Comment on Proposed Rescission of "Habitat" Definition

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
- This perverse incentive is strongest for land that is not currently able to sustain a species but requires active restoration effort
- Repealing the "habitat" definition, rather than improving it, will invite further conflict without promoting conservation

The Property and Environment Research Center (PERC) respectfully submits this comment to the Fish and Wildlife Service and National Marine Fisheries Service regarding the proposed rescission of the regulation defining "habitat" for purposes of designating critical habitat.[1] PERC's research has found that critical habitat designations can make habitat features or the potential to create them a significant liability for landowners, thereby discouraging habitat conservation and restoration.[2] While not avoiding it entirely, interpreting habitat as land that is currently able to support a species mitigates this perverse-incentive problem.[3] Repealing the current habitat definition, rather than improving it, would not only exacerbate conflict but also distract from better methods to promote habitat restoration.[4] PERC urges the Services to instead consider how to improve the definition to best encourage conservation.

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[1] Dkt. No. FWS-HQ-ES-2020-0047. *See* Final Rule Defining "Habitat," 85 Fed. Reg. 81,411 (Dec. 16, 2020) (promulgating the interpretation the Services propose to rescind).

[2] *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).

[3] *See id.* at 10,572–73.

[4] *See id.* at 10,573–75.

The Property and Environment Research Center

PERC is a nonprofit conservation 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 exploring the perverse incentives critical habitat designations can create for private landowners.[5] PERC scholars have given congressional testimony on the importance of state and private conservation and how misguided regulation can discourage this critical work.[6]

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.[7] Critical habitat designations provide only conditional regulation of designated land. If an activity adversely impacting habitat would coincidentally require a federal

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[5] *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; Hannah Downey, *Easements for Endangered Species: A Collaborative Approach to Saving the Lesser Prairie Chicken*, PERC Case Study (2017), *available at* https://www.perc.org/2017/12/06/ easements-for-endangered-species/; 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.

[6] *See*, *e.g.*, 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-curtail-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/.

[7] *See* David J. Hayes, Michael J. Bean, Martha Williams, *A Modest Role for A Bold Term: "Critical Habitat" Under the Endangered Species Act*, 43 Envtl. L. Rep. 10,671, 10,672 (2013).

permit, a designation triggers more searching review of that permit.[8] Otherwise, the landowner remains as free to engage in activities that purposefully or incidentally harm habitat features after the critical habitat designation as she was before.[9] The federal government does not generally regulate private land use.[10] 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.[11] 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.[12] Only 0.6 percent of this area was unoccupied critical habitat.[13] Prioritizing occupied habitat 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 in unoccupied areas. So the likelihood that a designation would benefit habitat is substantially reduced.[14]

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 costs*. It's these costs that have too often been given short shrift in the Service's critical habitat designations.[15]

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[8] *See* 16 U.S.C. § 1536.

[9] *Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,571.

[10] *See Solid Waste Agency of North Cook Cnty. v. U.S. Army Corps of Engnr's*, 531 U.S. 159, 174 (2001).

[11] *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).

[12] 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.

[13] *See id.*

[14] *See Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,572.

[15] *See Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,569–71.

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.[16]

While the stigma effect makes habitat features a liability for private landowners, a critical habitat designation offers no benefit to landowners and may not even impose any obstacle to the destruction or adverse modification of those features.[17] 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.[18] Evidence suggests that critical habitat designations increase development pressures, unless countered by increases in recovery spending.[19]

The dusky gopher frog critical habitat designation that spawned *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*[20] exemplifies this incentive problem. While there was some dispute whether one or more ponds on the property constituted breeding habitat,[21] most of the designation constituted uplands that did not contain the resources or conditions necessary to support the species. Instead, the Fish and Wildlife Service expressed its "belie[f]" that habitat conditions could be established "with reasonable effort."[22]

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[16] 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.

[17] *See Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,571–73.

[18] *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).

[19] *See Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,571.

[20] 139 S. Ct. 361, 368–69 (2018).

[21] 77 Fed. Reg. at 35,123.

[22] *Id*. at 35,135.

The Nature Conservancy's difficult work to create or restore habitat in Mississippi substantially undercuts this belief.[23] 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.[24]

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.[25] 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."[26]

Incentivizing 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.[27] However, they all depend on goodwill between the Services, conservation interests, and landowners—goodwill that can be undermined, not fostered, by critical habitat designations.[28] Many landowners, including those who value conservation, view federal regulation as an unwanted and burdensome intrusion on private property rights.[29]

Designating an area as critical habitat because of its habitat potential, rather than current conditions, would discourage habitat restoration

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[23] *See Critical Habitat's "Private Land Problem"*, *supra* n.2 at 10,568.

[24] *See id.*

[25] *See id.* at 10,569. *See also Weyerhaeuser*, 139 S. Ct. at 368 n.1.

[26] *See Critical Habitat's "Private Land Problem"*, *supra* n.2 at 10,568.

[27] *See id.* at 10,573–75.

[28] *See id.* at 10,572.

[29] *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).

Ultimately, the proper interpretation of "habitat" is a question of statutory interpretation: what was the ordinary public meaning of "habitat" in 1978 (when Congress amended Section 4 to add the relevant text)?[30] The Services' proposed rescission doesn't address this question, but it could be read to suggest that the term is ambiguous.[31] Assuming habitat is ambiguous, statutory context and policy considerations may be relevant to resolving that ambiguity. However, both point toward a definition limited to areas currently able to sustain a species.

In the same section of the ESA, for instance, Congress referred to habitat as something that cannot only be modified and curtailed but also destroyed.[32] This shows that, even if the quality of habitat exists along a continuum, there is a point at which the continuum ends and the land ceases to be habitat.[33] Logically, that point is where the land is unable to sustain a species (because, for instance, the qualities necessary for it to do so have not been maintained or have been destroyed).[34]

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[30] *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). *See also Weyerhaeuser*, 139 S. Ct. at 368–69. For this reason, the Services' suggestion that the current definition should be rescinded because it may differ from how habitat is interpreted for other statutes or programs, 86 Fed. Reg. at 59,355, is unpersuasive. Terms appearing in statutes enacted at different times and used in different contexts need not be interpreted identically.

[31] The Services suggest there is "*currently* some ambiguity" in the meaning of habitat, citing the evolution of "scientific literature . . . *over time*." 86 Fed. Reg. at 59,354 (emphasis added). But this is beside the point. Even assuming Congress intended "habitat" to be understood as a term of art, rather than given its lay meaning, the question would be what was the common understanding of habitat among relevant experts when the law was enacted. The Services' suggestion that Congress did not fix the meaning of a statutory term at enactment raises serious separation of powers issues.

[32] 16 U.S.C. § 1533(a)(1)(A).

[33] The Services suggest it is "illogical" that " the more a species' habitat has been degraded, the less ability there is to attempt to recover the species." 86 Fed. Reg. at 59,354. This is a red herring, however. If an area has degraded to such an extent that it is no longer habitat, that only means that it cannot be designated as critical habitat. It would not forbid the Services using other tools to encourage habitat restoration and species recovery. *Cf. Sweet Home*, 515 U.S. at 703 (noting that the ESA's compensation provisions, rather than regulation, are more useful for land that isn't habitat but could become so). There is nothing illogical with the notion that different tools are needed to address different problems.

[34] The Services suggest that the ESA's reference to destruction of critical habitat as a threat to species is in tension with the existing definition. But it offers no explanation to support this suggestion. It appears to be based on a conflating of two distinct concepts: the quality of an area's habitat versus whether the area is habitat. 86 Fed. Reg. at 59,354 (referring to habitat quality as "a continuum" and to "degraded or suboptimal habitat"). Under the current definition, an area is not excluded from habitat simply because it is degraded, *i.e.*, the population it could sustain is smaller than in ideal circumstances. Instead, it excludes areas that cannot, in their current condition, support the species.

Indeed, the Supreme Court has identified the ESA's compensatory provisions (Sections 5 and 6), rather than regulation, as the statute's means "for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species."[35] The Supreme Court's reference to land as "not yet" habitat even if it may become habitat in the future lends further support to the idea that habitat is limited to areas that are currently able to sustain a species and does not include areas that merely have the potential to do so.

The effect of critical habitat designations on landowners' incentives to conserve or restore habitat further counsels in favor of such an interpretation.[36] Designating areas based on the mere potential to create or restore habitat makes that potential a significant liability for landowners and establishes a perverse incentive to ensure that potential is not realized.[37] Critical habitat is all stick; it provides no carrot for landowners to encourage affirmative habitat maintenance or restoration.[38]

This is an inherent limitation of exaction processes, like critical habitat. The Constitution forbids the government conditioning permits on the provision of unrelated public benefits. Instead, a permit condition can at most require mitigation of the direct negative effects of a permitted action.[39] Thus, if land isn't able to support a species when a permit is sought, the government cannot constitutionally condition the permit on the landowner creating habitat or paying the government or someone else to do so.[40] Designating such land as critical habitat offers no conservation benefit but may impose substantial conservation costs, by creating perverse incentives and alienating landowners whose goodwill may be necessary to recover species.

The current definition may not be perfect. As the Services observe, some of its terms could be clarified to improve predictability.[41] But the Service does not propose to

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[35] *Sweet Home*, 515 U.S. at 703.

[36] *See Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,573.

[37] *See id.* at 10,572.

[38] *See id.* at 10,567–69, 10,572–73.

[39] *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).

[40] *See Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,571. *See also Koontz*, 570 U.S. at 613–15.

[41] 86 Fed. Reg. at 59,354.

improve the definition. Instead, it proposes to rescind it and repudiate any consistent interpretation of habitat. This is likely to lead to substantial conservation costs by facilitating designations that create perverse incentives and alienate landowners on whom species recovery depends. But it is also all but certain to invite conflict that consumes resources and crowds out other means of promoting species recovery.

Rescinding the definition without replacement will only invite conflict

The Services are correct that *Weyerhaeuser* does not require them to promulgate a definition of "habitat" by regulation.[42] But this doesn't mean that the rescission of the existing definition won't generate substantial conflict with private landowners. The proposed rescission reverses the agencies' prior position, which requires a reasoned explanation for the change that accounts for all relevant factors.[43] And even if the rescission weren't challenged, subsequent critical habitat designations that include areas not then able to sustain a species are likely to be challenged.

The rationales offered for the proposed rescission suggest serious legal grounds for such challenges. First, the Services' explanation conflicts with the Supreme Court's unanimous decision in *Weyerhaeuser*. Citing the ESA's broad definition of "conservation," the Services state that the definition is contrary to the statute's purpose because it would preclude designation of areas essential to a species' conservation.[44] But this argument was expressly rejected by *Weyerhaeuser*.

> Only the "habitat" of the endangered species is eligible for designation as critical habitat. Even if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species, Section 4(a)(3)(A)(i) does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species.[45]

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[42] *Id.* at 59,355.

[43] *See Dept. of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1981, 1907–15 (2020); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016).

[44] 86 Fed. Reg. at 59,354.

[45] *Weyerhaeuser*, 139 S. Ct. at 368.

Under the Supreme Court's holding, the ESA's definition of conservation has no relevance to the meaning of habitat. Instead, it is relevant only to determining what subset of habitat qualifies as critical.[46]

Second, the Services assert that the habitat definition is in tension with the requirement that critical habitat designations be based on the best available science.[47] But this confuses a substantive standard with the evidentiary rule used to determine whether that standard has been met, like saying that the elements of a tort cannot be articulated because of *Daubert*. To know whether the best available science supports a critical habitat designation, the Services must know what "critical habitat" means and, in the wake of *Weyerhaeuser*, what "habitat" means as well. Failing to articulate and follow any consistent interpretation inevitably leads to ad hockery. As Professor Doremus has observed, the Services' refusal to adopt and follow a consistent interpretation of statutory requirements results in an "incoherent approach" that "invites the charge that caprice or political pressure, rather than objective, value-neutral standards, drive [] decisions."[48]

Third, the Services state that having a definition of habitat is "inherently confusing" because it would be outcome determinative in only a fraction of cases.[49] Rather than being confusing, this is true of virtually all line-drawing. The purpose of such standards is to resolve close cases. The ESA's definition of "threatened" species, for instance, is not made inherently confusing by the fact that most species aren't on the knife's edge between threatened and not but fall comfortably in one category or the other.

Finally, the Services' proposed rationale gives no consideration to the effect of rescinding the rule on the incentives for landowners to maintain or restore habitat, rather than engage in conflict with the Service. Ultimately, critical habitat is not a tool well-suited to encouraging habitat restoration where a species' existing habitat is insufficient for its recovery. Instead, other approaches are required to address that problem, especially those that make habitat features an asset to landowners. Critical habitat designations may crowd out these alternative approaches, by

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[46] *See id. See also* 16 U.S.C. § 1532(5).

[47] 86 Fed. Reg. at 59,354.

[48] *See* Holly Doremus, *The Endangered Species Act: Static Law Meets a Dynamic World*, 32 Wash. U. J.L. & Pol'y 175, 192 (2010). Professor Doremus was describing the Services' incoherent approach to taxonomy, under which they refuse to identify and apply any consistent understanding of "species" and "subspecies." *Id.* But her critique applies equally to the Services' ad hoc approach to habitat.

[49] *See* 86 Fed. Reg. at 59,355.

alienating landowners. After suffering a significant decrease in the value of land they may be relying on for their livelihoods, to retire, or to send their kids to college, few landowners are likely to feel grateful for the imposition and a desire to work with the Service in the future.

These concerns are central to the future conservation and recovery of endangered and threatened species. A majority of listed species are "management dependent," meaning they will only persist through active habitat maintenance and other recovery efforts.[50] For most species, these efforts will not succeed without the support and cooperation of private landowners. Given the Services' heavy reliance on the ESA's purpose to justify its proposed rescission, it is a serious oversight to rescind the habitat definition without considering how designating areas lacking the resources and conditions necessary to sustain a species would affect the incentives for private landowners to engage in habitat restoration and other species recovery efforts.f

[50] *See Critical Habitat's "Private Land Problem"*, *supra* n.2, at 10,572.