

Comment on Proposed Rule: Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat

Department of the Interior; Fish and Wildlife Service; RIN 1018-BI76

We, more than 100 public officials representing 27 states, submit this comment prepared by the State Policy Network's (SPN) Center for Practical Federalism (CPF) in support of the United States Department of the Interior (DOI), Fish and Wildlife Service's (FWS) proposal to require robust economic analysis before making a landowner's land less valuable by designating it a critical habitat. We strongly recommend that FWS finalize its regulation as proposed in "Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat" (RIN 1018-BI76).

CPF works to equip state and local leaders with the tools, data, and policy they need to identify federal overreach and help to restore a balanced federal-state relationship. Our mission is to help states reclaim their constitutional authority by building long-term structural capacity.

We maintain a Federalism Scorecard that evaluates how well states are positioned to defend their constitutionally guaranteed autonomy in interactions with federal agencies. It assesses whether elected officials have meaningful oversight of state agencies and whether there are transparent, accountable processes for reviewing and responding to federal grants, guidance, and regulations. The scorecard highlights areas where targeted reforms, such as legislative review requirements or rolling back Chevron-style judicial deference to state agencies, can strengthen a state's capacity to resist coercive or unauthorized federal action and restore constitutional checks and balances at the state level.

In tandem, we operate a Subregulatory Guidance Tracker, which identifies active federal guidance documents that may be functioning as de facto rules, bypassing notice-and-comment requirements or imposing new conditions on states without statutory authority. Together, these tools support a growing network of policymakers working to institutionalize federalism protections at the state level and ensure federal agencies are held accountable when interacting with SLTT governments.

We strongly support the Service's proposed revisions to critical habitat designation procedures under the Endangered Species Act (ESA). These changes restore balance, accountability, and respect for both species protection and the livelihoods of American families. By requiring FWS to clearly weigh conservation benefits against, not only real-world economic costs, but also foregone private conservation efforts, the rule ensures that habitat designations are reasoned, transparent, and consistent with the Administrative Procedure Act. This proposal is not about

weakening protections—it is about strengthening them by making conservation credible, fair, and sustainable.

1. The Fish and Wildlife Service Should Not Abuse the Critical Habitat Designation to Destroy State and Local Economies, Jobs, and Family Incomes

The ESA exists to recover species, but has become, in the hands of some administrators, a blunt instrument that crushes American workers and small businesses. Critical habitat designations too often ignore the human cost, devaluing private property, stifling development, and eroding local tax bases that fund schools, roads, and public services. In states where forestry, agriculture, and energy jobs sustain families, these designations can wipe out livelihoods without delivering meaningful conservation gains.

Many farmers, ranchers, and foresters live on the land they work, viewing it as both a livelihood and a legacy. A critical habitat designation can be especially harsh where it prevents productive use of the primary business asset (land), adding to existing uncertainties from weather, input costs, and market fluctuations. We know that true environmental progress comes from empowering landowners as partners, not treating them as obstacles. This proposed rule's emphasis on upfront and robust economic impact assessments ensures federal agencies respect the economic backbone of our states and communities, providing the regulatory certainty needed for long-term investments in sustainable land management.

2. A Critical Habitat Designation Often Fails to Protect the Endangered Species Because It Encourages Nearby Landowners to Creatively Avoid Having Their Land Designated

Too often current critical habitat rules backfire on the species they are meant to save. We've seen this perverse incentive play out repeatedly: instead of fostering restoration, designations breed conflict and habitat loss, undermining Congress's intent to balance conservation with economic considerations. The proposed rule requires FWS to evaluate "probable incremental economic impacts" and weigh them against conservation value. It also requires consideration of the benefits of existing conservation efforts including current private and non-federal "conservation plans or agreements and their attendant partnerships" (90 FR 52596).

These requirements will help prevent counterproductive outcomes, encouraging proactive stewardship through transparent, balanced decision-making that complies with the Administrative Procedure Act's demand for reasoned agency actions.

3. Designating Critical Habitat Often Causes Economic Harm

Unfortunately, there are too many examples where unchecked designations inflict economic damage while offering little species benefit. In this section, we highlight three: The dusky gopher frog; black pine snake; and California gnatcatcher.

In the dusky gopher frog saga, the Fish and Wildlife Service designated 1,544 acres of private Louisiana timberland (unoccupied by frogs and lacking key habitat features like open-canopy longleaf pine forests) as critical habitat in 2012.¹ The designation reduced the land's development value by nearly \$34 million, sparked years of litigation, and did not improve conservation since owners had no incentive to restore it. The United States Supreme Court ultimately ruled that the designation was improper, but the damage was done: a family business was tangled in bureaucracy, eliminating the possibility that the landowner would be a future partner in habitat restoration.

Similarly, in Alabama, tens of thousands of acres of the Skipper family's timberland was designated as critical habitat for the black pine snake in 2020—despite only one sighting in 25 years. That designation threatened \$180 million in economic impacts, undermining the Skipper family's conservation efforts and property rights.² Yet the Service expected the designation to produce no additional conservation benefits for the species. Fortunately, a federal court recently struck down the designation, highlighting a process that ignored actual costs of the designation.

In California, the 2007 coastal California gnatcatcher designation across 197,000 acres was projected to cost \$640 million over 23 years, but independent analysis pegged the true figure at \$2.6 billion to \$3.2 billion due to delayed housing, higher land prices, and reduced development.³ This despite half the gnatcatcher's range *not* being subject to a critical habitat designation.⁴ The 2005 vernal pool species designation of over 850,000 acres was estimated to cost \$250 million, a number which grows to \$3.5 billion if you consider the broader ripple effects on jobs and families.⁵

These examples reveal a too common pattern: federal critical habitat designations burden Americans with hidden costs without sufficient gains in species recovery to justify the costs. And the costs of lost productivity, fewer homes for young families, and stalled infrastructure do not fall merely on rich landowners or businesses, but rather on everyday citizens. A Competitive

¹ Tate Watkins, "If a Frog Had Wings, Would It Fly to Louisiana?" PERC, available at: <https://www.perc.org/2018/07/13/if-a-frog-had-wings-would-it-fly-to-louisiana/>; Jonathan Wood and Tate Watkins "Critical Habitat's 'Private Land Problem': Lessons from the Dusky Gopher Frog" PERC, available at: <https://perc.org/2020/12/15/critical-habitats-unique-private-land-problem/>.

² Shawn Regan, "States and Landowners Are Key to Recovering Rare Species" PERC, available at: <https://www.perc.org/2025/09/15/states-and-landowners-are-key-to-recovering-rare-species-stop-penalizing-them/>

³ Brian Seasholes, "The Hidden Costs of Environmental Regulations" Reason Foundation, available at: <https://reason.org/commentary/the-hidden-costs-of-environmental-regulations/>.

⁴ Cornell Lab, "California Gnatcatcher Range Map" All about Birds available at: https://www.allaboutbirds.org/guide/California_Gnatcatcher/maps-range

⁵ Brian Seasholes, "The Hidden Costs of Environmental Regulations" Reason Foundation, available at: <https://reason.org/commentary/the-hidden-costs-of-environmental-regulations/>.

Enterprise Institute analysis of just a dozen critical habitat designations tallied billions in cumulative economic impacts, underscoring how these rules disproportionately hit rural and working-class communities without commensurate environmental wins. Broader studies of 159 species designations estimate over 60 million acres impacted (including 11 million privately owned) with more than \$10 billion in costs over 20 years, often ignoring non-biological factors outside the Service's expertise.⁶

4. The Proposed Rule Recognizes the Key Tradeoffs: Critical Habitat Designations Have Real Human Costs That Should Be Considered Before Making the Designation

This proposed rule reminds FWS staff to consider the true economic impacts of a designation, including impacts to “the economy of a particular area, productivity, jobs, and any opportunity costs” before making a designation (90 FR 52599). While it is imperative to protect endangered species, the decision to designate entire sections of land as critical should be carefully considered and should not be made in a vacuum that ignores the realities on the ground for the people who rely on the land today. By explicitly requiring the agency to perform this careful analysis and make such an analysis available to the public for comment, FWS brings greater transparency to the process, avoids unnecessary burdens on the use of land, and protects wildlife and the American people.

Further, the proposal recognizes that many private and non-federal conservation efforts already exist which can be equally protective of species. Rather than treating these efforts as an invitation for federal regulation, the proposed rule rightly requires FWS to strongly consider excluding such lands from critical habitat designation in order to foster further and more robust non-federal protection of the lands that sustain the endangered species.

This proposal rightly seeks to protect wildlife through incentives, not mandates, ensuring federal actions enhance both biodiversity and prosperity while providing regulatory stability and complying with the Administrative Procedure Act's requirement for reasoned decision making.

5. The Proposed Rule Enhances Federalism and Respects the Proper Role of States and Local Governments

Designating private or state-managed land as “critical habitat” is one of the most intrusive tools the federal government possesses to regulate land use within the states—often without compensation and with little regard for state and local priorities. FWS should be careful not to exercise this extraordinary federal authority unless the benefits are clear and clearly outweigh the costs and those cost estimates cannot ignore localized costs.

⁶ Brian Seasholes, "The Critical Nature of Critical Habitat Decisions," Reason Foundation Out of Control Policy Blog, available at: <https://reason.org/commentary/the-critical-nature-of-critical-hab/>.

States and local governments have the strongest interest in—and often the deepest knowledge of—managing the lands within their borders, funding schools and roads, protecting property rights, and balancing environmental goals with economic vitality. The proposed rule strengthens federalism by requiring FWS to give appropriate weight to the costs a designation will impose on the citizens and on state and local revenues, thus yielding the statutorily mandated evaluation of which carries a greater cost: inclusion or exclusion. This deference to states encourages cooperative conservation, while protecting vulnerable species and the landowners who steward their land while making our economy strong.

Conclusion

We urge the Service to finalize this rule promptly. It represents a step toward the ESA as originally intended by Congress—one that works for species, landowners, and taxpayers alike, delivering conservation without economic devastation. By removing overly broad mandates and focusing on reasoned, balanced decision-making, the Service will foster trust, voluntary stewardship, and lasting conservation outcomes.

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