

**Public Comment on Regulations for Listing Endangered and
Threatened Species and Designating Critical Habitat
Docket No. FWS-HQ-ES-2020-0047**

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

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Summary

- Defining “habitat” will help clarify the proper limits of designating “critical habitat,” reducing conflicts that benefit neither imperiled species nor landowners.
- Critical habitat designations on private land can discourage property owners from maintaining or restoring habitat for listed species.
- Landowner goodwill is a significant factor in conserving and recovering many listed species, which often require great expense and effort.
- A clear definition of habitat will make listed species and their habitats less of a liability for private landowners.

Introduction

The Property and Environment Research Center (PERC) respectfully submits this comment to the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. 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 Services are right to add a definition of “habitat” to the regulations that implement section 4 of the Endangered Species Act. Defining “habitat” will help clarify the proper limits of designating “critical habitat,” reducing conflicts over private land that benefit neither imperiled species nor landowners. As the Services note, defining habitat will also bring the regulations in line with the Supreme Court’s recent ruling in *Weyerhaeuser v. Fish and Wildlife Service*.¹ The court ruled that an area must first be “habitat” before it can be considered as the narrower category of “critical habitat” as defined in the act.

As *Weyerhaeuser* demonstrates, critical habitat designations on private lands can penalize landowners, discouraging them from participating in conservation or recovery of listed species. The punitive regulatory approach benefits neither landowners nor imperiled species, many of which

¹ 139 S. Ct. 361 (2018).

depend on private lands for habitat² and rely on human intervention for conservation and recovery.³ Defining habitat can help avoid future conflicts with landowners and make imperiled species and their habitat less of a liability for private citizens.

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

Too often, the Endangered Species Act turns listed species and their habitats into liabilities rather than assets for private landowners, giving landowners little incentive to participate in conservation or recovery efforts.⁴ In particular, critical habitat designations on private land can restrict land uses or decrease property values due to increased risk and regulatory uncertainty. When such designations encompass land unsuitable for an endangered species, they are especially unlikely to provide conservation or recovery benefits.

While a critical habitat designation does not directly regulate private land uses, it subjects landowners to more regulatory scrutiny if their activities require a federal permit. When landowners' activities require a permit, they alone bear the costs of meeting agency requirements to avoid or mitigate impacts of their activities on critical habitat. Furthermore, the uncertainty and scrutiny presented by a designation can affect the market value of land. 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.⁵

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 area, therefore, was designated critical habitat even though it would not be considered "habitat" by an ordinary definition. The agency estimated that, depending on mitigation or curtailment of development that might be required, the designation could decrease the value of the land by up to \$34 million.⁷ The potential cost to the landowners could have spurred acrimony and litigation no matter what, but the fact that the land was unsuitable for the frog no doubt played a role in their reaction to the designation. 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.

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 See Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC Policy Series (April 1995).

⁵ Maximilian Auffhammer et al., *The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions*, 96 *Land Econ.* 188-206 (2020).

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

⁷ *Id.* at 35,140.

2. Landowner goodwill is a significant factor for conserving and recovering many listed species, which often require great expense and effort.

Critical habitat designations that discourage private property owners from maintaining or restoring habitat fail to benefit imperiled species and can even be counterproductive for them. Landowner goodwill is a significant factor for the conservation and recovery prospects of imperiled species for two reasons: many endangered species rely on private lands for a significant amount of their habitat, and most listed species depend on human intervention for conservation and recovery, often in the form of habitat restoration or maintenance.

The Fish and Wildlife Service has estimated that approximately half of endangered species rely on private lands for 80 percent of their habitat.⁸ If property owners perceive critical habitat designations to bring uncertainty, potential restrictions on land use, costly permitting requirements, regulatory scrutiny, or lost property value, then they are likely to view critical habitat as a liability rather than an asset. 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 would bring such consequences. 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 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.⁹ 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.

In the case of the dusky gopher frog, a recovery effort undertaken by the Nature Conservancy in southern Mississippi helps demonstrate the degree of intervention required to help the frog. For more than a decade the organization has restored and maintained longleaf pine habitat on a 1,700-acre tract of private land, including planting new trees, performing controlled burns, removing invasive plants, and maintaining a frog breeding pond. In addition, the group has bred and raised nearly 10,000 tadpoles and dusky gopher frogs that it has released at the site to bolster the population. Biologists estimate that 50 adult dusky gopher frogs survive at the site, an achievement that underscores the laboriousness of such recovery efforts, as well as the amount of time, money, and willingness required to implement them.¹⁰

Perhaps goodwill toward a listed species can be expected when a conservation group such as the Nature Conservancy is the landowner. Yet the long-term effort undertaken by the organization to recover the dusky gopher frog demonstrates how atypical the group is as a private property owner. The wider challenge for endangered species policy is to avoid turning listed species and their habitats into liabilities for typical property owners. The challenge is crucial given that, like the frog, the prospects for numerous endangered species depend upon landowner goodwill.

⁸ *Supra* n. 2.

⁹ *Supra* n. 3.

¹⁰ Tate Watkins, *If a Frog Had Wings, Would It Fly to Louisiana?*, 37 PERC Reports 26 (2018).

3. A clear definition of habitat will make listed species and their habitats less of a liability for private landowners.

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. Furthermore, the specter of a critical habitat designation that threatens regulatory uncertainty or lost property value can encourage landowners to preemptively destroy habitat by, for instance, developing land earlier than they might otherwise.¹¹ By defining habitat and thereby clarifying that critical habitat must be habitable, the Services can reduce future designations that turn imperiled species and their habitats into liabilities for landowners.

The Services have proposed the following definition of habitat:

The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.

As well as an alternative definition of habitat:

The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.

The alternative definition provides two potential advantages. First, the active verb “use” is a more descriptive and precise term than the phrase “depend upon” to describe the relationship between a species and its habitat. Second, noting that areas currently unoccupied by a species qualify as habitat “only where the necessary attributes to support the species presently exist” reduces uncertainty about whether an area that requires restoration of habitat attributes could be considered habitat. The Services could further clarify this point and reduce uncertainty by adding the word “all” to the final phrase of the alternative definition: “... only where *all* the necessary attributes to support the species presently exist.”¹²

Ultimately, either definition would establish that “critical habitat” as defined by the statute falls within a larger scope of “habitat,” a clarification that will help reduce future conflicts over private land that benefit neither imperiled species nor landowners.

¹¹ See Jonathan Adler, *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* 14-17 (2011).

¹² This point has particular relevance to *Weyerhaeuser* given that the unoccupied critical habitat designation at the heart of the case encompassed land with only one of the three essential habitat elements for the dusky gopher frog. See *supra* n. 5.