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Submitted Electronically via *Federal eRulemaking Portal* to Docket No: FWS-HQ-ES-2020-0047

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Re: Comments on the US Fish and Wildlife Service and the National Marine Fisheries Service Proposed Rule to Add a Definition of “Habitat” Under Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat; 85 *Fed. Reg.* 47333 (August 5, 2020)

Dear Mr. Frazer and Mr. Rauch:

The National Rural Electric Cooperative Association (NRECA) appreciates the opportunity to comment on the US Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) proposal to add a definition of “habitat” to its regulations for implementing Section 4 of the Endangered Species Act (ESA).

NRECA is the national trade association representing nearly 900 local electric cooperatives and other rural electric utilities. America’s electric cooperatives are owned by the people that they serve and comprise a unique sector of the electric industry. From growing regions to remote farming communities, electric cooperatives power one in eight Americans and serve as engines of economic development for 42 million Americans across 56 percent of the nation’s landscape.

Electric cooperatives operate at cost and without a profit incentive. NRECA’s member cooperatives include 62 generation and transmission (G&T) cooperatives and 831 distribution cooperatives. All but three of these co-ops are small business entities as classified by the Small Business Administration. The G&Ts generate and transmit power to distribution cooperatives that provide it to the end of line co-op consumer-members. Collectively, cooperatives own and maintain 2.6 million miles or 42 percent of the nation’s electric distribution lines. Both G&T and distribution cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

As local energy and technology providers, electric cooperatives play a vital role in transforming communities and contributing to a thriving US economy. Electric co-ops frequently undertake activities to modernize the aging electric grid and diversify their energy portfolios, including projects such as traditional electrical power generation, renewable energy deployment, and transmission and distribution powerline construction, upgrades, and maintenance. Electric co-ops are also increasingly providing broadband service to their members to bridge the digital divide and modernize rural communities.

These efforts often trigger ESA consultation and compliance requirements. As such, electric cooperatives have extensive experience with ESA implementation. Each co-op also shares a common goal of responsibly delivering electricity to their consumer-members, while minimizing impacts from their activities on our nation’s natural resources. This includes responsible project planning, permitting, and practices to protect wildlife and habitat. NRECA members also routinely undertake voluntary activities to analyze, avoid, and mitigate project impacts to benefit species and their habitats, such as participating in conservation agreements and other public-private conservation partnerships.

However, critical habitat designations can burden and delay electric co-op infrastructure projects that are necessary to assure the delivery of safe, affordable, and reliable services. The designation of critical habitat can also impose significant costs on electric co-ops even if their project is not on critical habitat at all. Significant time, expertise, and expense is required simply to determine whether a parcel is included as critical habitat or not. These determinations can have a direct negative impact on electric co-op communities served by these projects, often without commensurate benefits to species.

For example, one NRECA member’s electric transmission line project was delayed two years with over \$270,000 in direct added costs even though multiple biological surveys indicated unsuitable habitat and no species present within the project footprint. This co-op’s consumer-members were on the verge of experiencing rolling blackouts during a hot desert summer before the agency issued a “not likely to adversely affect” finding, allowing the project to finally proceed. This example underscores the importance of avoiding situations where a critical habitat designation covers an area not actually occupied by or does not constitute habitat for the species.

In an important, unanimous decision, the Supreme Court held in the *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* case (139 S. Ct. 361, November 27, 2018) that an area is *only* eligible for ESA critical habitat designation if it is *actually habitat* for that species. The Services took an initial step to address the Supreme Court’s decision in *Weyerhaeuser* in the recent revisions to the ESA regulations governing the designation of critical habitat (84 *Fed. Reg.* 45,020, August 27, 2019). In those revisions, the Services returned to the step-wise approach for designating critical habitat and clarified criteria for when unoccupied habitat may be designated. This included adding a new requirement that an unoccupied area must have, at a minimum, one or more of the physical or biological features essential to the conservation of the species in order to be considered potential critical habitat. NRECA and its members support the Services’ current efforts to define “habitat” as the next step to address *Weyerhaeuser* in order to further provide clarity and consistency when designating critical habitat.

NRECA, as part of an ESA Cross-Industry Coalition, previously submitted comments to the Services’ regulatory reform dockets recommending the establishment of a regulatory definition of “habitat” (April 8, 2019 and attached for reference). We continue to support these recommendations that any “habitat” definition should specify that only those areas that are *actually habitable* at the time of critical habitat designation are “habitat.” In addition, we suggested the following key elements be used to shape a definition to cover designations of both occupied and unoccupied critical habitat:

- A proposed definition should be designed to determine what is habitat in the first instance;
- Habitat features must be present at the time the area is designated as critical habitat;
- A proposed definition should focus on specific geographic areas;
- Habitat features must be present for one or more relevant species’ life stages; and
- An area must be sufficiently habitable for species’ long-term survival.

In the proposed rule, the Services have provided the following proposed and alternative definitions of “habitat” for public comment:

- *Proposed definition* – “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.”
- *Alternative definition* – “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.”

NRECA believes both the proposed and alternative “habitat” definitions are generally consistent with our recommended key elements, the Supreme Court’s *Weyerhaeuser* decision and other case law, and the underlying ESA statute. However, we respectfully offer the following recommendations and revised “habitat” definition to provide additional clarification, improve implementation, and minimize unintended consequences.

I. The Services Should Clarify That the “Habitat” Definition Has a Narrow Application.

A. Use definition only to inform critical habitat designations.

Prior to this proposed rule, the Services have never adopted a “habitat” definition through regulations or policies to be used in the context of critical habitat designations. The Services appropriately recognize the reason for this proposal to add a regulatory definition of “habitat” is to respond to the Supreme Court’s *Weyerhaeuser* decision, which found that an area must logically be “habitat” in order to be “critical habitat.” The Supreme Court also stated, “[ESA] Section 4(a)(3)(A)(i) does not authorize the Secretary to designate [an] area as *critical habitat* unless it is also *habitat* for the species (emphasis added).” NRECA recommends that the Services explicitly clarify that any final “habitat” definition will *only* be used when determining areas to designate as critical habitat and for the subsequent treatment of such areas once designated. To place the definition in its proper context, NRECA recommends that the Services add a statement in the “habitat” definition itself to reflect that it only applies to the designation and revision of critical habitat. In addition, the Services should clarify in the final rule text or preamble that the “habitat” definition is broad enough to include both prongs of critical habitat, occupied and unoccupied designations. This would provide electric co-ops and other stakeholders with more transparency, clarity, and consistency, as well as avoid confusion and unintended consequences.

Furthermore, we are concerned that without this additional clarification, there will be broader and burdensome implications for a variety of electric co-op activities depending on how the “habitat” definition is used to implement other ESA provisions (*e.g.*, section 7 consultation, section 9 take prohibitions, and section 10 permits). The proposed rule is silent on whether and how the “habitat” definition might or might not be used in other ESA applications. Therefore, we suggest that the Services clarify that the identification of “habitat” is merely to inform critical habitat designations and does not impose any new or additional regulatory consequences for project proponents, private landowners, or other affected entities.

B. Use definition to determine what is habitat in the first instance.

In proposing to establish this “habitat” definition, the Services state that they do not intend to create a new procedural step prior to designating critical habitat in every case. Instead, the Services say they interpret the statutory definition of occupied critical habitat to “inherently verify” that an area meeting that definition is “habitat.” Only in cases where unoccupied habitat is at issue, would the Services consider whether the area is “habitat” in the context of the new regulatory definition. The Services believe this would not impose any additional procedural steps or change how they designate critical habitat but would instead serve as a regulatory standard to help ensure that unoccupied critical habitat designations are “habitat” for the species. Consistent with the ESA plain language at 16 U.S.C. § 1532(5); 1533(a)(3)(A)(i); 1536(a)(2) and the Supreme Court’s *Weyerhaeuser* decision, however, there is already an established textual limit and temporal analytical sequence that the Services must follow to establish what is “habitat” in the first instance before designating any such habitat as critical habitat for that species. Therefore, the Services cannot rely on the statutory critical habitat definition to justify what is “habitat,” given that definition only informs what makes such habitat “critical.” NRECA recommends that the Services clarify that it will first assess whether an area is “habitat” and then will proceed to a narrower step-wise determination that the area meets the requirements to be designated as either occupied or unoccupied critical habitat.

C. Frame “habitat” in relation to species range and designated critical habitat.

The Services appropriately recognize that the “habitat” definition must be sufficiently broad to fully encompass both the occupied and unoccupied prongs of the critical habitat definition found in the ESA. However, NRECA recommends the Services further clarify the scope of the “habitat” definition to ensure it is implemented in its proper context. Specifically, the Services should provide additional clarity on the relationship between species’ range, habitat, and critical habitat. We urge the Services to recognize that both conceptually and spatially, the term “range” is broader than “habitat” and “critical habitat” is a narrower subset of “habitat.”

The Services have defined range to mean “the general geographical area within which that species can be found at the time [the Services] makes any particular status determination. This range includes those areas used throughout all or part of the species life cycle, even if they are not used regularly (e.g. seasonal habitats) (79 Fed. Reg. 37,578, 37,609, July 1, 2014). Whereas, habitat more narrowly encompasses more specific geographic areas that contain the physical, biological, or chemical attributes which support and sustain the life, development, and propagation of a species. Notably, places within a species range or even areas occupied by a species may not necessarily be “habitat.” Then, as highlighted in *Weyerhaeuser*, critical habitat is narrower than the naturally broader definition of “habitat.”

II. The Services Should Refine the Proposed “Habitat” Definitions to Provide Additional Clarity.

As stated above, NRECA believes both the proposed and alternative “habitat” definitions are generally consistent with our recommended key elements, but suggest the Services provide additional clarifications to improve implementation and provide a narrower application.

A. “Depend upon” appropriately describes the relationship between a species and its habitat.

The Services solicit comment on whether “depend upon” in the proposed definition sufficiently differentiates areas that could be considered habitat, or whether “use” better describes the relationship between a species

and its habitat. The term “depend upon” more specifically and accurately reflects the relationship of necessary habitat attributes to support one or more of a species’ life processes. It more clearly implies the importance of a specific physical place. In addition, “depend upon” aligns with the congressional intent and stated purpose of the ESA to “provide a means whereby the ecosystems upon which endangered species and threatened species *depend* may be conserved (emphasis added)” (16 U.S.C. § 1531(b)). On the contrary, we believe the term “use” is vague and could cause inconsistencies in describing the importance of a specific place in supporting a species’ life processes. For these reasons, NRECA urges the Services to include the term “depend upon” and not “use” in any final “habitat” definition. Further, we recommend that the Service clarify in the rule’s preamble that an area that a species “depends upon” is one that is currently able to support one or more life processes of the species.

B. Limit “habitat” to areas where necessary attributes presently exist at the time of a critical habitat designation.

The Services seek input on whether the “habitat” definition should be limited to areas where the necessary attributes to support species *presently* exist, specifically as described in the second sentence of the alternative definition. In the preamble, the Services further clarify that this phrasing expressly limits unoccupied habitat for a species *to* areas “where the necessary attributes to support the species *presently* exist,” and explicitly excludes areas that have no present capacity to support individuals of the species. NRECA generally supports the Services retaining the “necessary attributes” phrasing from the alternative definition to demonstrate the nexus between an attribute and the relevant species’ life processes. Further, we believe “presently exist” is consistent with the ESA statutory requirement and the Supreme Court’s *Weyerhaeuser* decision that an area must first be “habitat” before it can be designated as “critical habitat.” Therefore, we recommend the Services retain the phrase “where the necessary attributes to support the species presently exist,” in any final “habitat” definition.

In addition, NRECA recommends that these necessary attributes must be present at the *time of designation*. We believe features may be deemed present when they occur on a sufficiently regular or frequent basis to support the species. The “habitat” classification should not rely on past occurrence or future development of features that are not currently present at the time the Services issue a critical habitat designation. The ESA does not authorize the Services to designate areas that may someday be habitat or someday meet the other critical habitat requirements. This does not preclude the ability of the Services to evaluate and revise any prior critical habitat designation “from time-to-time thereafter as appropriate” to account for best scientific and commercial information made available in the future regarding areas essential to the conservation of the species (16 U.S.C. § 1533(a)(3)(A)(ii)). While the proposed and alternative definitions generally address this key element, we recommend that the Services make the following revision to both definitions: Replace the phrase “includes areas” with “is an area” that has the capacity to support individuals of the species to clarify that “habitat” is limited to those areas that have such necessary attributes at the time of designation for both occupied and unoccupied critical habitat. The term “includes” is more expansive and can be interpreted to comprise a part of something larger. As stated above, we also suggest that the Services add a statement in any final “habitat” definition itself to reflect that it only applies to the designation and revision of critical habitat.

Although the Services stated that they intentionally refrained from using terms of art from other definitions in the ESA to avoid potential confusion, we are concerned that without additional clarification several new potential terms in any final “habitat” definition could be misinterpreted. For example, the term “existing attributes” is not defined in the ESA statute or supporting regulations. The Services also solicits input on

whether the words “existing attributes” are appropriate. As described above, we believe the phrase “necessary attributes” provides a better description. NRECA recommends that the Services further clarify and explain in the final rule text or preamble that “necessary attributes” means the presence of physical or biological features that determine whether an area is “habitat.”

C. “Habitat” should focus on specific geographic areas.

NRECA recommends that the “habitat” definition is limited to *specific* physical areas that are habitable, and not broadly encompass areas that are not habitable. We recognize that multiple specific areas at a site could constitute “habitat” for a species, and species may migrate between those areas of a site. However, NRECA recommends that the determination of a species’ habitat should not be drawn so broadly as to encompass areas not *habitable* or not likely to be used by the species (such as those uninhabitable areas within or adjacent to an area of habitat that contains no attributes with the capacity to support a species). The proposed and alternative “habitat” definitions generally address these key elements. To provide greater clarity, however, NRECA recommends that the Services revise both definitions to insert the word “specific” before “physical places.” Further, we recommend that the Services explain in the final rule text or preamble that “specific physical area” means a delineated habitat area that is readily identifiable and sufficiently described. The Services should also recognize that due to margins of error in its mapping capabilities, it should allow for portions of designated areas to be reconsidered if ground truthing reveals it is not “habitat.” Several electric co-ops have faced delays and added costs when the Services required portions of their infrastructure projects to be redesigned or rerouted due to mapping inaccuracies, even though the specific area was shown not to be habitable by the species.

D. Necessary attributes must sufficiently support one or more species life processes and sustained survival.

NRECA recommends that the features necessary to support the sustained survival of the species must be present throughout one or more of the species’ life stages that occur in that area. While we agree that seasonally or intermittently used areas may constitute habitat for various species, those areas must be sufficient for more than just temporary survival to be considered “habitat.” NRECA recommends that any final definition of “habitat” include the phrase to support and “sustain” a species. We recommend that the Services clarify in the final rule text or preamble that “sustained survival” means successive generations of the species either do or could persist in that area. In addition, the Services should clarify in the final text or preamble of the final rule that to be “habitat” that serves only part of a species’ life processes, the area should be *currently accessible* to the species (i.e., 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 such as 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).

III. The Services Should Revise the Definition of “Habitat.”

NRECA recommends the Services adopt, finalize, and add the following refined definition of “habitat,” at 50 CFR 424.02, which incorporates our feedback above and combines concepts from both the proposed and alternative definitions:

Letter to Mr. Gary Frazer and Mr. Samuel D. Rauch III
NRECA Comments on the Services “Habitat” Definition Proposed Rule
September 4, 2020

“Habitat. For the purposes of designating or revising occupied and unoccupied critical habitat, the specific physical places that individuals of a species currently depend upon to carry out one or more life processes. Habitat is an area with the capacity to support sustained survival of individuals of the species, but only where the necessary attributes to support the species presently exist.”

IV. The Proposed Rule Should Be Categorically Excluded Under NEPA.

In response to the recent Supreme Court case law arising from the *Weyerhaeuser* decision, the Services have issued this proposed rulemaking that is legal, technical, and procedural in nature. After reviewing the Services existing policies and procedures for complying with the National Environmental Policy Act (NEPA), and in particular those pertaining to determining categorical exclusions at 43 CFR 46.210(i) for the Department of the Interior (DOI) and Categorical Exclusion G7 in the National Oceanic and Atmospheric Administration (NOAA) Companion Manual for NEPA compliance at Appendix E, we concur with the Services’ assessment that this action should be categorically excluded. If finalized, this rulemaking would not individually or cumulatively have a significant effect on the human environment. Therefore, it should not be subject to requiring the completion of an Environmental Assessment or Environmental Impact Statement. We encourage the Services to complete its NEPA analysis as such and finalize this proposal.

V. Conclusion.

NRECA appreciates the opportunity to provide comments on the proposal to define “habitat” to ensure clear and consistent implementation. We request that the Services take these comments into full consideration when finalizing the definition of “habitat” in the context of designating critical habitat under the ESA. We welcome a chance to discuss our comments further with you and your teams.

Please contact me at Janelle.Lemen@nreca.coop if you have any questions regarding these comments.

Respectfully,



Janelle Lemen
Regulatory Director, Environmental Policy
National Rural Electric Cooperative Association

Enclosure

**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

**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**

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.