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The Honorable Doug Burgum, Secretary
U.S. Department of Interior
1849 C. Street, NW
Washington, DC 20240

December 19, 2025

Submitted via regulations.gov

Re: Endangered and Threatened Wildlife and Plants;
Regulations for Designating Critical Habitat
Docket No. FWS-HQ-ES-2025-0048
90 Fed. Reg. 52,592 (Nov. 21, 2025)

Dear Secretary Burgum,

On behalf of Defenders of Wildlife ("Defenders") and our nearly 2 million members and supporters, please accept the following comments regarding the U.S. Fish and Wildlife Service's ("FWS" or "the Service") proposed rule to amend the Endangered Species Act's ("ESA") section 4(b)(2) implementing regulations. 90 Fed. Reg. 52,592 (Nov. 21, 2025) ("2025 Proposed Rule").

Defenders is a national conservation organization focused solely on conserving wildlife and habitat and safeguarding biodiversity. For 78 years, Defenders has been a leading advocate for innovative solutions to safeguard our wildlife heritage for generations to come.

Defenders strongly opposes the proposed rule. Critical habitat designation is central to the ESA's purpose of ensuring that all threatened and endangered species not simply survive but fully recover. The 2025 Proposed Rule, however, unnecessarily requires the Service to exclude land from critical habitat based on the unverified information of third parties, thereby undermining congressional intent.

INTRODUCTION

Biodiversity is the foundation of all life on Earth and is key to human well-being. Healthy, diverse wildlife and habitats pollinate crops, keep our waterways clean, and even buffer humans from diseases like Lyme and malaria. These critical services have wide-reaching impacts on our economies, food security, health, and more.

Yet biodiversity is in crisis. Today, approximately one million species are at risk of extinction globally. The majority of Earth's lands and seas have been significantly modified by human

activity. Populations of wild species continue to decline, putting ecosystems at risk of collapse.

The U.S. is not immune to the risk of ecosystem collapse. Over one-third of U.S. plant and animal species are at risk of extinction. Land cover conversion continues at an estimated rate of two football fields per minute. None of our ecosystems are shielded from the threats of ongoing habitat loss, climate change, pollution, and invasive species.

Unless we can arrest and reverse extinction trends, endangered species will continue to creep towards extinction. We will see hundreds of species not yet imperiled decline to the point that ESA protections may be required. And we will continue to witness biodiversity loss and experience the fallout of nature's collapse: more frequent pandemics, increased pollution, and deteriorating human well-being.

The U.S., however, benefits from the strong protections of the ESA—one of the world's most powerful laws for biodiversity conservation. When it passed the ESA, Congress sought to prevent extinction, recover imperiled species, and protect the ecosystems in which they live. Now is the time to uphold and strengthen the protections that the ESA affords.

The ESA has a strong track record; approximately 99% of U.S. species listed under the ESA are still with us, and hundreds of those species are on the road to recovery. Moreover, the ESA's protections slow the loss of habitat for imperiled species on federal lands.

Yet for the ESA to do the work it was intended to do, it must be implemented properly. The statute lays out a pathway for imperiled species: from science-based listing and critical habitat designations (under ESA section 4) to the prevention of harm by federal agencies (section 7) to recovery and ultimately delisting. But if implementation is thwarted—for example, if politics creep into the designation of critical habitats—then this pathway to recovery is blocked.

Two years ago, we celebrated the fiftieth anniversary of the ESA. This law was visionary, but it could have never foreseen where we find ourselves today—an extinction rate unprecedented in human history and one million species at risk. There is no common interest more widely shared and inclusive than healthy natural systems founded on thriving, native biodiversity. Failure to prioritize this common interest may mean continued loss of nature and its benefits to the detriment of all Americans.

Despite the urgency of the issue and the importance of the ESA as a strong tool to address it, the current rulemaking process proposes to return to previous regulatory changes from 2020 that made the statute less effective before being rescinded in 2022. The 2025 Proposed Rule undercuts a key protection for species by increasing the likelihood that crucial areas of federal land will be excluded from critical habitat designations.

BACKGROUND

When Congress enacted the ESA more than 50 years ago, it recognized that species cannot survive and recover unless their habitats are protected. It therefore sought to conserve not only endangered and threatened species, but also the ecosystems on which they depend. 16 U.S.C. § 1531(b). The statute defines "conserve" and "conservation" to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id*. § 1532(3). It defines critical habitat as "the specific area . . . essential for the conservation of the species." *Id*. § 1532(5)(A); *see also* ESA Amendments of 1978, Pub. L. No. 95-632, § 2, 92 Stat. 3751, 3751 (1978). Critical habitat designation and protection are fundamental to the ESA's ultimate mandate of ensuring listed species fully recover.

As the Service has previously recognized, critical habitat designation serves a wide range of the ESA's conservation goals. *See, e.g.*, 81 Fed. Reg. 7,414, 7,414–15 (Feb. 11, 2016) ("2016 Rule"). Designating critical habitat facilitates the implementation of section 7(a)(1), which requires all federal agencies to use their authorities to further the ESA's conservation purposes, by identifying specific areas to focus their efforts. *See* 16 U.S.C. § 1536(a)(1); 2016 Rule, 81 Fed. Reg. at 7,414. Similarly, designation also helps non-federal entities (state, tribal, and local governments, NGOs, and individuals) to focus their conservation efforts on specific areas essential to recovery. *Id*. When critical habitat designation occurs concurrently with listing (as the statute generally requires, 16 U.S.C. § 1533(b)(6)(C)), "it provides a form of early conservation planning guidance . . . to bridge the gap until the Services can complete recovery planning." 2016 Rule, 81 Fed. Reg. at 7,414–15.

COMMENTS

The ESA already grants FWS wide discretion to exclude land from designation when the costs of doing so greatly outweigh the benefits or when designation would otherwise be harmful to the species. The proposed regulation, however, would inappropriately put a thumb on the scale in favor of excluding even more areas that species need to survive and recover. Indeed, the proposed regulation states that FWS "shall" exclude areas when the costs of designating them outweigh the benefits (except when it can be shown that extinction would otherwise result). 2025 Proposed Rule, 90 Fed. Reg. at 52,599. This requirement is contrary to the plain language of the ESA, which uses the word "may" and does not require FWS to exclude any area based on economic impacts. *See* 16 U.S.C. § 1533(b)(2).

Of particular concern, the proposed rule would reverse FWS's 2016 policy position that FWS will generally not exclude federal lands from critical habitat designations. *See* 81 Fed. Reg. 7,226, 7,231–32 (Feb. 11, 2016) ("2016 Policy"). Federal agencies and federal lands have a special responsibility to protect and recover endangered and threatened species. But under the proposal, FWS would unduly privilege the concerns of permittees and licensees on federal land in making critical habitat designations.

The 2025 Proposed Rule also would require FWS to accept as true the assertions offered by state, tribal and local governments and private interests when determining whether to exclude an area from designation, unless FWS has information specifically rebutting that evidence. The proposal would require FWS to defer to expert or "firsthand" information on impacts "outside the scope of the Service's expertise" when deciding on critical habitat exclusions, unless FWS has information rebutting that outside information. *See* 90 Fed. Reg. at 52,599. Not only does this inappropriately presume the validity of such information, which could include speculative economic analyses by self-interested parties, but it arguably precludes FWS from investigating the evidence and collecting further data regarding such claims. Consequently, non-FWS entities will have the ability to drive critical habitat exclusions.

For these reasons, and as detailed further below, Defenders urges FWS to reject the 2025 Proposed Rule. At a time when scientists are repeatedly warning that species in the U.S. and across the globe are disappearing at an alarming rate, FWS should not be reducing protections for listed species. FWS is already fully capable of making necessary critical habitat exclusions with its current authority under the ESA and implementing regulations. FWS does not need any additional authority to do so, and the proposed regulation would violate both the letter and spirit of the ESA.

FWS Has Not Provided "Good Reasons" for Its Change In Position

When an agency changes its mind and reverses its position, at a minimum: the agency must announce the change, the new policy must be "permissible under the statute," there must be "good reasons" for it, and the agency must believe it to be better. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*FCC v. Fox*"). If an agency cannot meet this standard, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–559, directs reviewing courts to "hold unlawful or set aside" the action as arbitrary and capricious. *Id.* § 706(2); *FCC v. Fox*, 556 U.S. at 515. The Service has not come close to meeting this standard.

As an initial matter, the Service neither acknowledges that its new proposed policy is a change of position nor articulates a satisfactory rationale for this change. The 2025 Proposed Rule would reinstate regulations the Service adopted in 2020, 85 Fed. Reg. 82,376 (Dec. 18, 2025) ("2020 Rule"). *See* 2025 Proposed Rule, 90 Fed. Reg. at 52,594–95. The Service, however, revoked the 2020 rule in 2022. 87 Fed. Reg. 43,433 (July 21, 2022) ("2022 Rule"). In revoking the 2020 rule, FWS explained that it was problematic for three reasons: (1) it undermined the Service's role as the expert agency; (2) it constrained the Service's discretion, thus decreasing the agency's ability to further the conservation of endangered and threatened species through designation of their critical habitats; and (3) it did not further the goal of providing clarity and transparency and instead created confusion. *Id.* at 43,434–35. In proposing to reinstate the 2020 Rule, FWS has failed to address any of these concerns.

As the Service acknowledged in 2022, it has always possessed the power to decide when and how to exclude areas as critical habitat, and that power is committed to its discretion. If FWS now wishes to depart from its longstanding approach to critical habitat designations by requiring a specific balancing procedure that constrains its discretion and ability to function as an expert agency, it must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *FCC v. Fox*, 556 U.S. at 515).

Next, the Service's position is not permissible under the statute. As set forth throughout this comment, the 2025 Proposed Rule is contrary to the text, purpose, and structure of the ESA, as well as Congress's intent in enacting it. As discussed below, the ESA grants FWS significant discretion in determining whether to exclude—or not exclude—parcels of land from critical habitat. Nevertheless, the 2025 Proposed Rule constrains that discretion and undermines the ability of the Service to exercise its independent judgment by requiring it to defer to the self-interested statements of third parties. Such controls on agency discretion and expertise contradict Congress's clear direction that FWS must make economic decisions based on the facts and science in individual cases.

Additionally, the Service's position is not based on an examination of the relevant data or other "relevant factors." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."). The Service considers no data—no data on habitat loss in the U.S.; no data on the frequency or scope of past decisions to exclude (or include) land based on economic, national security, or other factors; and no data on the impact that requiring the Service to follow the proposed strict balancing test may have on future designations or listed species.

These deficiencies are severe. The Service has neither fully acknowledged nor provided a satisfactory explanation for this change in position. It has failed to base its decision on an examination of relevant data or other good reasons for its new position. And it has failed to grapple with the impermissible constraints this proposal will place on the agency. If it finalizes the 2025 Proposed rule, FWS's action will be arbitrary and capricious.

The Proposed Rule Is Inconsistent with the Language and Purpose of the ESA

The 2025 Proposed Rule improperly seeks to rewrite the statute by stripping the Service of the discretion to make individual determinations about whether to designate any particular area as critical habitat. Depriving the Service of this statutorily guaranteed discretion is illegal and cannot be squared with either the text or the purpose of the ESA.

FWS must designate critical habitat for a species concurrently with that species' listing as threatened or endangered. 16 U.S.C. § 1533(a)(3)(A)(i). Occupied critical habitat is defined

to include “the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.” *Id*. § 1532(5)(A)(i). Unoccupied critical habitat is defined to include “specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.” *Id*. § 1532(5)(A)(ii).

The agency must take into consideration the economic impact, the impact on national security, and any other relevant impact of the critical habitat designation and may exclude any area from critical habitat if it determines that the benefits of an exclusion outweigh the benefits of designating the area as critical habitat:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary *may* exclude any area from critical habitat *if he determines* that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. § 1533(b)(2) (emphasis added).

The first sentence of section 4(b)(2) imposes the requirement that the Secretary consider economic and other impacts. And the second sentence authorizes the Secretary to act on his consideration by providing that he *may* exclude an area if he determines the benefits of exclusion outweigh the benefits of designation. *Id*. Congress’s purposeful choice of the word “may,” rather than “shall,” reflects the legislative branch’s intent for the Service to retain the discretion to designate a “particular area as critical habitat” for an imperiled species, even where the evidence at the time of designation indicates that the costs of designating that “particular area” outweigh the benefits. *See Id*.

Both courts and FWS have previously recognized that this discretion is central to the ability of the agency to carry out its ESA obligations. In promulgating its 2016 Policy, the Service explained that “the decision to exclude is always discretionary,” and, “[u]nder no circumstances is exclusion required under the second sentence of section 4(b)(2).” 2016 Policy, 81 Fed. Reg. at 7,229. Likewise, in *Building Industry Association of the Bay Area v. U.S. Department of Commerce*, the Ninth Circuit held that the entire exclusionary process is discretionary and there is “no particular methodology that the agency must follow.” 79, F.3d 027, 1033 (9th Cir. 2015). The court cited a House Report in support of this conclusion, which states that the agency is “not required to give economics or any other ‘relevant impact’ predominant consideration . . . in specification of critical habitat.” *Id*. (quoting H.R.

REP. NO. 95–1625 at 17 (1978)). The court further explained that an agency's "obligation" to consider the economic impact of a critical habitat designation derives from the first sentence of 4(b)(2), which only requires that an agency take economic impact into consideration. *Id*. (citing *Bennett v. Spear*, 520 U.S. 154, 172 (1997)). And the Supreme Court reached the same conclusion in *Weyerhaeuser Company v. U.S. Fish and Wildlife Service*, 586 U.S. 9, 25 (2018) ("The use of the word 'may' certainly confers discretion on the Secretary"). Nonetheless, the 2025 Proposed Rule states that FWS *shall* exclude areas when the costs of designating them outweigh the benefits, which directly contradicts the ESA's discretionary language.

Indeed, any critical habitat designation process must be consistent with the purpose of the ESA, which is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). In enacting the ESA, Congress recognized that:

> Man can threaten the existence of species of plants and animals in any of a number of ways. . . . The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat. . . . [T]here are certain areas which are critical which can and should be set aside. It is the intent and purpose of this legislation to see that our ability to do so, at least within this country, is maintained.

H.R. REP. NO. 93-412 (1973).

Protection of habitat is central to the conservation of imperiled species. Designation of critical habitat is a key tool authorized by the ESA to ensure habitat, including unoccupied habitat needed for recovery, is conserved. The new rule will likely increase exclusions because putatively adversely affected parties will have a greater say in the Service's balancing and, as explained below, the Service will have constrained its own ability to consider and rebut that information or to determine that, even if accurate, such information is outweighed by the benefits of designation. FWS's efforts to constrain its own decisionmaking discretion and deprioritize conservation conflict with Congress's clear mandate to recover imperiled species.

The Proposed Rule Requires FWS to Weigh Speculative Economic Considerations Over Species Conservation and Would Allow Third Parties to Drive the Exclusion Process

In the 2025 Proposed Rule, FWS proposes to weigh heavily the evidence offered by states, tribes, local governments, and private interests when determining whether to exclude an area from designation, unless it has information specifically rebutting that evidence. The validity of economic impact assertions by a wide range of third parties is assumed, allowing non-FWS entities undue control over the designation and exclusion process. Although the ESA requires that FWS take economic considerations into account, it does not countenance weighing these interests over species conservation. To the contrary, the 2025

Proposed Rule would contravene Congress's intent that the Service balance those interests.

The Proposed Rule Illegally Privileges Third-Party Economic Impact Assertions in Contravention of the ESA's Mandate That FWS Designate Critical Habitat Based on the Best Scientific Data Available

Of particular concern, the 2025 Proposed Rule creates new presumptions that any information submitted by state, tribal, and local governments, as well as private interests, is valid unless FWS has specific information in its possession to rebut that information. The ESA requires that critical habitat designation decisions be made on the basis of the best scientific data available. 16 U.S.C. § 1533(b)(2). That necessarily requires FWS to assess any information provided to ensure that it is accurate and reliable. The 2025 Proposed Rule, however, contradicts the best available science standard. The 2025 Proposed Rule would require FWS to accept as valid speculative economic analyses (including land development proposals and valuations). It appears FWS intends to foreclose its authority to investigate the assertions submitted and collect further data regarding such claims, or to determine that the costs of including areas as critical habitat, even accepting all economic impact assertions as true, do not outweigh their conservation value to a species. If FWS cannot fully evaluate information and assertions presented and weigh them against the conservation needs of the species, exclusions could become the rule rather than the exception. Indeed, this would encourage private parties to refuse to collaborate with FWS on conservation initiatives and research to ensure the former's information is the only data available.

Such a blatant weighting of evidence against critical habitat designation is simply not necessary to accommodate reasonable economic concerns. Research shows that critical habitat designations do not, in theory or practice, hamstring private development. In fact, the ESA only restricts federal actions destroying or adversely modifying critical habitat; private activities that do not require federal permits or funding are unaffected. Properly implemented, critical habitat designations advance the ESA's recovery goals by striking a science-driven balance between conservation and economic activity. In fact, FWS has generally been cautious in its designation of critical habitat in part because of political and economically driven concerns.[1]

As Defenders' research demonstrates, FWS does not need additional authority to determine whether to exclude areas from critical habitat. In June of 2020, Defenders produced a report with the results of a study of 4(b)(2) exclusions. Seventy-six critical

[1] Jacob W. Malcom and Ya-Wei Li, Data contradict common perceptions about a controversial provision of the US Endangered Species Act, PNAS (Dec. 14, 2015), https://www.pnas.org/content/112/52/15844.

habitat designations were examined, thirty-one of which had exclusions.[2] In sixteen out of seventy-six instances, an exclusion was included in the final rule that was not included in the proposed rule. The report concludes that critical habitat exclusions increased dramatically in the 2000s, suggesting that FWS already has the necessary discretion to exclude areas from critical habitat designations when warranted.

The Proposed Rule Deprives FWS of Its Role as Expert Agency by Illegally Delegating Factfinding to Third Parties

"[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making." *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004). Nevertheless, the 2025 Proposed Rule delegates FWS's factfinding responsibilities to non-federal third parties, by requiring the agency accept information about "the benefits of including or excluding any particular area" provided by these parties as accurate and reliable, and preventing the agency from independently investigating the information, whenever alleged impacts involve a broad range of "areas that may be outside the scope of the Service's expertise." 2025 Proposed Rule, 90 Fed. Reg. at 52,599.

Congress, however, delegated the responsibility to determine the best available science and weigh the benefits of designating any particular area as critical habitat to the Secretary. 16 U.S.C. § 1533(b)(2). FWS cannot now subdelegate that authority to non-federal third parties. *U.S. Telecom Ass'n*, 359 F.3d at 565 (explaining that "subdelegations" of authority that Congress vests in an agency "to outside parties are assumed to be improper absent an affirmative showing of congressional authorization"). This is especially true when the third parties "will not share the agency's 'national vision and perspective,'" and may pursue goals inconsistent with those of the agency and the underlying statutory scheme." *Id*. at 565–66 (citation omitted).

Here, FWS proposes to deem presumptively correct the assessments of impacts made by parties that have a vested interest in preventing critical habitat designations—state, tribal and local governments, permittees, lessees, and those applying for contracts on federal lands. These entities are not required to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). Rather, these third parties will seek to further their own economic gain. Congress, however, mandated that the Federal government conserve "the ecosystems upon which endangered species and threatened species depend." *Id*. § 1531(b). FWS cannot disregard that instruction by twisting the designation process to favor a narrow set of short-term economic interests.

[2] Andrew Carter et al., Limited Patterns Among ESA 4(b)(2) Critical Habitat Exclusions (June 2020), https://defenders-cci.org/publication/esa-4b2-critical-habitat-exclusions/.

FWS Has Failed to Explain Why It Presumes Third-Party Information to be Valid

As discussed, the 2025 Proposed Rule creates a new presumption that putative economic information submitted by private interests is valid and restricts the ability of the Service to independently investigate or validate that information. If the 2025 Proposed Rule is adopted the Service will for the first time presume the validity of this information despite the historic animosity state and local governments, and permittees and lessees of federal lands have shown for critical habitat designation. And in proposing to establish this presumption, the Service ignores the high likelihood that information could be self-interested and at odds with the agency's statutory obligation to ensure the conservation of listed species and the habitats on which they depend. *See* 16 U.S.C. §§ 1531(b), 1536(a)(1).

Despite this significant departure from FWS's past policy and practice, the agency has failed to provide any rationale for establishing this presumption. One of the "basic procedural requirement[s] of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino*, 579 U.S. at 221. The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted). That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." *Encino*, 579 U.S. at 221 (quoting *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

How the Service came to establish this presumption is at best opaque. Although the proposal states that this presumption only applies to expert and firsthand information that is outside the Service's scope of expertise, the agency does not explain why information on "non-biological impacts" are within the expertise of third parties such as local governments or permit holds. In fact, the Service assumes that the new presumption is correct without any support or analysis. This failure to explain the basis for the 2025 Proposed Rule is arbitrary and capricious.

Federal Lands Should Not Be Excluded from Critical Habitat

Federal lands play a vital role in conserving endangered and threatened species. The proposal would put a heavy thumb on the scale in favor of excluding even more areas that listed species need for survival and recovery. Of particular concern, the 2025 Proposed Rule would reverse FWS's existing policy that generally disfavors excluding federal lands from critical habitat designation. The Service has previously explained that "Federal lands should be prioritized as sources of support in the recovery of listed species" and that "designation of critical habitat [should focus] on Federal lands." 2016 Policy, 81 Fed. Reg. at 7,231–32. This presumption in favor of designating federal lands is the longstanding practice of the Service, as evidenced by, for example, the critical habitat designation for the Gunnison sage grouse, which notes: "On Federal lands where agencies are required to conserve endangered species (section 7(a)(1) of the Act) and consult on projects that may adversely affect species (section 7(a)(2) of the Act), it is difficult to show how an exclusion

outweighs inclusion." 79 Fed. Reg. 69,312, 69,321 (Nov. 20, 2014); *see also* 77 Fed. Reg. 71,876, 72,006 (Dec. 4, 2012) (in designating northern spotted owl critical habitat, FWS "prioritized the inclusion of Federal lands over other land ownerships"); 75 Fed. Reg. 76,086, 76,097 (Dec. 7, 2010) (refusing to exclude from polar bear critical habitat federal lands "in which oil and gas exploration, development, production, and transportation activities are occurring or are planned in the future").

Contrary to the 2025 Proposed Rule's emphasis on excluding federal lands from critical habitat, the presumption in favor of designating federal lands is inherent in the ESA itself. Section 7 of the ESA imposes a substantive obligation on federal agencies to "utilize their authorities in furtherance of . . . the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). The Service acknowledges this obligation in the 2025 Proposed Rule, *see* 90 Fed. Reg. at 52,695, but fails to grapple with how this reversal in policy might undermine the ability of federal land managers to carry out this obligation.

Similarly, federal agencies must also "in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2). This consultation process is specifically designed to lessen the impact of federal or federally permitted activities on species and their critical habitats. In fact, critical habitat imposes no burdens on states or private parties absent a federal nexus and the ensuing obligations to conduct an ESA section 7 consultation. It makes no sense, therefore, to encourage exclusion of federal lands from critical habitat designation, when Congress developed a scheme where important legal protections for critical habitats are derived from this federal nexus.

Furthermore, because federal lands are managed for multiple uses, critical habitat designations are often essential for ensuring that the recovery of listed species is prioritized in management decisions. For example, the Canada lynx is a threatened species that relies on connected forest habitats. It currently has nearly 39 thousand square miles (twenty-five million acres) of critical habitat, sixty percent of which is on federal lands. 79 Fed. Reg. 54,782, 54,803 (Sept. 12, 2014). In the absence of critical habitat designation on federal lands, those forests would be vulnerable to timber harvesting, habitat fragmentation from road development for that timber harvest, recreation, and energy and mineral development projects.

Similarly, the Pacific Coast distinct population segment of the Western snowy plover is a threatened species that relies on undeveloped and undisturbed sandy beaches and connected inland dune systems for breeding, foraging and nesting as well as overwintering. It currently has 24,500 acres of listed critical habitat, 6,000 of which are on federal lands managed by multiple federal agencies, including FWS, National Park Service, U.S. Forest Service, and Bureau of Land Management. 77 Fed. Reg. 36,728, 36,754–73 (June 19, 2012). Because these federal lands may be managed for recreation, the federal

land designation alone would not adequately protect the species in the absence of an overlapping critical habitat designation. Critical habitat designation ensures that management decisions—through the section 7 consultation process—prevent destruction of or adverse modification to plover habitat that might otherwise occur due to human disturbances such as motorized recreational vehicle use.

The 2025 Proposed Rule flies in the face of Congress's express intention in Section 7 of the ESA that federal agencies hold a special responsibility to protect species and their critical habitats from the impacts of federally funded or permitted activities. It would instead elevate the interests of extractive industries, such as grazing and mining, that are already allowed to use federal lands for private profit at well below market rates, over species protection. In fact, the 2025 Proposed Rule specifically highlights the possibility that a lessee or permittee might have to modify its operations in response to a critical habitat designation as the kind of cost that FWS would now have to take into account and give weight to in deciding whether to exclude an area from designation.

Accordingly, Defenders strongly urges FWS to retain the current presumption against excluding habitat on federal lands.

Areas Under Conservation Plans Should Be Reviewed on a Case-By-Case Basis

Under current practice, FWS already routinely considers excluding areas from critical habitat when conservation plans, agreements, or partnerships authorized under section 10, 16 U.S.C. § 1539, are in place. The 2025 Proposed Rule, however, creates a presumption that such areas will not be included in future critical habitat designations. 2025 Proposed Rule, 90 Fed. Reg. at 52,599. Defenders opposes that presumption.

The current practice of considering such areas on a case-by-case basis is the better approach. Although areas that are subject to conservation plans or agreements may provide sufficient protection for the species and its habitat, these plans and agreements are not always closely monitored. Under the proposal, FWS will only consider whether the permittee is properly implementing the conservation plan or agreement but will not evaluate whether the plan or agreement is effective in conserving the species. It is essential that FWS fully consider both the benefits of any applicable conservation agreement as well as any gaps in protection that may result either from its design or from a lack of adequate implementation.

FWS should never reflexively exclude an area because of the mere existence of a plan, regardless of its effectiveness. Where critical habitat would provide additional conservation value, the land covered by a plan should be designated.

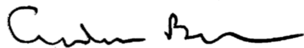
* * *

Successful conservation in this era of biodiversity loss requires expanding, not contracting, the tools we have to conserve wildlife and the habitats on which they depend. Critical

habitat is a historically underutilized conservation tool that, properly implemented, can yield significant benefits for species. The 2025 Proposed Rule inappropriately puts a heavy thumb on the scale in favor of development interests over species conservation. And it does so in a way that violates the plain language and intent of the ESA. FWS already possesses all the discretion it needs to balance economic interests and determine whether an area should be excluded from critical habitat designation. Accordingly, we urge FWS to withdraw the 2025 Proposed Rule.

We appreciate your consideration.

Sincerely,



Andrew Bowman
President & CEO
Defenders of Wildlife