

# 18 states challenge Obama admin's critical habitat rules

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Published: Wednesday, November 30, 2016

Eighteen states are challenging the Obama administration's recent changes to critical habitat rules, asserting they allow the federal government to designate "entire states" as habitat for imperiled species.

Led by Alabama, the states filed a [lawsuit](#) yesterday in the U.S. District Court for the Southern District of Alabama. The legal challenge comes 10 months after the administration finalized a series of controversial updates to critical habitat rules under the Endangered Species Act ([Greenwire](#), Feb. 5).

Those rules changed the way federal managers determine critical habitat. That designation only applies to activities with a federal nexus, mandating that agencies consult with the Fish and Wildlife Service or the National Marine Fisheries Service before approving or funding any projects.

The states' lawsuit takes particular aim at a rule that gives FWS and NMFS more flexibility in including so-called unoccupied habitat in a critical habitat designation.

Previously, the agencies only could consider such habitat — which isn't a current home to the species — if they determined that the species could not recover without it. In other words, occupied habitat came first.

The new rule got rid of that provision. FWS and NMFS can now consider both occupied and unoccupied habitat at the same time, rather than first trying to make a conservation plan work with just occupied habitat. In its February notice of the rule, the agencies argued that the previous "rigid step-wise approach" can sometimes result in larger, but less effective, conservation.

But the lawsuit asserts that the rule, through that change and others, unlawfully expands the government's control over state lands and waters.

"This is nothing more than yet another end run around Congress by a president who is desperate to establish his environmental legacy by any means necessary before his time in office ends in less than 60 days," Texas Attorney General Ken Paxton (R) said in a statement. "The Obama administration is hiding behind bogus rules to perpetrate land grabs, kill energy projects and block economic development."

Along with Alabama and Texas, the states included in the lawsuit are Alaska, Arizona, Arkansas, Colorado, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, South Carolina, West Virginia, Wisconsin and Wyoming. New Mexico is also challenging the rules but is represented by its Department of Game and Fish.

In a statement, FWS emphasized that critical habitat designations are required by the Endangered Species Act. FWS officials "endeavored to make commonsense changes that would clarify criteria and procedures and provide for a more predictable and transparent critical habitat designation process," according to the agency.

"These revisions largely reflect how we have designated critical habitat during the last 15 years," FWS said in the statement. "Allegations of greatly expanded authority and political intent are unfortunate and without merit. One need only look at our recent designations to see that."

The nonprofit Center for Biological Diversity pledged to intervene in the case and "make sure [President-elect Donald] Trump doesn't sell out species on the brink of extinction."

"This attack on much needed protections for endangered species habitat is unfounded and out of step with strong majorities of the American public that want to see America's wildlife saved from extinction," Brett Hartl, CBD's endangered species policy director, said in a statement. "There is simply no way to save endangered species without protecting the places they live."

The group has previously criticized another change FWS and NMFS made in its critical habitat rules to the definition of adverse modification, calling it a "giveaway to powerful special interests." But Hartl said the group supports the changes to unoccupied habitat that are at the center of the states' lawsuit.

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