



PRESS RELEASE

Attorney General Frosh Opposes Trump Administration Proposal to Exclude Critical Habitat from Endangered Species Act Protections

BALTIMORE, MD (October 8, 2020) – Maryland Attorney General Brian E. Frosh today led a multistate coalition in filing a [comment letter](#) opposing the U.S. Fish and Wildlife Service’s (FWS) proposal to establish a new, unlawful process for excluding areas from critical habitat designations under the federal Endangered Species Act. If finalized, the proposal is likely to reduce drastically the areas protected as critical habitat, further endangering the conservation of our nation’s most imperiled species. In the comment letter, the coalition of 17 attorneys general state that FWS’s proposal is contrary to the plain language of the Endangered Species Act and arbitrarily limits protection for endangered and threatened species required by the Act.

“Protection of critical habitat is an essential factor in achieving the recovery of our nation’s most imperiled species,” said Attorney General Frosh. “The Trump Administration would allow exploitation of that habitat in violation of the Endangered Species Act. The proposed rule would elevate economic interests over the needs of endangered species and cripple our ability to achieve species recovery.”

Enacted under the Nixon Administration in 1973, the Endangered Species Act is intended “to halt and reverse the trend toward species extinction, whatever the cost.” Under Section 4(b)(2) of the Endangered Species Act, FWS is required to designate critical habitat for listed species based on “the best scientific data available” and after considering economic, national security, and other relevant impacts. Areas designated as critical habitat are provided with significant protections to allow species to recover to the point that they no longer need to be listed. FWS “may” exclude areas of critical habitat if the agency determines that the benefits of exclusion outweigh the benefits of designation.

On September 8, 2020, FWS published a proposed rule that would establish a new process for that exclusion analysis. If finalized, FWS would be required to consider excluding areas from a critical habitat designation when a “proponent of excluding a particular area” presents “credible information” supporting exclusion. In conducting such an analysis, FWS would have to defer to outside “experts” and “sources” regarding “nonbiological impacts” that are outside the scope of FWS’s expertise. Furthermore, the proposed rule would require FWS to exclude any area where it determines that the benefits of exclusion outweigh the benefits of inclusion unless doing so would result in the extinction of a species. This would likely drastically reduce the amount of critical habitat designated and protected under the Endangered Species Act.

In the comment letter, the coalition argues that FWS's proposal is unlawful and should be abandoned because:

- The proposal is contrary to the plain language and overarching conservation purposes of the Endangered Species Act;
- The proposal is arbitrary and capricious under the Administrative Procedure Act because FWS fails to provide any reasoned explanation for the proposal; and
- FWS incorrectly suggests that the proposal is subject to a categorical exclusion under the National Environmental Policy Act, or that it may complete review at a later date, despite the rule's major substantive changes that are likely to cause significant environmental effects on imperiled species and their habitat.

Attorney General Frosh is joined by the attorneys general of California, Massachusetts, Connecticut, Illinois, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin, as well as the City of New York in filing the comment letter.