
**Recommendation of the
American Petroleum Institute, National Association of Home Builders,
National Rural Electric Cooperative Association, and Utility Water Act Group to
Establish Regulatory Definition of Habitat**

**U.S. Department of the Interior and
National Oceanic and Atmospheric Administration
Docket Nos. DOI-2017-0003-0009; NOAA-NMFS-2017-0067**

April 8, 2019

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These comments recommend establishment of a regulatory definition of “habitat,” through rulemaking, for purposes of implementing the critical habitat provisions of the Endangered Species Act (“ESA” or the “Act”). A regulatory definition of “habitat” should specify that only those areas that are *actually habitable* at the time of critical habitat designation are “habitat.”

Introduction

The American Petroleum Institute (“API”),¹ National Association of Home Builders (“NAHB”),² National Rural Electric Cooperative Association (“NRECA”),³ and Utility Water Act Group (“UWAG”),⁴ each of which are members of the ESA Cross-Industry Coalition (hereinafter, “Coalition”), submit these comments in response to the U.S. Department of the Interior (“DOI”) and National Oceanic and Atmospheric Administration (“NOAA”) regulatory reform initiative.⁵

In 2014, Coalition members filed detailed cross-industry comments in response to the Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (jointly “Services”)

¹ API is the only national trade association representing all facets of the oil and natural gas industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API’s more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation’s energy and are backed by a growing grassroots movement of more than 40 million Americans.

² NAHB is a nationwide federation of more than 700 state and local home builder associations. NAHB represents more than 140,000 members, including individuals and firms engaged in land development, single and multifamily construction, multifamily ownership, building material trades, and commercial and industrial projects.

³ NRECA is the national service organization of America’s electric cooperatives, which are energy providers and engines of economic development for more than 19 million American homes, businesses, farms, and schools in 47 states. NRECA represents the national interests of nearly 900 private consumer-owned, not-for-profit rural electric cooperatives and public power districts. NRECA members deliver safe, reliable, and affordable electric service to vast rural areas of the United States. Electric cooperatives own and maintain 2.6 million miles, or 42 percent, of the nation’s electric distribution lines, powering 56 percent of the nation’s landmass.

⁴ UWAG is a voluntary, ad hoc, non-profit, unincorporated group of 132 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the American Public Power Association, and the NRECA. UWAG’s purpose is, among other things, to participate on behalf of its members in federal agency rulemakings under the Clean Water Act and related statutes, such as the Endangered Species Act, and in litigation arising from those rulemakings.

⁵ 82 Fed. Reg. 28,429 (June 22, 2017) (DOI Regulatory Reform Task Force request for public comment on existing policies and regulations that may warrant repeal, replacement, or modification); 82 Fed. Reg. 31,576 (July 7, 2017) (NOAA request for public comment on efforts to improve regulations and regulatory processes).

proposal to revise the critical habitat regulations. After the Services promulgated the critical habitat rules in 2016, the Coalition challenged those rules.⁶ The action settled, and the Services agreed to review and reconsider the 2016 rules. The Services' July 25, 2018 proposals to amend their ESA regulations responded to key concerns raised by the Coalition's challenge and the settlement. 83 Fed. Reg. 35,193, 35,178, 35,174 (July 25, 2018). The Coalition filed comprehensive comments on the proposed rules on behalf of a broad cross-section of industry with significant interests in the implementation of the ESA. The Coalition also filed a cross-industry *amici curiae* brief in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*.

The FWS informed the U.S. Court of Appeals for the Fifth Circuit that it is considering rulemaking to define the statutory term "habitat" in response to the Supreme Court's unanimous November 27, 2018, decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 586 U.S. ____ (2018). Letter from David Gunter, Counsel for Defendants-Appellees, to Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Feb. 25, 2019), *Markle Interests, LLC v. U.S. Fish & Wildlife Service*, Nos. 14-31008 & 14-31021 (5th Cir.). The Coalition supports the Services' consideration of rulemaking to define the ESA term "habitat" in accordance with *Weyerhaeuser*. We urge the Services to adopt a definition of "habitat" through rulemaking in order to receive and consider the views of the public, including entities regulated under the ESA (including the Coalition's members), and to establish a consistent and durable definition of this important statutory term.

Specifically, the Coalition recommends the Services establish a definition of "habitat" that specifies that only those areas that are *actually habitable* at the time of critical habitat designation are "habitat," and suggests the following definition:

The term "habitat" means a geographic area, either occupied or not occupied by the species, on which (1) are found, at the time of designation as critical habitat, physical and biological features necessary to support long-term survival of the species during the species' life stages that occur in that area, and on which (2) the species can survive through successive generations during the species' life stages that occur in that area. The term "habitat" does not include areas that have in the past or may in the future, but do not currently, contain such features.

Additional background and explanation is provided in support of this recommendation below.

***Weyerhaeuser* Decision**

The Supreme Court's decision in *Weyerhaeuser* confirms that an area is eligible for designation as critical habitat under the ESA *only* if that area is *actually habitable* for the species concerned. This limit reflects the plain language of the statute. As the Supreme Court observed, "[e]ven if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species, Section 4(a)(3)(A)(i) does not authorize the Secretary to designate the area as critical habitat *unless it is also habitable for the species*." (emphasis added). "According to the ordinary understanding of how adjectives work, 'critical habitat' must also be 'habitable,'" the Court explained. The Court emphasized that "[o]nly

⁶ *UWAG v. NMFS*, No. 17-cv-00206 (S.D. Ala.).

the ‘habitat’ of the endangered species is eligible for designation as critical habitat.” The case was remanded to the U.S. Court of Appeals for the Fifth Circuit for a determination whether the areas designated as critical habitat for the dusky gopher frog are “habitat,” within the meaning of that statutory phrase, for the species.⁷

Consistent with the Court’s opinion, the ESA, and common understandings of the term “habitat” (including the Services’ definition of “habitat” in the 2016 Habitat Conservation Planning (“HCP”) Handbook), the Coalition recommends that a definition of “habitat” incorporate the following principles:

Statutory and Regulatory Principles

- An area designated “critical habitat” must actually be “habitat” for the species. The term “critical habitat” plainly means that the area must be habitat for the species, whether the area is occupied or unoccupied by the species,⁸ because “habitat” is the only noun in the term. Section 4 of the Act emphasizes that a designated area must be “habitat” by the placement of the word “habitat” first in the statutory provision that authorizes such designations, which directs the Services, “to the maximum extent prudent and determinable,” to promulgate a regulation that “designate[s] *any habitat* of such species which is then considered to be *critical habitat*.” 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added).
- Critical habitat must be habitat at the time of designation. The Act authorizes the Services, “concurrently” with listing a species, to designate “habitat of such species *which is then* considered to be critical habitat.” 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added); *id.* at § 1532(5)(A)(i) (defining critical habitat as areas “on which essential physical or biological features *are found*” and areas that “*are essential*” for conservation of the species). Congress’s use of present tense terms, including the words “then considered,” underscores that designated critical habitat must meet all of the statutory elements for designation, including that the area is actually habitat for the species, at the time of designation.
 - The Act does not authorize the Services to designate an area that is not currently habitat but may in the future become habitat. Instead, for areas that do not meet designation requirements (but may meet those requirements in the future), the Act

⁷ After remand to the Fifth Circuit, the government filed a letter with the court providing an update on related developments, including the Services’ proposed revisions to clarify, interpret, and implement portions of the ESA regulations that relate to the designation of critical habitat. FWS also informed the Fifth Circuit that it is considering rulemaking to address the meaning of the statutory term “habitat.” In late March, the government moved for a voluntary remand to allow FWS to reconsider the designation of Unit 1 as critical habitat for the dusky gopher frog, in light of the Supreme Court’s opinion in *Weyerhaeuser*. On April 2, 2019, the Fifth Circuit remanded the case to the district court for further proceedings, including a determination as to the appropriateness of a remand to FWS.

⁸ Critical habitat is statutorily defined to include both “areas within the geographical area occupied by the species” and “areas outside the geographical area occupied by the species.” 16 U.S.C §§ 1532(5)(A)(1)(i)-(ii).

specifies that the Services may revise critical habitat designations “from time-to-time thereafter as appropriate.” *Id.* at § 1533(a)(3)(A)(ii).

- An area must be able to support the species’ life stages to be habitat. The Act’s definition of “critical habitat” does not define the singular term “habitat,” but its language addresses both what constitutes habitat and what makes a specific area of habitat “critical.” Specifically, the Act requires that designated critical habitat contain “physical or biological features” essential to the species, and additionally for unoccupied critical habitat, that designation of the area is essential to the conservation of the species. *Id.* at § 1532(5)(A)(i).⁹
 - The Services’ 2016 critical habitat regulations define “physical or biological features” as “the features that support the life-history needs of the species, including but not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features.” 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). The term life-history refers to what “the species needs throughout its different life stages to survive and thrive.” *Id.* at 7421-22.¹⁰
 - Whether a species would occupy an area at every life stage (*e.g.*, a parcel of land that is gopher frog habitat) or at only certain life stages (*e.g.*, a river that is anadromous species habitat), the habitat must contain the physical and biological features necessary to support long-term survival of the listed species throughout its relevant life stages in that area.¹¹

Plain Language Principles

- Habitat is an area where the species naturally lives. “Habitat” is defined in *Webster’s Third New International Dictionary* (1976) as “the place where a plant or animal species

⁹ The ESA imposes a higher standard on the designation of unoccupied areas by requiring the Secretary to make a showing that designation of an unoccupied area is essential for the conservation of the species. *See, e.g., Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Cape Hatteras Access Preservation Alliance v. Dep’t of the Interior*, 344 F. Supp. 2d 108, 125 (2004) (“Designation of unoccupied land is a more extraordinary event than designation of occupied lands.”).

¹⁰ The 2018 proposed revisions to the 2016 regulations solicited feedback on whether the definition of “physical or biological features” should be modified, but did not propose any specific changes.

¹¹ ESA § 4 requires the Services to periodically publish lists that identify “over what portion of its range” a listed species “is endangered or threatened, and specify any critical habitat *within such range*.” 16 U.S.C. § 1533(c)(1) (emphasis added). This requirement illustrates that habitat in general, and designated critical habitat in particular, will typically be located within and constitute only a portion of the species’ overall range. *See, e.g.,* Senate Consideration and Passage of S. 2899, With Amendments on July 19, 1978, in *A Legislative History of the ESA* at 1101, 1080-81 (Senator Garn stating that the extent of critical habitat should usually be smaller than the “entire range of the endangered or threatened species”). The Services interpret the term “range” to be “*the general geographical area within which the species is currently found*, including those areas used throughout all or part of the species’ life cycle, even if not used on a regular basis.” 79 Fed. Reg. 37,578, 37,583 (July 1, 2014) (Final SPR Policy) (emphasis added).

naturally lives and grows,” with the “physical features” that are “naturally or normally preferred” by a species. *See also American Heritage Dictionary of the English Language* (1981) (“habitat” is the “area or type of environment in which an organism or biological population normally lives or occurs”); *The Random House Dictionary of the English Language* (2d ed. unabridged, 1987) (“the kind of place that is natural for the life and growth of an organism”).

- *Black’s Law Dictionary* defines “habitat” as “the place where a particular species of animal or plant is normally found.” *Habitat, Black’s Law Dictionary* (10th ed. 2014).

Agency Interpretations of “Habitat”

- The new HCP Handbook reinforces present tense habitability. The Services’ 2016 HCP Handbook defines “habitat” as “the location where a particular taxon of plant or animal lives and its surroundings,” including “the presence of a group of particular environmental conditions surrounding an organism....” *Habitat Conservation Planning Handbook Glossary G-14* (Dec. 21, 2016).
- International conventions are in accord. The Convention on Migratory Species states that “habitat” “means any area in the range of a migratory species which contains suitable living conditions for that species.” Convention on the Conservation of Migratory Species of Wild Animals, art. I, § 1(g) (1979). The Convention on Biological Diversity defines “habitat” as “the place or type of site where an organism or population naturally occurs.” Convention on Biological Diversity, art. 2 (1992).

Proposed Definition of “Habitat”

The Coalition recommends the following definition of “habitat”:

The term “habitat” means a geographic area, either occupied or not occupied by the species, on which (1) are found, at the time of designation as critical habitat, physical and biological features necessary to support long-term survival of the species during the species’ life stages that occur in that area, and on which (2) the species can survive through successive generations during the species’ life stages that occur in that area. The term “habitat” does not include areas that have in the past or may in the future, but do not currently, contain such features.

Key Elements of Proposed Definition of “Habitat”

The following provides an explanation of the key elements of the proposed definition as background and for possible incorporation in a preamble to a proposed rule, but is not intended as regulatory text.

- Proposed definition is designed to determine what is habitat in the first instance. It is not designed to determine when habitat is “critical” (*i.e.*, the area need not be sufficient to support a “critical habitat” designation, but must be habitable). The proposed definition of “habitat” is broader than “critical habitat” in that it (1) is not limited to “specific areas within the geographic area occupied,” but includes *all* habitat; (2) is not limited to

“physical or biological features essential to the conservation of the species”; (3) need not require special management considerations or protection; (4) need not be “areas [that] are essential for the conservation of the species”; and (5) ultimately need not be “considered to be critical habitat.” See 16 U.S.C. §§ 1532(5)(1); 1533(a)(3).

- Features must be present at time the area is designated as critical habitat. Features necessary to support long-term survival of the species must be present at the time of designation; designation may not rely on past occurrence or future development of features that are not currently present. Features may be deemed present when they occur on a sufficiently regular or frequent basis to sustain the species (*e.g.*, side channels and backwaters that are periodically flooded during spring runoff but dry out as river flows subside, which may serve as habitat for listed Colorado River fish, or exposed, bare sandbars and alluvial deposits that are maintained over time by periodic inundation or scouring to prevent vegetation encroachment, and may serve as habitat for species such as the least tern).
- Focuses on specific geographic areas. The proposed regulatory definition is drafted to focus on whether a specific geographic area constitutes habitat, and not to broadly encompass areas that are not habitable. Multiple specific areas at a site could constitute “habitat” for a particular species, and species may migrate between those areas of a site. However, the determination of a species’ habitat should not be drawn so broadly as to encompass areas not “habitable” or likely to be used by the species.
 - For example, an amphibian might be able to inhabit multiple areas on a site, including terrestrial, fossorial, arboreal, or freshwater aquatic ecosystems, at different life stages. Each of these habitats is necessary to support long-term survival of the species. The amphibian could move between the habitat areas via certain corridors (such as fields), but would not transit other areas (such as a paved lot or unvegetated mound). The listed species’ habitat in this example would include the specific geographic areas necessary to support each of its life stages and the specific corridors through which it would naturally travel (such as fields), but would not include areas the species would not naturally use (such as a paved lot or unvegetated mound).
- Features must be present for relevant life stages. Requires the presence of physical and biological features necessary to support long-term survival of the species throughout the species’ life stages that occur in that area.
- Features that support geographically separate life stages need not be present. Accounts for the fact that certain life stages may occur in other areas, such as in the case of rivers for anadromous and other migratory species. To be habitat that serves only part of a species’ life cycle, the area should be currently accessible to the species (not a remote or isolated area that has features that could otherwise serve as habitat but would not be accessible or useful to the species – *e.g.*, a pond that could theoretically be used by an amphibian at one life stage, but which is hundreds of miles from habitat necessary for other life stages).

- Area must be sufficiently habitable for long-term survival. Area must be habitable and sufficient for long-term survival of species at time of designation; area must be sufficient for more than just temporary survival.
- Applies to occupied and unoccupied habitat. Designed to apply to both occupied and unoccupied critical habitat designations.

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The Coalition appreciates the opportunity to provide these comments to inform the Services' development of a forthcoming proposed rulemaking to define "habitat." Please contact counsel for the Coalition, Andrew Turner at (202) 955-1658 or Karma Brown at (202) 955-1893, with any questions.