrade or destroy habitat features.<sup>31</sup> Yet it doesn't compare this meager benefit to the stigma effect and analyze how this tradeoff will shape landowners' incentives. Instead, it often declines to probe the magnitude of the stigma effect while loading up the benefit side of the equation with purported benefits that do not depend on the designation. For instance, it may credit the designation with drawing attention to the need to conserve the area and speculate that this may increase the likelihood that the Service or a conservation organization will acquire the property to conserve

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<sup>29</sup> 16 U.S.C. § 1533(b)(2).

<sup>30</sup> *Id.*

<sup>31</sup> See *Critical Habitat's "Private Land Problem"*, *supra* n.2., at 10,573.

habitat.<sup>32</sup> However, this purported benefit is not attributable to the critical habitat designation.<sup>33</sup> It would exist if the Service identified the area and excluded it from the designation. (Indeed, the Service and conservation groups may be more motivated to acquire such an area absent the false comfort of a designation.)

### **Critical Habitat Designations Should Ultimately Be Guided By the Likelihood That They’ll Encourage Landowners to Recover Species**

To account for critical habitat’s conservation costs, decisions to designate private land should be guided by close consideration of their impact on the incentives for private landowners to conserve, maintain, and restore habitat. The Exclusion Rule was partly consistent with this principle, partly not. Likewise for the Service’s prior policy.<sup>34</sup> Therefore, instead of simply reverting to the prior policy—following the unfortunate but common model of policies yo-yoing between administrations—the Service should instead revise its approach to designating critical habitat to ensure that its decisions create the right incentives for private landowners to recover species. PERC addresses several factors relevant to such consideration below.

#### *Federal v. Private Land*

One critical factor is whether designated land is federally or privately owned. Under the prior policy, the Service would generally include federal land in designations because of “the unique obligations that Congress imposed for Federal agencies in conserving endangered and threatened species.”<sup>35</sup> Under this approach, the Service would, “[t]o the extent possible, . . . focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands.”<sup>36</sup>

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<sup>32</sup> See, e.g., Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Black Pinesnake, 85 Fed. Reg. 11238, 11242 (Feb. 26, 2020).

<sup>33</sup> See *Critical Habitat’s “Private Land Problem”*, supra n.2., at 10,573. The Service’s reliance on tangential benefits like this appears especially arbitrary considering how the Service sharply constrains the costs it will consider. See Jeffrey McCoy, *The Costs and Benefits of Critical Habitat Designation: Legal Requirements of the Endangered Species Act*, Center for Growth and Opportunity Policy Paper (2020), available at <https://www.thecgo.org/research/the-costs-and-benefits-of-critical-habitat-designation-legal-requirements-of-the-endangered-species-act/> (criticizing the Service’s “incremental approach” to analyzing the costs of critical habitat designations).

<sup>34</sup> The proposed rule does not only rescind the Exclusion Rule but also restores the prior policy. Therefore, the Service is obligated to consider all relevant factors affecting both decisions.

<sup>35</sup> 81 Fed. Reg. at 7,231.

<sup>36</sup> *Id.* at 7,232.

Consideration of conservation costs supports the prior policy’s approach here, and not the Exclusion Rule’s.<sup>37</sup> The costs of a designation are less likely to create perverse incentives for federal land managers, considering the multiple use mandate under which they operate.<sup>38</sup> And because federal land management decisions necessarily have the federal nexus required to trigger consultation, a designation is more likely to result in some benefit to the species.<sup>39</sup> Indeed, studies show that critical habitat and other federal regulations are more effective at conserving habitat on federal land than private land.<sup>40</sup>

### *Occupied v. Unoccupied Habitat*

Another relevant factor is whether an area is occupied by the species. For occupied critical habitat, the take prohibition may provide overlapping protection for the habitat. The species’ presence and need for an incidental take permit provides the federal nexus required for consultation and for mitigating adverse modification of the habitat.<sup>41</sup> Designating occupied areas can make habitat features a liability, to be sure. But the likelihood that a federal permit will be required for take and, thus, that consultation will occur, provides some probability of conservation benefit to weigh against costs to the landowner. While this does not mean that the benefits of designating occupied areas always exceed the costs or that the costs of designating unoccupied areas always exceed the benefits, it counsels an approach that favors exclusion of unoccupied areas.<sup>42</sup> Neither the Exclusion Rule nor the prior policy directly address this issue and, therefore, the Service should reform its approach to require consideration of the unique conservation costs created by designating unoccupied areas.

### *Areas requiring habitat restoration or maintenance*

Another important feature is whether an area under consideration requires active habitat maintenance or restoration to promote a species recovery. This is a significant issue, as a majority of species are “management dependent,” meaning

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<sup>37</sup> *Critical Habitat’s “Private Land Problem”*, *supra* n.2, at 10,571–72.

<sup>38</sup> *See id.* at 10,571.

<sup>39</sup> *See id.*

<sup>40</sup> *See, e.g.*, Adam J. Eichenwald et al., *U.S. Imperiled Species Are Most Vulnerable to Habitat Loss on Private Lands*, 18 *Frontiers Ecology & Env’t* 439 (2020).

<sup>41</sup> *See Babbitt*, 515 U.S. at 687.

<sup>42</sup> *See Critical Habitat’s “Private Land Problem”*, *supra* n.2, at 10,572.



they will not persist without active human effort.<sup>43</sup> By imposing unwanted costs on private landowners, such designations may encourage the landowner to prevent the natural establishment or continuation of habitat features and to discourage the landowner from investing in habitat restoration.<sup>44</sup> Moreover, critical habitat designations provide no mechanism to encourage a landowner to maintain or restore habitat features.<sup>45</sup> Neither the Exclusion Rule nor the prior policy directly address this issue and, therefore, the Service should reform its approach to require consideration of the unique conservation costs created by designating areas that require active habitat maintenance or restoration.

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<sup>43</sup> J. Michael Scott *et al.*, *Conservation-Reliant Species and the Future of Conservation*, 3 Conservation Letters 91 (2010).

<sup>44</sup> See *Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,572–73.

<sup>45</sup> See *id.* Under the Constitution's protections for property rights, a land use permit can only be conditioned on the mitigation of the direct negative impacts of the permitted activity. It cannot be used to extract public benefits generally. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Thus, if a permitted activity would not harm any habitat features, because they are absent from the property, the permittee cannot be required to provide such features.