



FWS Proposal to Dramatically Expand Critical Habitat Designations

- The U.S. Fish and Wildlife Service (FWS) has proposed a new regulation that would dramatically expand the areas that could receive critical habitat designations. Critical habitat is areas of habitat that the FWS has determined are essential to the survival or recovery of a species.
- If the rule is adopted, FWS would become, in effect, a National Zoning Commission with authority to close off areas that have never been occupied by a threatened or endangered species and are not presently (and may never be) necessary to their survival.
- FWS would justify the designations on the theory that, depending on the effects of climate change, the areas might become critical habitat at some undetermined point in the future. In the meantime, all federally-permitted activities in the area would need to be conducted in such a way as to insure that the designated areas are not destroyed or adversely modified.
- The proposed rule is a sharp departure from current law, which only allows critical habitat designations of unoccupied areas under special circumstances.

Current Rule	Proposed Rule
<p>FWS may only designate areas not currently occupied by a listed species as critical habitat if two conditions are met:</p> <ol style="list-style-type: none"> 1. The occupied habitat must presently be inadequate to insure the conservation of the species. 2. The unoccupied habitat must presently have physical or biological features that are essential to the conservation of the species. 	<p>FWS would be authorized to designate areas not currently occupied by the species as critical habitat even if:</p> <ol style="list-style-type: none"> 1. The occupied habitat is presently adequate to insure the conservation of the species. 2. The unoccupied habitat does not presently have, and may never have, physical or biological features that are essential to the conservation of the species.

- To make a designation, all FWS would have to find is that “it is reasonable to infer from the record that [the unoccupied areas] will eventually become necessary to support the species’ recovery.”

For example, if the FWS believes that a low-lying area currently occupied by a species may eventually become too hot, it may designate as critical habitat an upland area nearby in the hope that this area will serve as a future location to which the species could migrate.

- FWS attempts to justify this dramatic expansion of its authority, not on some substantive provision in the Endangered Species Act, but on the inferences it claims can be drawn from its newly-discovered reading of the 40-year old definition of “critical habitat.” As the Supreme Court has recently stated, however, “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate, we typically greet its announcement with a measure of skepticism.”
- If FWS believes that it needs new authority to deal with the projected effects of climate change on the habitat of listed species, it should ask Congress for that authority, and let Congress decide what, if anything, is necessary and appropriate. It should not seek to grab that power by creative re-interpretations of the 40-year-old Endangered Species Act.