

Memo: Preserve and Improve Rules that Promote Species Recovery

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The U.S. Fish and Wildlife Service has indicated its intention to repeal several Endangered Species Act rules adopted during the prior administration. According to PERC's research, three of those rules could, if properly implemented, improve incentives for private landowners to conserve endangered and threatened species, encourage greater state participation in species management, and reduce conflicts. For those reasons, PERC urges the Service to improve the rules where appropriate, rather than discard them without replacement.

Take of Threatened Species

Instead of repealing the Threatened Species Rule, 84 Fed. Reg. 44,753 (Aug. 27, 2019), PERC urges the Fish and Wildlife Service to retain the rule and develop guidance addressing when and how it will issue species-specific rules for threatened species. This rule formalized a shift begun during the Obama administration, which departed from the prior blanket prohibition in favor of the species-specific approach more than almost any other administration.

PERC's *Road to Recovery* report (attached) found that repealing the blanket prohibition in favor of species-specific rules would, if properly implemented, better align the incentives of private landowners with the interests of rare species. It would, for instance, encourage landowners to recover endangered species by rewarding them with reduced regulation when the species is upgraded to threatened status. Under the prior blanket rule, unfortunately, such incentives were the exception rather than the rule.

The Threatened Species Rule could also encourage greater state participation, by shifting management responsibility to states gradually as species reach recovery benchmarks. The prior rule exacerbated conflict in the delisting process by dramatically shifting responsibility entirely from the federal government to the states. In comments on the grizzly bear's status review, PERC explained that conflict over that species could have been reduced if management had gradually shifted to states under tailored 4(d) rules as populations neared and reached recovery goals.

Of course, how the Threatened Species Rule is implemented is of critical importance. That's why, instead of repealing the rule, PERC suggests the Service improve the rule by adopting guidance for how species-specific rules will be developed to encourage conservation. The Western Governors' Association, several states, and conservation organizations endorsed this solution in comments on the proposed Threatened Species Rule.¹ Developing such guidance now will ensure that species-specific rules are developed in accordance with the administration's priorities, while preserving the Threatened Species Rule's improved conservation incentives.

¹ See, e.g., <https://www.regulations.gov/comment/FWS-HQ-ES-2018-0007-61683> (Western Governors' Assoc. comment); <https://www.regulations.gov/comment/FWS-HQ-ES-2018-0007-60748> (Utah comment); <https://www.regulations.gov/comment/FWS-HQ-ES-2018-0007-49309> (MO Dept. of Conservation comment); <https://www.regulations.gov/comment/FWS-HQ-ES-2018-0007-62271> (AZ Dept. of Game & Fish comment); <https://www.regulations.gov/comment/FWS-HQ-ES-2018-0007-60748> (EDF, EPIC, & Sand County Found. comment).

Critical Habitat

In response to the Supreme Court's unanimous decision in *Weyerhaeuser*, the Service adopted two rules affecting its designation of critical habitat. The Service has indicated it intends to revoke these rules without replacement. Instead, PERC suggests improving the rules to enhance incentives for landowners to maintain and restore habitat features, to clarify how critical habitat will be designated and, to ensure designations will withstand judicial review.

In a new article published by *Environmental Law Reporter* (attached), PERC scholars identify factors affecting landowners' incentives and describe how these factors should inform critical habitat designations. The 2020 critical habitat rules are in some ways consistent with these findings, but in other ways not. The rules disfavor designation of areas that require significant habitat restoration, a situation where the *ELR* article finds critical habitat creates perverse incentives and that other measures would be more effective. But the rules also eliminate the Service's policy favoring designation of public land over private land, contrary to PERC's finding that designation of public land is more likely to produce positive outcomes and to avoid perverse incentives.

Under *Weyerhaeuser*, it is imperative that the Service have some sensible and consistent definition of "habitat" and process for producing designations that withstand judicial review. Repealing the rules without replacement, therefore, could provoke litigation and, ultimately, lead to the judiciary deciding these questions for the Service. Therefore, PERC suggests revising the rules to ensure that critical habitat designations consider the factors identified in PERC's research and that, as PERC explained in its prior comment (attached), such designations are principally guided by their effect on landowners' incentives to conserve and restore habitat.