

Comment on Reforming Critical Habitat Designations Under the Endangered Species Act to Promote Species Recovery

Property and Environment Research Center (PERC)

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Main Points

- Critical habitat designations under the Endangered Species Act often create disincentives for private landowners to conserve or restore habitat, undermining species recovery.
- Designating habitat without regard to landowner incentives has led to regulatory conflict and preemptive habitat destruction.
- PERC recommends that the Department of the Interior reform critical habitat implementation by:
 - Designating only those areas where the benefits of conservation outweigh the costs and disincentives
 - Narrowing use of unoccupied and restorable lands unless landowner incentives are aligned
 - Prioritizing incentive-based, voluntary conservation approaches to make habitat an asset rather than a liability
- Reforming the implementation of critical habitat designations will align the incentives of imperiled species and property owners, improve ecological outcomes, and reduce regulatory burdens on landowners.

The Property and Environment Research Center (PERC) respectfully submits this comment in response to the Department of the Interior’s request for recommendations to reduce regulatory burdens while promoting responsible stewardship of America’s public lands and resources. PERC urges the Department to reform the way the Fish and Wildlife Service implements the Endangered Species Act’s (ESA) “critical habitat” provisions, with a focus on aligning incentives for private landowners to participate in species recovery.

Designating critical habitat without regard to how it affects landowner behavior often leads to regulatory conflict and undermines habitat conservation. By taking steps to ensure that maintaining or

restoring habitat is valued—not punished—the department can promote more successful recovery outcomes while reducing counterproductive regulatory burdens.

The Property and Environment Research Center

PERC is the national leader in market solutions for conservation, with over 45 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife.

Our work has consistently emphasized that listed species recovery depends not only on regulation but also on the willing cooperation of landowners and local stakeholders.¹ As the majority of species listed under the ESA rely on private land for habitat, effective conservation must align incentives so that landowners are rewarded for preserving or restoring habitat. Yet in practice, critical habitat designations frequently do the opposite.

Critical Habitat Designations Can Undermine Conservation on Private Land

Under the ESA, “critical habitat” is defined as areas occupied by the listed species with features that are “(I) essential to the conservation of the species and (II) which may require special management considerations or protection,” or unoccupied areas that the area itself is “essential for the conservation of the species.”² Nearly 80 percent of endangered species rely on private land for habitat.³ Yet under the current implementation of the ESA, landowners may be penalized when their land is designated as critical habitat. Designations can reduce property values, increase permitting burdens, and expose landowners to federal oversight for otherwise routine land-use decisions.

Research by PERC and others has shown that these regulatory costs—generally imposed without compensation—can lead to perverse incentives. Designating unoccupied land as critical habitat—even when it does not currently support the listed species—creates broad regulatory burdens that constrain land use without ecological benefit. Broad designations can stretch limited conservation resources thin, diverting attention away from the areas most important for recovery. Landowners may preemptively

¹ See, e.g., Katherine Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, PERC (July 2023); Jonathan Wood & Tate Watkins, *Critical Habitat’s “Private Land Problem”: Lessons From the Dusky Gopher Frog*, 51 Env’t. L. Rep. 10,565 (2021); 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 (Apr. 2018); Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, (Case Rsch. Paper Series in Legal Stud., Working Paper No. 09-34, Dec. 2011); Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC Policy Series (Apr. 1995).

² 16 U.S.C. § 1532(5).

³ Brian Seasholes, *The Importance of Property Rights for Endangered Species Conservation*, Reason Foundation (July 10, 2015).

destroy habitat features to avoid future restrictions, or they may be discouraged from restoring habitat or conserving species out of concern that it could trigger a designation.⁴

A notable example is the Supreme Court’s 2018 decision in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, which involved a critical habitat designation for the dusky gopher frog on private land in Louisiana that lacked essential habitat features.⁵ The landowners had no intention—or incentive—to manage the land for the species, yet the designation imposed potential development losses of up to \$34 million.⁶ The court ultimately held that land must first be “habitat” before it can be “critical habitat,” reinforcing the need for clarity, restraint, and care for incentives in designations.⁷

Recommendations

1. Focus Designations on Habitat That Encourages Recovery

The Service should largely limit critical habitat designations to lands where the designation will clearly encourage habitat conservation or species recovery. To do so, the Service should issue a regulation that limits critical habitat designations to areas that currently support a population of the listed species or contain the physical or biological features necessary to the species’ conservation. In addition, designations should be avoided where the benefits of the designation are outweighed by the costs to the landowner, or when the designation will discourage voluntary stewardship. In cases where these conditions are not met, the Service should pursue habitat designation only with the consent of the landowner, and the Service should work with landowners to provide incentives to encourage voluntary participation.

2. Avoid Designating Unoccupied or Restorable Areas Without Voluntary Cooperation

Designating unoccupied land—particularly where it requires active restoration—can impose burdens without generating conservation benefits. Most endangered species are “management dependent,” requiring ongoing human stewardship, not just set-asides of land.

Avoiding speculative designations that could hinder future landowner cooperation and instead fostering voluntary restoration through conservation agreements can help make critical habitat an asset rather than a liability for landowners. This approach would respect the realities of habitat restoration and avoid chilling voluntary efforts.

⁴ See *Endangering the Endangered*, PERC (Nov. 4, 2014).

⁵ *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 586 U.S. 9 (2018).

⁶ See *id.* at 17–18.

⁷ *Id.* at 19–21.

3. Embrace Incentives Over Coercion

Rather than regulating landowners into compliance, the Service should reward those who conserve habitat. Such approaches could include: 1) purchasing land that contains valuable habitat or potential habitat; 2) paying landowners to manage or restore land for listed species; 3) compensating landowners for meeting benchmarks for recovery or other measurable conservation outcomes; or 4) incorporating maintenance or restoration of habitat into existing mitigation programs.

The ESA authorizes habitat acquisition and other positive incentives, yet these tools are often underused. As PERC research has shown, direct conservation funding produces better outcomes than bureaucratic designations that pit property owners and imperiled species against one another.⁸

Conclusion

The ESA's critical habitat provisions should be implemented in ways that encourage—rather than deter—conservation on private and working lands. The Department of the Interior has the opportunity to restore trust, reduce conflict, and improve species outcomes by reforming critical habitat rules.

By narrowing designations to lands that offer a clear benefit, avoiding speculative use of unoccupied areas, and prioritizing voluntary and incentive-based approaches, the department can reduce regulatory burdens, respect landowner rights, and reward proactive stewardship while fulfilling the ESA's conservation mandate.

⁸ See Hannah Downey et al., [*A Field Guide for Wildlife Recovery*](#), PERC (Sep. 20, 2023).