EWAC®
Energy and Wildlife Action Coalition

December 13, 2021

Comments Regarding:

October 27, 2021 Proposed Rule to rescind the Final Rule titled ‘‘Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat”

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:
Public Comments Processing
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Docket No. FWS-HQ-ES-2020-0047

The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the United States Fish and Wildlife Service's ("USFWS") and National Marine Fisheries Service's (collectively, "Services") October 27, 2021 proposed rule ("Proposed Rule") to rescind the regulatory definition of "habitat" adopted by the Services and published on December 16, 2020 ("Final Rule"),[2] relating to critical habitat designations under section 4 of the Endangered Species Act ("ESA").[3]

In general, EWAC believes a rule establishing a definition of habitat benefits the Services and regulated community, and encourages the Services to reconsider the Proposed Rule, setting forth its rationale below.

I. EWAC supports the codification of a definition of "habitat."

EWAC supports efforts taken by the Services to increase predictability, efficiency, transparency, and the consideration and use of best available information. EWAC submitted comments to the Services in response to the August 5, 2020 proposed rule adding a definition of "habitat" to the Services' regulations implementing ESA section 4.[4] In its comments, EWAC encouraged the Services to establish a definition of "habitat." EWAC agreed with the Services' position at the time that under the "text and logic of the statute, the definition of 'habitat' must inherently be broader than the statutory definition of 'critical habitat'" while being less broad than a species' entire range,[5] and provided several suggestions on how the Services' then-proposed rule could be strengthened.

The definition of "habitat" ultimately adopted by the Services ("Habitat Definition")[6] considered and addressed the myriad comments received during the public comment period and provides a solid framework by which the Services may base critical habitat designations.

II. The Preamble to the 2020 Rule does not go beyond what is contemplated by the ESA.

One of the primary reasons given by the Services for the Proposed Rule is that the Habitat Definition goes beyond what is contemplated by the ESA. In the preamble to the Proposed Rule, the Services indicate that the overarching "conservation" purposes of the ESA "indicates that areas not currently in an optimal state to support the species could nonetheless be considered 'habitat'

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[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] 85 Fed. Reg. 81,411 (Dec. 16, 2020).

[3] 86 Fed. Reg. 59,353 (Oct. 27, 2021). The Service subsequently extended the comment period associated with the Proposed Rule. 86 Fed. Reg. 67,013 (Nov. 24, 2021).

[4] 85 Fed. Reg. 47,222 (Aug. 5, 2020).

[5] *Id*. at 47,334.

[6] 85 Fed. Reg. 81,411 (Dec. 16, 2020).

and 'critical habitat.'"[7] The Services then go further to state that such areas (those without the resources and conditions necessary to support listed species) could be "essential for the conservation" of the relevant species.[8] The Services do not provide any caselaw, regulation, policy, or scientific rationale in support of its purported position that an area could be essential to a species' conservation yet not contain resources or conditions necessary to support a listed species. EWAC believes the result of that position is illogical and does not further the purposes of the ESA, as described further below.

III. The Habitat Definition does not unnecessarily constrain the Services or add an additional procedural step.

The United States Supreme Court specifically held in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv*.,[9] that in order for an area to be critical habitat, it must be "habitat" in the first place. The Habitat Definition did not create a new procedural step that the Services need to undertake every time they designate critical habitat, because in the vast majority of cases there is no question that the areas that qualify as critical habitat are "habitat." The question of whether areas within a potential critical habitat designation qualify as "habitat" arise only in the rare situations when there is a question as to whether any of the unoccupied areas that the Services are considering designating as critical habitat qualify as "habitat." In such situations, *Weyerhaeuser Co.* requires the Services to undertake the analysis reflected in the Habitat Definition, that is, "to determine—based on concepts in the ecological literature, combined with the Services' regulatory and scientific experience and expertise—whether the unoccupied areas meet the definition of 'habitat.'"[10]

As stated in the Final Rule, the objective of the Habitat Definition was to "provide transparency, clarity, and consistency for stakeholders."[11] The result of the Habitat Definition, therefore, was to inform the public and the Services' biologists and staff of the mechanics of how that consideration would work, so that the process of designating critical habitat would be more straightforward, more efficient, and more transparent. Requiring the Services designate as critical habitat areas that are, in fact, "habitat" in the first place does not constrain the agencies unnecessarily. Indeed, where a habitat area meets the definition of "critical habitat"—be it occupied or unoccupied—the Services are free to designate such areas in accordance with the ESA and its implementing regulations.

IV. The Services cannot ignore the operative provisions of the ESA and the plain meaning of the word "habitat."

Much of the Services rationale for rescinding the Habitat Definition is that areas that may not be habitat should nevertheless be considered for critical habitat designation. This is contrary to the Supreme Court's holding in *Weyerhaeuser Co.,* that in order for an area to be critical habitat,

[7] 86 Fed. Reg. at 59,354.
[8] *Id*.
[9] *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv*., 139 S. Ct. 361, 202 L. Ed. 2d 269 (2018).
[10] 86 Fed. Reg. at 59,354.
[11] 85 Fed. Reg. at 81,419.

it must be "habitat" in the first place.[12] Under the ESA, occupied critical habitat must be occupied by the species at the time it is listed.[13] It must also contain physical and biological features that: (1) are "essential for the conservation of the species"; and (2) may require special management considerations or protection."[14] Unoccupied critical habitat is limited to areas that are not occupied at the time the species is listed, but nevertheless are deemed "essential for conservation of the species."[15] Logically, an area cannot be essential to the conservation of the species if it does not currently or periodically contain resources and conditions necessary to support one or more life processes of the species in the first place. In the case giving rise to *Weyerhaeuser Co.*, the U.S. Court of Appeals for the Fifth Circuit upheld the designation of unoccupied critical habitat for the dusky gopher frog where the lands at issue could not support the species, were not likely to be capable of doing so in the reasonably foreseeable future without significant human manipulation, and in which the landowners had already indicated their unwillingness to engage in activities that would be necessary to cause the lands to become habitable.[16] The Supreme Court examined the ESA and the statutory context in which "critical habitat" exists and found the failure to read the term "critical habitat" with an eye to the context in which that term is used in the ESA resulted in the Fifth Circuit giving improper *Chevron* deference to a USFWS interpretation of the ESA's definition of unoccupied critical habitat.[17]

Nevertheless, EWAC recognizes that species populations and habitats may shift over time, in part as a result of climate change, and that areas that do not presently or periodically contain resources and conditions necessary to support one or more life processes of listed species may do so in the future. Should that occur, the Services may voluntarily propose to revise the critical habitat designation at that time to incorporate occupied or unoccupied areas that become essential to the conservation of the species.

In short, EWAC believes the Services' rationale for the Proposed Rule contradicts the Supreme Court's holding in *Weyerhaeuser Co*., and that concerns about the future conservation status of listed species relative to currently uninhabitable areas can be lawfully addressed by future revisions to species' critical habitat rules.

V. The Services should take a measured approach to revising ESA implementing regulations adopted under the prior Administration.

Clear and consistent frameworks for ESA implementation result in less drain of scarce agency resources and predictability for project proponents, such as renewable energy generators and electric transmission and distribution providers, landowners, and all interested stakeholders. The Habitat Definition provided clarity, thereby increasing regulatory certainty, and decreasing litigation risk, all without creating a new regulatory process resulting in additional regulatory consequences for landowners, project proponents, or other affected parties. A wholesale rescission

[12] 139 S. Ct. 361 at 368.
[13] 16 U.S.C. § 1532(5)(A)(i).
[14] *Id*.
[15] 16 U.S.C. § 1532(5)(A)(ii).
[16] *See Markle Ints., L.L.C. v. United States Fish & Wildlife Serv.*, 827 F.3d 452 (5th Cir. 2016), *vacated and remanded sub nom. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 202 L. Ed. 2d 269 (2018), and *cert. granted, judgment vacated sub nom. Markle Ints., L.L.C. v. U.S. Fish & Wildlife Serv*., 139 S. Ct. 590, 202 L. Ed. 2d 423 (2018).
[17] *See* 139 S. Ct. 361 at 368.

of the definition of "habitat" is unnecessary. We urge the Services to take a measured approach to reviewing and revising ESA implementing regulations finalized under the previous administration.

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