



## **Public Comment on the U.S. Fish and Wildlife Service's Proposed Listing and Designating Critical Habitat Rule, FWS-HQ-ES-2021-0107-0001**

Property and Environment Research Center

Bozeman, Montana

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### **Main Points**

- To help accomplish the Endangered Species Act's ultimate goal of recovering species, critical habitat designations should avoid perverse incentives and encourage proactive habitat restoration.
- Prioritizing designations of occupied areas over unoccupied ones helps promote species conservation and recovery.
- If designating an unoccupied area as critical habitat is not likely to encourage conservation, it would be beneficial to instead focus on areas that will.
- Designating occupied areas will at least guarantee some protection for habitat features, but that is not the case for unoccupied areas.

### **Introduction**

The Property and Environment Research Center (PERC) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service's proposed rule that includes policy changes to criteria for designating critical habitat under the Endangered Species Act. PERC supports proactive conservation efforts to recover species, especially where they avoid counterproductive regulatory conflict. When it comes to critical habitat designations, PERC urges the Service to ensure that its policies do not penalize private landowners for their maintenance and conservation of habitat for imperiled species. Instead, the Service should seek to make listed species assets rather than liabilities for the local communities who provide habitat for them.

PERC is the national leader in market solutions for conservation, with over 40 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. PERC has produced extensive research on the Endangered Species Act and the incentives it generates for landowners, states, local

communities, and other stakeholders.<sup>1</sup> We have also advocated for policies that remove disincentives from critical habitat designations on private land and instead encourage landowners to conserve endangered and threatened species.<sup>2</sup> Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

The Fish and Wildlife Service's proposed rule would, among other things, change the way that it approaches critical habitat designations. Specifically, the Service proposes to eliminate a policy that prioritizes designation of occupied areas over unoccupied areas, eliminate a requirement that the Service explain how designating unoccupied areas would contribute to a species' recovery, and eliminate a requirement that unoccupied areas have some habitat feature for a species. Each of these proposed changes, however, risks alienating potential partners in conservation of imperiled species. This comment identifies several factors that the Service should weigh as it considers its approach to critical habitat designations. Designations that align the incentives of landowners and other local stakeholders with those of listed species will help fulfill the Service's mission of recovering endangered species. Conversely, designations that generate ill will with those who provide habitat or create perverse incentives to restoring or maintaining habitat risk undermining efforts to recover species.

**To help accomplish the Endangered Species Act's ultimate goal of recovering species, critical habitat designations should avoid perverse incentives and encourage proactive habitat restoration.**

Passed 50 years ago, the Endangered Species Act aims to promote the recovery of species at risk of extinction. Over the last half-century, more than 99 percent of listed species have avoided extinction, a significant accomplishment. But the ultimate goal of the act is to recover species so that they are no longer at risk of dying out.<sup>3</sup> While the act excels at preventing extinctions, it underperforms in recovering ailing species. Only 3 percent of listed species have ever recovered to come off the list. Despite public enthusiasm for the goals of the Endangered Species Act, this split record combined

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<sup>1</sup> Jonathan Wood, "The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery," Property and Environment Research Center (2018); 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 and 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* 3 (1995).

<sup>2</sup> Jonathan Wood and Tate Watkins, "Critical Habitat's 'Private Land Problem': Lessons From the Dusky Gopher Frog," *Environmental Law Reporter* 51, no. 7 (2021): 10,565.

<sup>3</sup> The Endangered Species Act notes that its purposes include providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and providing "a program for the conservation of such endangered species and threatened species." It further clarifies that the terms "conserve," "conserving," and "conservation," mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. §§ 1531(b); 1532(3).

with the statute’s regulation-based approach helps explain why it is one of the nation’s most controversial laws.

A recent analysis from PERC assessed the Fish and Wildlife Service’s progress at recovering species. One key finding was that while the Service projected that 300 species would have recovered by now, only 57 have actually recovered.<sup>4</sup> Of those 57, the agency projected only 13 of them to recover by now; the other 44 were species for which the agency did not predict a recovery date. This low recovery rate is significant because it highlights how much the Service is lagging behind its projections and underlines how species need proactive conservation efforts, not just more time, to recover. If an endangered species listing is akin to going to the emergency room, then the lack of recoveries suggests that most species have remained on perpetual life support. While the vast majority avoid extinction, they have never been able to recover and leave the hospital.

## Endangered Species Act Recovery Progress is Less than Expected

Total number of species the U.S. Fish and Wildlife Service expected to recover vs. actual recoveries.

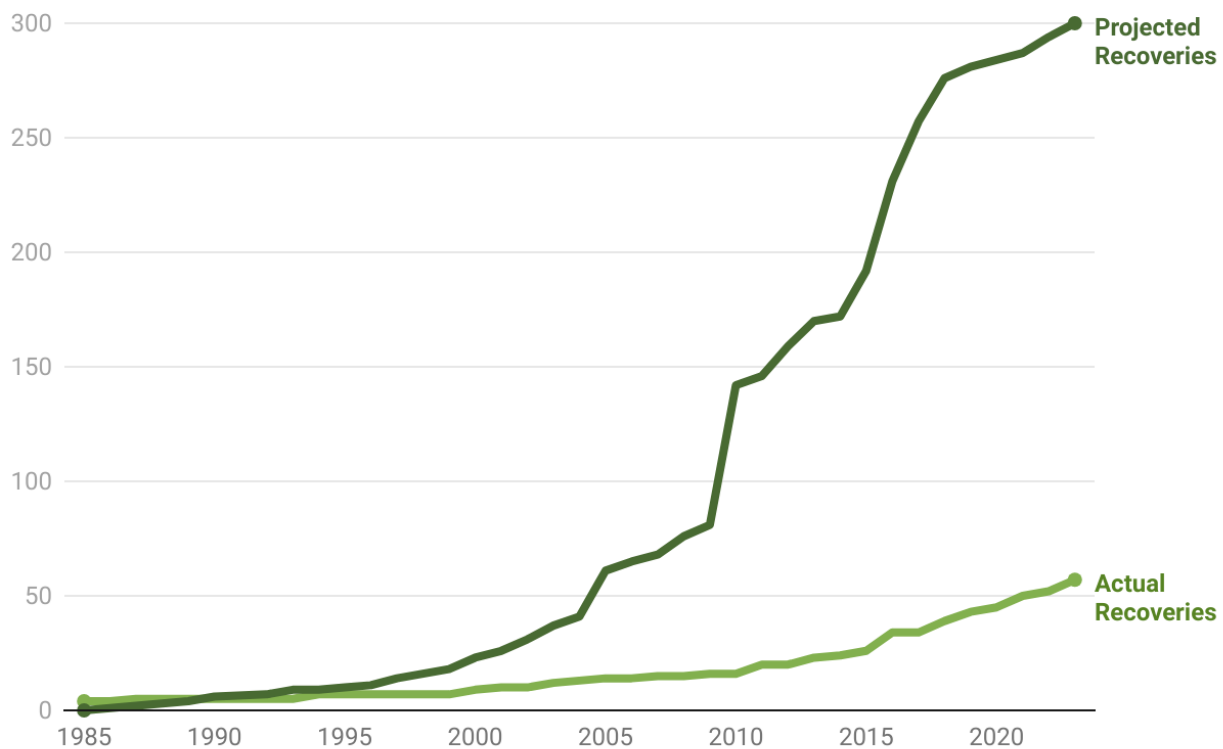


Chart: Katherine Wright • Source: PERC, USFWS, and Katherine Wright • Created with Datawrapper

<sup>4</sup> Katherine Wright and Shawn Regan, “Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals,” Property and Environment Research Center (July 2023).

The recovery record raises questions about what obstacles stand in the way of recovering species. Too often, the Endangered Species Act has failed to align incentives in ways that spur landowners to actively participate in recovery efforts. This has significant consequences because private landowners play a crucial role in species recovery by providing habitat. The Service has estimated that private landowners provide 80 percent of habitat for half of listed species.<sup>5</sup> Moreover, two-thirds of all listed species have at least some habitat on private land.<sup>6</sup>

Property owners who provide habitat for listed species, however, often face negative regulatory consequences from the statute. Specifically, critical habitat designations of private land can penalize landowners for the presence of habitat features on their property through land-use restrictions, lower property values, costly permitting requirements, or regulatory uncertainty.<sup>7</sup> Presence of a listed species or designation of critical habitat can make landowners reluctant to participate in conservation. Many fear endangered species regulations will threaten property values or hinder the economic viability of working lands. In some cases, property owners have gone out of their way to preemptively destroy habitat to keep endangered species off their land.<sup>8</sup> A regulation-first approach creates conflict rather than collaboration between landowners, the federal government, and imperiled species.<sup>9</sup>

While the Service must take into account future extinction threats such as climate change when it designates critical habitat, incentives matter most where species depend on active habitat maintenance or restoration. It does no good if designations today generate ill will with landowners and others who could provide habitat for rare species in the future. When designations of private land, in particular, bring punitive regulatory consequences, the Service risks undermining the need to encourage proactive conservation and recovery efforts through critical habitat designations.

To the Biden administration's credit, it has recognized the importance of incentives in many of its conservation initiatives. PERC has proudly supported the administration when it has acted consistent with this commitment. Unfortunately, the administration's vision of conservation as something "done with private landowners, not to them" has not been born out in its implementation of the Endangered Species Act generally and its approach to critical habitat designations specifically. In light of its proposed reforms to critical habitat designations, the Fish and Wildlife Service should consider whether its proposal risks hampering rather than bolstering future conservation and recovery efforts.

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<sup>5</sup> U.S. Fish and Wildlife Service, "Our Endangered Species Program and How It Works with Landowners," (July 2009), <https://www.fws.gov/endangered/esa-library/pdf/landowners.pdf>.

<sup>6</sup> U.S. Fish and Wildlife Service, "ESA Basics: 50 Years of Conserving Endangered Species," (2023) <https://www.fws.gov/sites/default/files/documents/endangered-species-act-basics-february-2023.pdf>.

<sup>7</sup> Wood and Watkins, *Critical Habitat's "Private Land Problem."*

<sup>8</sup> Dean Lueck and Jeffrey Michael, "Preemptive Habitat Destruction under the Endangered Species Act," *Journal of Law and Economics* 46, no. 27 (2003); Daowei Zhang, "Endangered Species and Timber Harvesting: The Case of Red-Cockaded Woodpeckers," *Economic Inquiry* 32, no. 150 (2004); List et al., "Is the Endangered Species Act Endangering Species?" NBER Working Paper 12777 (2006).

<sup>9</sup> U.S. Fish and Wildlife Service, *Our Endangered Species Program*.

## **Prioritizing designations of occupied areas over unoccupied ones helps promote species recovery and conservation.**

Critical habitat designations of unoccupied areas can be especially controversial, particularly if landowners feel they are being targeted arbitrarily or irrationally. In such cases, designating unoccupied areas can undermine efforts to conserve and restore species.

Unoccupied areas represent a relatively small portion of all designated areas, constituting less than 1 percent of all designations according to one review.<sup>10</sup> For virtually all of the Endangered Species Act's history, the Service's policy was to designate all occupied areas before considering unoccupied areas — and only then consider them if occupied areas were insufficient to conserve a species.<sup>11</sup> This policy, combined with the higher statutory bar required for designating unoccupied areas,<sup>12</sup> perhaps helps explain why the vast majority of past designations have covered occupied areas. Eliminating the policy of prioritizing occupied areas over unoccupied ones, however, could set the stage for increased conflict over designations.

A recent, high-profile case of acrimony created over a designation of unoccupied critical habitat is *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*.<sup>13</sup> At issue was a designation of approximately 1,500 acres of private land unoccupied by the endangered dusky gopher frog. The frog had not been documented in the area for more than half a century. Yet according to the Service, the land in question contained rare ephemeral ponds of the type that the frog relies on to breed. Due to the land containing this unique habitat feature — one of three that the dusky gopher frog requires — the area was deemed essential for the conservation of the species and was included in the critical habitat designation.<sup>14</sup>

The Service acknowledged that its designation lowered the value of the property due to the “stigma” effect of critical habitat designations. The agency's own economic analysis estimated that the property owners could lose out on up to \$34 million in value if the designation prohibited eventual development of the area.<sup>15</sup> The case was ultimately settled when the property in question was removed from the designation.

The landowners had no interest in using their property, which operated as a commercial timber farm, to relocate and conserve the frog. Doing so would have been a massive and costly undertaking that would require removing existing tree stands, establishing the appropriate longleaf pine tree

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<sup>10</sup> From 2007 and 2017, the Fish and Wildlife Service designated approximately 207 million acres as critical habitat, and unoccupied areas comprised less than 1 percent of the total. Environmental Policy Innovation Center, “Endangered Species Act 2018 Administrative Reform: Initial Perspectives on Proposed Regulatory Changes,” (July 2018).

<sup>11</sup> 81 Fed. Reg. at 7415.

<sup>12</sup> For the Fish and Wildlife Service to designate unoccupied areas, the Secretary of the Interior must deem those areas to be “essential for the conservation of the species.” 16 U.S.C. §1532(5)(A).

<sup>13</sup> 139 S. Ct. at 368-69.

<sup>14</sup> Tate Watkins, “If a Frog Had Wings, Would It Fly to Louisiana?” *PERC Reports* 37, no. 26 (2018).

<sup>15</sup> Wood and Watkins, *Critical Habitat's “Private Land Problem.”*

ecosystem, controlling invasive grasses, and carrying out prescribed burns regularly. One member of the landowner family summarized the ill will generated through the designation:

Our land is not suitable for the frog. We know that. The government and Fish and Wildlife Service have said that you don't have the elements for it. So to make it suitable you'd have to rip up every tree on 1,544 acres, replant all of it with the right tree, make sure the ponds are still there, and make sure you burn it every year. Who is going to pay for that? They don't care. It's not their job. Their job is to find a habitat. The consequences are not their problem.<sup>16</sup>

The Fish and Wildlife Service acknowledges that a designation of critical habitat cannot compel any private party to take further steps toward species recovery. By prioritizing designations of occupied areas, the Service can avoid generating acrimony with potential providers of habitat. A policy that avoids designations of unoccupied areas is more likely to promote species recovery and conservation.

**If designating an unoccupied area as critical habitat is not likely to encourage conservation, it would be beneficial to instead focus on areas that will.**

The Fish and Wildlife Service should explicitly consider the likelihood that costs of a designation will discourage landowners from conserving or restoring habitat. For instance, a designation of an unoccupied area of private property might alert a landowner that increased regulatory burdens would follow if a listed species ever did arrive on that land. This would generate perverse incentives such that some landowners may choose to destroy their unoccupied habitat before it becomes occupied, an unfortunate but rational course of action for some parties. Better accounting for such "conservation costs" can avoid perverse incentives while limiting designations to areas where there are clear and direct benefits to species.

Another significant factor to consider is that the Service has limited resources. To get the most conservation from those limited resources, it makes sense to focus critical habitat designations on areas that are likely to yield conservation benefits. Returning to the example of the dusky gopher frog is illuminating. The Nature Conservancy, one of the largest conservation organizations in the world, has worked since the early 2000s to restore the frog and other species to a reserve in southern Mississippi. Its work has entailed all of the efforts described above to reestablish a longleaf pine ecosystem. Much of this work to conserve the frog, including establishing facilities to raise and release tadpoles, was carried out on federal land.<sup>17</sup> Focusing designations on federal land, where consultation under section 7 of the Endangered Species Act is highly likely if not certain, could spur such projects and partnerships that benefit imperiled species. Given that federal agencies have an obligation to help conserve endangered species, designations on federal land could help channel resources toward recovery efforts while keeping private actors free from potential regulatory burdens of a designation that could result in perverse incentives for recovery.

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<sup>16</sup> Watkins, *If a Frog Had Wings*.

<sup>17</sup> These federal areas include ponds in DeSoto National Forest where tadpoles from extant populations of dusky gopher frogs were collected as well as facilities at Camp Shelby where the tadpoles were raised to be released on The Nature Conservancy's private land.

Considering the perverse incentives a designation can create, the Service would be prudent to avoid designating areas as critical habitat unless it has good reason to believe that it would create substantial, on-the-ground benefits for the species to offset this risk.<sup>18</sup> Moreover, the proposed rule offers no explanation or justification for changing this policy. As alluded to above, in pursuit of minimizing the conservation costs of critical habitat designations, it would be wise to continue to prioritize occupied habitat over unoccupied areas.

**Designating occupied areas will at least guarantee some protection for habitat features, but that is not the case for unoccupied areas.**

In general, occupied areas will be more likely to yield conservation benefits than unoccupied ones. The presence of a species guarantees at least some protection for habitat features in occupied areas. If there is a designation of an unoccupied area that lacks habitat features necessary for a listed species, then there is a chance the designation will yield no conservation benefit at all.

Habitat features receive no direct protection under the Endangered Species Act. In *Weyerhaeuser*, for instance, the landowners would have been free to destroy or otherwise modify the ephemeral ponds on their property unless the activity coincidentally required a federal permit under another law. Regardless of the particulars of that case, the precedent of penalizing landowners for conserving habitat features creates an incentive for landowners to preemptively destroy habitat features to avoid future regulatory scrutiny. After all, if habitat features no longer exist on a given property, then that property cannot be subject to restrictions on permitted activity due to it containing habitat features.

**Conclusion**

Designating unoccupied areas as critical habitat will in many cases be much less likely to provide conservation benefits for listed species than occupied areas. It is sensible to focus limited agency resources where conservation is feasible and likely. That approach could foster good will with landowners, states, and other local stakeholders, thereby increasing the likelihood for collaboration on conservation and recovery efforts in the future.

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<sup>18</sup> While the Service has frequently touted “informational” benefits of critical habitat designations, such benefits would not depend on a formal designation of an area. Moreover, any purported information benefits of a designation must be balanced with potential costs of perverse incentives associated with critical habitat. Wood and Watkins, *Critical Habitat’s “Private Land Problem.”*