



September 4, 2020

Comments regarding:

**August 5, 2020 Proposed Rule to Add a Definition of “Habitat” to Regulations
Implementing Section 4 of the Endangered Species Act**

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comment Processing
Attn: Docket No. FWS-HQ-ES-2020-0047
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The Energy and Wildlife Action Coalition (EWAC)¹ submits these comments in response to the U.S. Fish and Wildlife Service’s (USFWS) and National Marine Fisheries Service’s (NMFS) (collectively, Services) August 5, 2020 Proposed Rule to Add a Definition of “Habitat” to the Services’ Regulations Implementing Section 4 of the Endangered Species Act (Proposed Rule).² The Services’ Proposed Rule comes as a result of the United States Supreme Court decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, in which the Court held that in order for the Services to designate a geographic area critical habitat pursuant to Endangered Species Act (ESA) section 4, the area must be “habitat” in the first place, and that while “critical habitat” was defined in the ESA, there was no such definition for “habitat” generally.³

EWAC appreciates that in the Services’ Proposed Rule, the agencies recognize that under the “text and logic of the statute, the definition of ‘habitat’ must inherently be broader than the statutory definition of ‘critical habitat’” and less broad than a species’ range.⁴ EWAC believes, however, that the Services’ Proposed Rule could be strengthened and avoid future potentially adverse unintended consequences with changes as we describe below. In particular, EWAC’s recommendations aim to avoid scenarios where habitat has never been occupied or does not have the requisite attributes necessary to support a life process of the subject species at the time of designation or revision, which is the appropriate timeframe for determining whether an area is habitat. However, EWAC’s proposed modifications preserve the Services ability to designate unoccupied habitat where areas are truly “essential to the conservation of the species” pursuant to its authority under the ESA.⁵ Additionally, EWAC’s recommendations seek to clarify the purpose of the rulemaking – to inform designation of critical habitat – and avoid application in other ESA contexts creating unintended consequences.

In structuring this comment letter, EWAC thought it best to first provide its comments on the alternate definitions of habitat proposed by the Services, and then proffer a third option EWAC

¹ EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

² Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 47,333 (proposed Aug. 5, 2020).

³ 139 S. Ct. 361, 363 (2018).

⁴ 85 Fed. Reg. 47,334.

⁵ See 16 U.S.C. § 1532(5)(A)(ii). As clarified in the final rulemaking amendments to the ESA section 4 regulations, in order to designate unoccupied areas as critical habitat, the unoccupied area must “have one or more of the physical or biological features essential to the conservation of the species” and there must be “high confidence that an area designated as unoccupied critical habitat will actually contribute to the conservation of the species.” Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020, 45,022, 45,045 (Aug. 27, 2019).

believes may go further in capturing the nuances of what constitutes actual species habitat consistent with the ESA.

I. Comments on the definitions of habitat provided in Proposed Rule

In the Proposed Rule, the Services proffered a proposed definition for “habitat” and an alternative definition:

1. The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species. (Proposed Definition).
2. The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist. (Alternative Definition).

In the Proposed Rule, the Services requested comment on both the Proposed Definition and Alternative Definition. In particular, the Service solicited comments on (1) whether the terms “use” or “depend upon” sufficiently differentiates areas that could be considered habitat; and (2) the appropriateness of the second sentence of the Alternative Definition, providing that habitat must presently contain the necessary attributes to support the listed species at issue. We address each issue in turn.

A. Whether “use” or “depend upon” better differentiates areas that could be considered habitat.

EWAC recommends that the Services retain the phrase “depend upon” in any final definition. EWAC’s reasoning is primarily based on the fact that one of the ESA’s stated purposes is “to provide a means whereby the ecosystems upon which endangered species and threatened species *depend* may be conserved[.]”⁶ Thus, “depend upon” is consistent with the purpose of the ESA. EWAC contends that the term “depend upon” is superior to “use” because it connotes that the physical places that fall within the definition actually contribute to the survival, growth, and/or reproduction of individual members of the species in question. “Depend upon” is defined to mean “rely upon.”⁷ While individuals of a species may incidentally “use” an area without relying upon it, such areas are not necessarily habitat for the species. EWAC contends that introducing the term “use” has the potential to cause confusion and inconsistencies.

For example, on rare occasions Peninsular bighorn sheep native to the San Jacinto Mountains in southern California wander onto golf courses on the Valley floor. In this scenario, individual sheep use the golf courses in the sense that they are present on them, but they do not rely on the golf courses for their life processes; therefore, the golf courses are not habitat. In contrast, certain species of anadromous salmon spend the majority of their lives in the ocean, but

⁶ 16 U.S.C. § 1531(b) (emphasis added).

⁷ See New Oxford American Dictionary 466 (3d ed. 2010).

their habitat extends to the streams and rivers that the individual fish navigate in order to get to and from natal spawning grounds that are frequently unoccupied, but upon which they depend for reproduction.

B. Whether “habitat” should presently contain necessary attributes to support listed species?

EWAC agrees the definition of habitat should clearly require that the area presently contain necessary attributes to support the listed species in question, and that necessary attributes of habitat include the suite of abiotic and biotic resources and ecological processes the relevant species depends upon to carry out one or more life processes. Determining habitability is a threshold requirement to an area being “habitat” and consistent with the Supreme Court’s directive in *Weyerhaeuser Co.*⁸

Furthermore, EWAC is of the strong view that the definition should clarify that an area must meet the definition of habitat at the time the Services propose to designate critical habitat. This flows logically from the fact that the definition of habitat is being added to the regulations for the specific and limited purpose of informing the designation of critical habitat. While the geographic area that comprises habitat for a species is dynamic over time (e.g. riverine sand bars utilized by certain migratory bird species for nesting), the legal obligation of the Services is to designate specific areas as critical habitat. Therefore, it is necessary for the Services to identify the geographic areas or physical places that constitute habitat at a point in time. The appropriate time to determine whether an area is habitat is at the time the Services are designating or revising critical habitat. In the next section, EWAC suggests some language to address this point.

II. A new proposal for the definition of “habitat”

EWAC understands the complex considerations agencies must take into account in determining first whether an area constitutes “habitat”, and then whether, through applying the statutory and regulatory frameworks, an area constitutes “critical habitat.” Recognizing that fact, EWAC suggests further refinement of the Proposed Definition, along the following lines:

For the purpose of designating or revising critical habitat, the term habitat means the physical places that individuals of a species depend upon to carry out one or more life processes at the time of such designation or revision. Habitat includes areas with existing attributes that have the capacity to support individuals of the species. Habitat also may extend to areas individuals of the species do not presently depend upon to carry out one or more life processes at the time of the designation or revision, but only if such areas presently possess the necessary attributes to support one or more life processes of the specific species.

The changes we propose to the first sentence are, in our view: (1) critical to clarify that the definition is being included for the limited purpose of informing the designation of critical habitat; and (2) intended to clarify that an area must meet the definition of habitat at the time the Services propose to designate critical habitat. First, we concur with the stated position in the preamble of

⁸ See 139 S. Ct. 361, 369.

the Proposed Rule – that the purpose of this rulemaking is to inform critical habitat designations. EWAC is concerned that unintended consequences may arise in other contexts if Services personnel extend this definition when applying effects analyses under ESA section 7, making determinations under ESA section 9, or when working with applicants to quantify take or mitigation under ESA section 10. Second, the timing is important because areas that may have met the definition of “habitat” at one point in time, may not meet the definition at the time of designation or revision.

With respect to the second sentence of the Proposed Definition, having necessary attributes to support the life processes of a subject species at the time of designation of critical habitat is a threshold matter that should be clear in the definition of “habitat.” Therefore, we recommend deleting the second sentence because it can be interpreted to encompass geographic areas that a species has never occupied and may never occupy, even including areas far outside its historical range, provided such areas can support the species in some fashion. Such a broad definition would be inconsistent the ESA’s purpose to conserve threatened and endangered species along with the ecosystems upon which those species depend.

Instead, we propose a second sentence that helps address EWAC’s primary concerns. An area should not be characterized as “habitat” when it has never been occupied and may never be occupied unless it can support a life process of the subject species at the time of designation or revision of critical habitat. Only those areas that have the necessary attributes to support a life process of the species when the Services are evaluating the area for designation should be eligible for consideration as critical habitat. An area cannot be “essential to the conservation of the species” if it cannot meet these minimum threshold criteria set forth in EWAC’s proposed modifications. EWAC’s proposed modifications would not interfere with the Service’s ability to designate or revise critical habitat to expand into areas that may develop into habitat should a species’ range shift.

III. Conclusion

In sum, EWAC urges the Services to consider the following in finalizing a definition of “habitat”:

- Any final definition should use “depend upon” to minimize inconsistent application of the definition.
- Any final definition of “habitat” should require the presence of necessary attributes to support a life process of the subject species at the time of designation or revision of critical habitat for the subject species.
- The Services should make clear both that the purpose of the definition is to inform critical habitat designations, and that the definition does not create additional regulatory requirements or implications for the implementation and application of other sections of the ESA.

EWAC is appreciative of the effort undertaken by the Services to formulate a definition of “habitat” to inform designation of critical habitat. EWAC believes the recommended revisions to the Proposed Definition and provided examples represent sound scientific principles and are

consistent with the ESA statutory framework. We respectfully request that these comments be given due consideration.

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