

The Center for Growth and Opportunity at Utah State University
Public Interest Comment on the US Fish and Wildlife Service
and the National Oceanic and Atmospheric Administration
proposed rule

Endangered and Threatened Wildlife and Plants: Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat

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Executive Summary

On October 27, 2021, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), collectively referred to as the Services, proposed a rule, hereafter referred to as the 2021 rule, that would rescind its 2020 definition of *habitat* under the Endangered Species Act.¹

The 2020 Final Rule provided a definition of habitat to be used in decisions about critical habitat designations. Critical habitat is a key regulatory tool under Section 4 of the Endangered Species Act (ESA). However, up until 2020, the Services had not defined what conditions must be present for an area to be considered habitat and thus eligible for designation as critical habitat.

In its 2018 *Weyerhaeuser v. Fish and Wildlife Service* decision, the Supreme Court held that in order for an area to be designated as *critical habitat*, it must first qualify as *habitat*.² The Court left it to the Services to define the term *habitat*. In response, the Services issued a Final Rule on December 16, 2020 providing the following definition of habitat:

For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.³

In other words, the Services can only designate an area as critical habitat if the area already provides what is needed to support a species during one or more phases of life. The Services are now proposing to rescind this definition in favor of relying on their own discretion to determine whether an area is eligible for designation as critical habitat.

Our research suggests that the 2020 Final Rule was a positive change that provided greater clarity and transparency for private landowners. Most endangered species rely on private land for their habitat. Thus, private landowners are crucial conservation partners. If the Final Rule is rescinded, private landowners and other conservation stakeholders will have less certainty about whether an area may be designated as critical habitat in the future.

More uncertainty may create unintended consequences that encourage landowners to make their land less hospitable to endangered species. This outcome would conflict with the core goal of the Endangered Species Act by making life harder for the very species it is meant to protect.

We recognize the importance of protecting areas that do not presently support endangered species but could provide valuable habitat if restoration and management efforts were to take place. However, instead of including such areas in critical habitat designations, the Services should consider other less punitive tools for improving potential habitat to eventually support endangered species. Our research suggests that incentive-based tools like Safe Harbor Agreements and payments for ecosystem services are more likely to get private landowners engaged in cooperative conservation efforts.

1 Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 86 Fed. Reg. 59353-59357 (October 27, 2021) (revising 50 C.F.R. 424.02). <https://www.federalregister.gov/documents/2021/10/27/2021-23214/endangered-and-threatened-wildlife-and-plants-regulations-for-listing-endangered-and-threatened>

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

3 50 C.F.R. 424.02

Rationale behind the 2020 Final Rule defining *habitat*

The 2020 Final Rule defining the term *habitat* was a direct response to the 2018 Supreme Court case *Weyerhaeuser v. Fish and Wildlife Service*. The *Weyerhaeuser* case began when the FWS designated a private timber plantation in St. Tammany Parish, Louisiana as critical habitat for the dusky gopher frog. Although the frog had not lived there since 1965, the land contained the rare breeding ponds necessary for the frog's survival and the FWS concluded that it met the requirements for critical habitat.

The owners of the land sued, claiming that their closed canopy timber land could not be critical habitat because the dusky gopher frog needs open canopy to survive. Returning the land to livable habitat for the frog would have required extensive land changes, including periodic controlled burns. The owners also claimed that the FWS failed to adequately assess the economic impact of the designation, which would cost the owners up to \$33.9 million and require extensive land management.⁴

After both the District Court and the 5th Circuit Court affirmed the critical habitat designation, the case was heard by the Supreme Court in the fall of 2018, which unanimously voted that habitat is a necessary precondition of critical habitat. The Court left it to the Services to define the term habitat, which they did by finalizing the 2020 rule. The Final Rule defined habitat as a setting that must “currently or periodically” be able to support key life processes of a species.

On January 20, 2021 President Biden signed an executive order requiring all agencies to review actions taken during the Trump administration. This included the December 2020 Final Rule defining habitat. After reviewing the rule, the Services concluded that it should be rescinded in full, claiming that the Final Rule contradicted their mandate to engage in species conservation as defined in the Endangered Species Act. Conservation under the ESA is any activity that is necessary to help recover an endangered species. The Services have stated in their 2021 proposed rule that the 2020 definition of habitat, which bars critical habitat designations in areas that cannot currently support the species, prevents them from fully engaging in species conservation as defined by the act.

Removing the 2020 definition of habitat would allow the Services to potentially designate areas as critical habitat which do not currently have the ability to support species but may be able to support species after future investments in restoration and management.

The proposed 2021 rule would reduce transparency, alienating important conservation partners

Private lands make up more than 80 percent of habitat for over half of endangered species, making private landowners important partners in species conservation.⁵ Our research at The Center for Growth and Opportunity has shown that private landowners want to be good stewards of the land

⁴ *Weyerhaeuser Co. v. United States Fish and Wildlife Service et al.* 139 S. Ct. 361 (2018).

⁵ “Our Endangered Species Program and How It Works with Landowners,” US Fish and Wildlife Service, July 2009, <https://www.fws.gov/endangered/esa-library/pdf/landowners.pdf>

and value protecting endangered species. Landowners, however, are most willing to engage in conservation programs that are non-punitive, incentive-based, and locally driven.⁶

Research has also shown that top-down regulatory approaches to conservation discourage landowner participation and sometimes even harm the species being protected. In one study, landowners in North Carolina preemptively harvested timber to stop their land from becoming habitat for the red-cockaded woodpecker and avoid the regulations involved in that designation.⁷ Another study in Utah showed that landowners actively removed prairie dogs from their land to avoid the punitive regulations associated with the species.⁸

As we discussed in a previous comment, the definition of habitat established by the 2020 Final Rule provided more certainty to landowners. The clear definition helped relieve concerns that private lands that could not currently support endangered species present may become critical habitat.⁹ Rescinding this definition of habitat will only serve to increase uncertainty, alienating landowners and pushing them away from being active participants in land conservation. In the worst cases, it could even encourage landowners to harm endangered species or make their land less hospitable to avoid additional regulation.

More flexible tools can help protect potential habitat, without the downsides of critical habitat

Surveys of landowners in the academic literature show that landowners value conservation and want to be known as good stewards of their land. They also show that landowners are more interested in conservation programs that are non-punitive and incentive-based.¹⁰ Many such programs exist and could be leveraged to help improve potential habitat to the point that it can help support species.

The simplest way to include landowners in species conservation is by encouraging them to voluntarily join and provide habitat for endangered species in exchange for protection against future regulations. Programs like Candidate Conservation Agreements with Assurances, Safe Harbor Agreements and Working Lands for Wildlife have proven successful at using private lands to protect endangered species.

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, November 28, 2018. <https://www.thecgo.org/research/cooperative-conservation-determinants-of-landowner-engagement-in-conserving-endangered-species>

7 Dean Lueck and Jeffrey A. Michael, “Preemptive Habitat Destruction under the Endangered Species Act,” *Journal of Law and Economics* 46 (2003): 51.

8 Amara Brook, Michaela Zint, and Raymond Deyoung, “Landowners’ Responses to an Endangered Species Act Listing and Implication for Encouraging Conservation,” *Conservation Biology* 17, no. 6 (2003): 1644; R. Dwayne Elmore, “Recovery of the Utah Prairie Dog: Public Perception and Cattle Grazing as a Management Tool” Ph.D. Dissertation, Utah State University, (2006): 7.

9 Megan Jenkins and Jennifer Morales. “Endangered and Threatened Species: Regulations for Designating Critical Habitat.” The Center for Growth and Opportunity. October 15, 2020. <https://www.thecgo.org/research/endangered-and-threatened-species-regulations-for-designating-critical-habitat/>

10 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, November 28, 2018. <https://www.thecgo.org/research/cooperative-conservation-determinants-of-landowner-engagement-in-conserving-endangered-species>

Working Lands for Wildlife, in particular, has proven popular with landowners, protecting more than seven million acres of habitat for 19 different species.¹¹ Providing regulatory haven through these programs gives landowners the stability they want while still helping conserve endangered species.

Some programs provide direct cash payments to engage private landowners in conservation. The Conservation Reserve Program improves species habitat by offering rental payments to farmers in exchange for removing land from production.¹²

Other programs led by nonprofit organizations also work to create financial incentives for private landowners to protect wildlife. For example, the American Prairie Reserve pays neighboring landowners for pictures of predators taken by camera traps, incentivizing them to allow species that may otherwise be seen as a threat onto their land.¹³ Similar financial incentives could be used to enhance habitat for species of all types.

Conservation easements can also be used to provide habitat for endangered species. Easements have proven an effective private conservation tool, protecting more than 32 million acres of land across the United States.¹⁴ Landowners usually donate the easement to a government agency or nonprofit group in exchange for federal tax deductions. Direct easement purchase options also exist. Federal and state governments could save specific habitat sites by purchasing easements, allowing private individuals to own the land while providing habitat.

In cases where habitat that is currently used by a species must be conserved, critical habitat designation can be useful. However, if the Services decide habitat should be *restored*, the more flexible, incentive-based tools listed above can help do so without alienating private landowners.

For example, in the case of the dusky gopher frog, establishing habitat using cooperative means before declaring critical habitat may have been a better approach. While we cannot speak to the motives of the plaintiffs in *Weyerhaeuser*, presenting them with a number of options to voluntarily participate in saving the frog could have resulted in a less contentious outcome.

Conclusion

Private landowners value conservation and are willing to participate in protecting endangered species when their rights and opinions are respected. As our research has shown, cooperative and voluntary methods, combined with clear and concise rules are the best way to include private landowners in conservation.

Rescinding the 2020 Final Rule and returning to no definition of habitat in the regulations would increase uncertainty, distance private landowners, and ultimately make species conservation more difficult. Only through true cooperation, enabled by clear and transparent regulation, can these species be protected in a meaningful and successful way.

11 Natural Resource Conservation Service. “Working Lands for Wildlife.” <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/initiatives/?cid=stelprdb1046975>

12 Farm Service Agency. US Department of Agriculture. “Conservation Reserve Program: Fact Sheet.” December 2019.

13 Huggins, Laura, Olivia Hansen and Harrison Naftel. “Cameras for Conservation: Direct Compensation as Motivation for Living with Wildlife.” The Center for Growth and Opportunity. 2021. <https://www.thecgo.org/research/cameras-for-conservation-direct-compensation-as-motivation-for-living-with-wildlife/>

14 National Conservation Easement Database, accessed November 11, 2021. <https://www.conservationeasement.us/>