

Center for Growth and Opportunity at Utah State University
Public Interest Comment on the U.S. Fish and Wildlife Service
proposed rule

Endangered and Threatened Species: Regulations for Designating Critical Habitat

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The Center for Growth and Opportunity at Utah State University is a research center dedicated to producing ideas that transform lives. We explore the interactions between key institutions — business, government, and civil society — to improve opportunity, broad-based economic growth, and individual well-being. The Center occasionally conducts independent analyses addressing government rulemakings and proposals. This comment is designed to assist the agency as it explores these issues. The views expressed in this comment are those of the author(s) and do not necessarily reflect the views of the Center for Growth and Opportunity at Utah State University or the views of Utah State University.

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Executive Summary

On September 8, 2020, the Fish and Wildlife Service (FWS or “the agency”) released a proposed rule that would amend its regulations implementing section 4 of the Endangered Species Act (ESA). This new rule codifies a more detailed regulatory process for when and how FWS will consider excluding an area from a critical habitat designation—a key regulatory tool for protecting endangered species.

Our research suggests that establishing a clear process for how decisions about exclusion will be made will help improve transparency and provide greater certainty to stakeholders who may be impacted by a critical habitat designation. Endangered species rely on many stakeholders working together to ensure their survival. Providing those stakeholders with certainty about how and why decisions regarding critical habitat designations are made will help to improve trust and increase the likelihood of private landowners and other stakeholders working toward positive conservation outcomes.

In particular, the proposed rule takes the positive step of requiring decision-makers to weigh the value of designating an area as critical habitat against the value of existing conservation agreements with non-federal partners. These agreements have significant benefits for species and reflect investments in partnerships with the many stakeholders that endangered species rely upon for their survival. Careful consideration of the tradeoffs involved in overriding existing partnerships will help maintain trust with these stakeholders, which is crucial for obtaining positive conservation outcomes for species.

The proposed rule will also allow for greater opportunity to gather relevant knowledge from experts and those with firsthand knowledge regarding areas proposed as critical habitat. Because knowledge about a particular area is often localized, allowing individuals with first-hand or expert knowledge to provide input is likely to help FWS make more informed decisions about whether an area should be included or excluded from critical habitat.

Overall, our research suggests the proposed rule will improve the status quo by increasing transparency, fostering trust with important stakeholders, and allowing FWS to better gather important information about the impact of critical habitat designation on a particular area. We also suggest that FWS make the process of providing feedback on a potential exclusion easy and straightforward for relevant stakeholders.

A Clear Process Will Improve Transparency and Trust among Important Stakeholders

The primary goal FWS cites for the proposed rule is “to provide greater transparency and certainty for the public and stakeholders” regarding the process by which an area may be excluded from a critical habitat designation. By clarifying the process for excluding areas of critical habitat under section 4(b)(2) of the ESA, this proposed change will likely achieve its intended goal.

Critical habitat is a regulatory tool under the ESA used to designate and protect areas that are essential for the survival of a threatened or endangered species. The ESA requires the FWS to designate critical habitat for listed species based on “the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact.”¹ Section 4(b)(2) of the ESA allows the FWS to exclude an area from a critical habitat designation if the benefits of doing so outweigh the conservation benefits of including it, but only if excluding the area will not cause a species to go extinct.

In the past, decisions about whether to exclude a particular area were guided by case law. Courts had established a precedent that decisions about exclusion were not subject to judicial review, but were instead committed by law to the discretion of the agency. This idea is codified in 50 CFR 424.19(c). A 2016 policy— 81 FR 7226 — outlined the process FWS undertakes when approving or excluding designations while affirming the discretionary power of the agency’s secretary. That changed in 2018 when the Supreme Court ruled in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service* that such decisions are in fact subject to judicial review.² This proposed rule takes the elements of the 2016 policy and more clearly defines them as the established regulatory process for determining whether an area will be excluded from a critical habitat designation.

The proposed rule provides a clear framework for how FWS should consider economic impacts, impacts on national security, and other relevant impacts under section 4(b)(2) of the ESA. It also requires, “that FWS will exclude areas whenever it determines that the benefits of exclusion outweigh the benefits of inclusion, as long as exclusion will not result in the extinction of the species.”³ This is a change from the 2016 Policy which stated, “Although we retain discretion because we cannot anticipate all fact patterns that may occur, it is the general practice of the Services to exclude an area when the benefits of exclusion outweigh the benefits of inclusion.”⁴ The proposed rule also requires that an exclusionary analysis will be conducted if “credible information supporting exclusion” is presented.

The proposed rule also lays out the mechanics of the discretionary exclusion analysis. The analysis would weigh the expected conservation benefits and other impacts of a designation based on expertise from the agency itself or from external commenters with relevant knowledge. Those may include tribes, state and local governments, the Department of Defense, and members of the public with relevant knowledge who would have the opportunity to comment.

By clearly defining when and how FWS will engage in a discretionary exclusion analysis, the proposed rule will achieve its stated goal of greater transparency. Increased transparency will likely improve trust with local landowners, which our research at the Center for Growth and Opportunity suggests is crucial in obtaining good conservation outcomes for species.

1 16 U.S.C. 1533(b)(2)

2 *Weyerhaeuser Co. v. United States Fish and Wildlife Service et al.* 139 S. Ct. 361 (2018).

3 Fish and Wildlife Service. Regulations.gov. “Endangered and Threatened Species: Regulations for Designating Critical Habitat.” September 7, 2020. <https://beta.regulations.gov/document/FWS-HQ-ES-2019-0115-0001>

4 Fish and Wildlife Service. “Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act,” 2016, <https://www.federalregister.gov/documents/2016/02/11/2016-02677/policy-regarding-implementation-of-section-4b2-of-the-endangered-species-act>

Private landowners are important conservation partners because the majority of listed species rely on private land for their habitat. The FWS has found that over 50 percent of species listed as endangered or threatened rely on private land for greater than 80 percent of their habitat.⁵ We reviewed surveys of private landowners regarding their attitudes towards conservation in general as well as different conservation approaches. The vast majority of those surveyed stated that they value conservation of endangered species and want to be known as good stewards of their land. When asked which factor is most likely to deter them from participating in conservation of endangered species, the most common responses given were fear of future regulation and concerns about government involvement.⁶

All of the academic literature we reviewed suggested trust is a crucial factor in obtaining landowner participation in conservation.⁷ For example, although incentive programs have proven effective at getting private landowners positively engaged in conservation, existing research suggests that distrust can lead them to opt out of such agreements.⁸ Researchers have also found that, “for conservation programs targeting private lands to achieve landscape-level benefits, they must attract a critical level of participation that creates a connected mosaic of conservation benefits.”⁹

By increasing transparency in the critical habitat designation process, the proposed rule should help build trust between landowners, conservationists, and FWS. Landowners will have a chance not only to understand the reasoning behind why FWS made a decision to designate or exclude, but will also have the opportunity to contribute their own concerns and relevant expertise to the decision-making process. Based on our research, we feel this is a positive step forward for the agency and will result in improved cooperation among landowners and better conservation outcomes overall.

Considering Existing Conservation Agreements Will Increase Trust and Maintain Conservation Benefits

Prior to this proposed rule change, FWS would “sometimes exclude areas from critical habitat designations based on the existence of private or other non-Federal conservation plans or agreements... when the benefits of exclusion outweigh the benefits of exclusion.”¹⁰ The proposed rule will establish a more systematic process for considering existing conservation agreements with non-federal partners. Section 10 of the ESA allows for the development of habitat conservation plans, (HCPs) safe harbor agreements (SHAs), and candidate conservation agreements with assurances (CCAAs). These agreements provide the non-federal partner with a permit for incidental take of a species (under which a species may be unintentionally harmed by otherwise legal activity) in exchange for an agreement to undertake conservation activities to aid in the species’ recovery.

These programs may have significant conservation benefits for species because they require landowners to actively assist in species conservation on their land. For example, researchers have found evidence that Safe Harbor-type programs have successfully led landowners to reduce timber harvesting by 7 to 13 percentage

5 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>.

6 Megan Jenkins, Rebekah Yeagley, Sarah Bennett, and Jennifer Morales. “Cooperative Conservation: Determinants of Landowner Engagement in Conserving Endangered Species.” The Center for Growth and Opportunity at Utah State University, November 28, 2018. <https://www.thecgo.org/research/cooperative-conservation-determinants-of-landowner-engagement-in-conserving-endangered-species>.

7 Kendra Womack. 2008. “Factors Affecting Landowner Participation in the Candidate Conservation Agreements with Assurances Program.” Utah State University. <https://digitalcommons.usu.edu/etd/29/>.

8 Michael G. Sorice and J. Richard Conner. 2010. “Predicting private landowner intentions to enroll in an incentive program to protect endangered species.” *Human Dimensions of Wildlife* 15:77-89;

Michael G. Sorice, W. Haider, J. R. Conner, and R. B. Ditton. “Incentive structure of and private landowner participation in an endangered species conservation program.” *Conservation Biology* 25:587-5 (2011).

9 Michael G. Sorice, C. Oh, T. Gartner, M. Snieckus, R. Johnson, C. J. Donlan, “Increasing Participation in Incentive Programs for Biodiversity Conservation,” *Ecological Applications*, 23, no. 5 (July 2013): 1146–55.

10 Fish and Wildlife Service. 2020. “Regulations.gov.” Endangered and Threatened Species: Regulations for Designating Critical Habitat. September 7, 2020. <https://beta.regulations.gov/document/FWS-HQ-ES-2019-0115-0001>

points in potential habitat areas.¹¹ Other scholars found that species with HCPs in place from 1990 to 2004 were more likely to be improving and less likely to go extinct than species without HCPs.¹²

FWS is proposing this change because it recognizes that existing conservation agreements often entail greater conservation benefits for a species than critical habitat designation would provide. Under the proposed rule, areas covered by an existing conservation plan under Section 10 will be considered for exclusion only if the permittee is following the established conservation plan and the plan in place addresses the habitat of the species for which critical habitat is being proposed.

Considering existing conservation agreements is another positive step toward increased trust among private landowners, conservation groups, and state and local governments. This, in turn, could lead to more positive conservation outcomes. Our research on landowner attitudes toward conservation suggests that assurances against future regulation are one of the most convincing incentives in getting people more involved in efforts to conserve endangered species.¹³

Other researchers have also highlighted the importance of considering existing conservation agreements. In a new paper author Y-Wei (Jake) Li, environmental attorney, practitioner, and Director of Biodiversity at the Environmental Policy Innovation Center, proposes a framework for how FWS could more methodically consider potential benefits and potential disadvantages of designating an area as critical habitat. Among the key factors that Li includes are whether the designation “is likely to result in the non-federal landowner forgoing meaningful voluntary conservation activities for species in the area,” and whether the designation “is likely to significantly undermine future conservation opportunities with the non-federal landowner.”¹⁴ The proposed rule will do just that by systematically considering these factors when determining whether to include an area in critical habitat.

Existing conservation agreements reflect important partnerships that FWS has worked to establish with private landowners, state and local governments, tribes, and conservation organizations. These agreements play an important role in helping species recovery, and the proposed rule will rightly consider and value their conservation benefits against the potential impacts of a critical habitat designation.

Expert and First-Hand Knowledge Can Improve Decisions about Critical Habitat

The proposed rule will provide several opportunities for landowners and those with expert knowledge to provide information to FWS. Gathering local knowledge and expertise is likely to improve the decision-making process surrounding critical habitat. As mentioned in our research above, landowners and those with local knowledge are crucial to species’ survival. For that reason, we strongly suggest that FWS make it easy and straightforward for relevant stakeholders to provide comments.

The proposed rule provides the opportunity (through a public comment period) for the public to present credible information that an area should be excluded. If information in favor of exclusion is deemed credible, the agency will conduct a discretionary exclusion analysis. In addition to private landowners, FWS will also consider information from tribes, state and local governments, and the Department of Defense. Once an exclusion analysis is begun, FWS will then weigh the evidence based on the credibility

11 Jacob Byl. “Perverse incentives and safe harbors in the Endangered Species Act: Evidence from timber harvests near woodpeckers.” *Ecological Economics*, 157 (2019).

12 Christian Langpap and Joe Kerkvliet. “Endangered species conservation on private land: Assessing the effectiveness of habitat conservation plans.” *Journal of Environmental Economics and Management*, 64: 1 (July 2012).

13 Megan Jenkins, Rebekah Yeagley, Sarah Bennett, and Jennifer Morales. “Cooperative Conservation: Determinants of Landowner Engagement in Conserving Endangered Species.” The Center for Growth and Opportunity at Utah State University, November 28, 2018. <https://www.thecgo.org/research/cooperative-conservation-determinants-of-landowner-engagement-in-conserving-endangered-species>.

14 Jake Li. “When does critical habitat designation benefit species recovery?” The Center for Growth and Opportunity, October 2020, <https://www.thecgo.org/research/when-does-critical-habitat-designation-benefit-species-recovery/>

and expertise of experts or those with first-hand knowledge. The agency must then exclude an area if the expected benefits of exclusion outweigh the expected benefits of inclusion.

Local residents, particularly landowners who share their land with wildlife, have specialized knowledge that may be difficult or costly for the agency to discover on its own. Some academic studies suggest that surveys of local residents can help to accurately identify the distribution of wildlife in an area, and are often corroborated by researcher-modeled estimates.¹⁵ Soliciting public comments from private landowners, conservation groups, and local governments in areas where critical habitat is being considered helps ensure that the agency receives the best information relevant to the exclusion decision. It can also foster trust by providing local stakeholders with the opportunity to highlight potential issues or benefits of including an area in critical habitat before a decision is made, rather than leaving them with no option but to challenge it after the fact through the legal process.

When possible, FWS should also allow the public a more generous window to prepare and provide their comments. The public comment period can be very short (often no longer than 30 days), and local residents may remain unaware of the opportunity to comment until the period is nearly over. Even if residents are made aware of the public comment period in a timely manner, they may still struggle to submit their concerns and expertise due to the technical knowledge needed to understand and comment on proposed regulations.¹⁶ For these reasons, the process should be made as simple and straightforward as possible, and comment periods should extend for periods longer than 30 days when possible.

Conclusion

Overall, the rule proposed by FWS is promising for two reasons. First, it will increase transparency by clearly establishing the process for whether and how exclusions to critical habitat will be considered. Second, it will increase the opportunity for stakeholders to provide input and expertise, strengthening the decision-making process and reducing conflict. Our key suggestion is that FWS should consider how to make it as easy as possible for those with relevant information to provide input into the process of whether to exclude areas from critical habitat. We thank the FWS for the opportunity to provide comments on this proposed rule.

15 Cybil C. Huntzinger, I. Louque Jr., E.K. Lyons, P.V. Lindeman, W. Selman, "Using Local Ecological Knowledge in Louisiana to Infer Distribution and Abundance of the Alligator Snapping Turtle," *Wildlife Society Bulletin* 44, no. 1 (March 2020): 42–48; Jose D. Anadón, A. Giménez, R. Ballestar, and I. Pérez. "Evaluation of local ecological knowledge as a method for collecting extensive data on animal abundance." June, 2009. *Conservation Biology* 23:617–625.

16 Cary Coglianese, "Citizen Participation in Rulemaking: Past, Present, and Future," *Duke Law Review* 55, no. 5 (March 2006): 943–68.