



September 4, 2020

VIA ELECTRONIC SUBMISSION

The Honorable Wilbur Ross
Secretary
U.S. Department of Commerce
National Marine Fisheries Service
1401 Constitution Ave NW
Washington, D.C. 20230

The Honorable David Bernhardt
Secretary
U.S. Department of the Interior
Fish and Wildlife Service
1849 C St. NW
Washington, D.C. 20240

Re: Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat (85 Fed. Reg. 47333; August 5, 2020).

Dear Secretaries Ross and Bernhardt:

On August 5, 2020 the U.S. Department of the Interior’s Fish and Wildlife Service (FWS) along with the U.S. Department of Commerce’s National Marine Fisheries Service (NMFS), (hereinafter “Services” or “the Services”) published a proposed rule to add a definition of “habitat” to regulations implementing Section 4 of the Endangered Species Act. Section 4 of the Act requires the Services to designate critical habitat when a determination is made that a species is endangered or threatened.¹

¹ 16 U.S.C. § 1533 (a)(3)(A)(i).



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The Office of Advocacy of the U.S. Small Business Administration (Advocacy) is pleased that the Services are adding a regulatory definition of “habitat” for purposes of designating critical habitat as this adds additional clarity and regulatory certainty to the existing framework.

Advocacy encourages the Services to consider the below recommendations, and those of small entities in finalizing its definition to ensure that there are no unintended consequences that may be overly burdensome.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule’s publication in the Federal Register, the agency’s response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy’s comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”⁶

Background

Congress enacted the Endangered Species Act (ESA) in 1973 to conserve species likely to become endangered. The Act defines endangered species as any species that is “in danger of extinction throughout all or a significant portion of its range.”⁷ Section 4 of the Act requires the Services to designate critical habitat when a determination is made that a species is endangered or threatened.⁸ A critical habitat designation is to be made based on the best available scientific data, and also take into consideration the economic impacts of the proposal, and any other

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁵ *Id.*

⁶ 5 U.S.C. Sec. 601 note

⁷ 16 U.S.C. § 1532(6).

⁸ *Id.*

relevant impact of designating a specific area as critical habitat.⁹ Critical habitat is further defined as the specific areas within a geographic area occupied by the species at the time it is listed.¹⁰ Critical habitat may include areas not currently occupied by the species when those areas are determined to be essential to the conservation of the species.¹¹ In determining geographic areas occupied by the species, the statute looks to physical and biological features essential to the conservation of the species that may require special management considerations.¹²

On November 27, 2018, the U.S. Supreme Court in *Weyerhaeuser v. U.S. Fish & Wildlife Serv.* ruled that in order to be eligible for critical habitat designation, an area must be “habitat” for the listed species.¹³ In response to this ruling, on August 27, 2019, the Services finalized a new regulation governing the designation of critical habitat. This regulation updated the framework for several items including “foreseeable future” and “not prudent” determinations, and factors to consider in delisting. Another important change implemented by the regulation was a stepwise approach to designating critical habitat by which the Services will only designate unoccupied critical habitat if they determine that occupied habitat is inadequate for the conservation of the species and that the unoccupied area will include one or more physical or biological features essential to the conservation of the species. The regulation did not address the definition of “habitat” for purposes of designating critical habitat.¹⁴

On August 5, 2020 the Services issued this proposed rule to add a definition of “habitat” to the regulations implementing Section 4 of the Endangered Species Act for critical habitat designation. The proposed rule offers two definitions for consideration and public comment. The first definition defines “habitat” as “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.”¹⁵ In its alternate definition, the Services change “depend upon” to “use”, and in the second sentence change the language to read, “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.”¹⁶ The Services are seeking comment on both definitions and any other suggestions for the definition.

⁹ 16 U.S.C. § 1533 (b) (2).

¹⁰ 16 U.S.C. § 1532 (5).

¹¹ *Id.*

¹² *Id.*

¹³ *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). At issue was whether the ESA prohibited designation of private land as unoccupied critical habitat when that land was neither habitat nor essential to species conservation. Petitioner stated that the Service erred in its determination that a site in St. Tammany Parish, LA “Unit 1” be designated as unoccupied critical habitat for the dusky gopher frog. The frog had not been spotted in Unit 1 for decades and the land was now being used as a commercial timber plantation. The Supreme Court unanimously ruled in favor of the Petitioner stating that an area is eligible for designation of critical habitat only if it is habitat for the species. (139 S. Ct. 361 at 368).

¹⁴ Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020, (August 27, 2019).

¹⁵ 85 Fed. Reg. 47333, 47334.

¹⁶ *Id.*

Critical Habitat Designations Directly Affect Small Entities

Critical habitat designations can impose a significant burden on small entities, especially in instances where the Services improperly designate an area. Critical habitat designations delay infrastructure and development projects and necessary repairs to existing infrastructure. Often small entities must wait for more than a year for a consultation and biological assessment finding of “not likely to adversely affect” the species.¹⁷ One stakeholder from the National Rural Electric Cooperative (NRECA) noted that a critical electrical transmission line project was delayed for two years and resulted in over \$270,000 in added costs despite multiple biological surveys indicating that the species was not present, and that the area was uninhabitable habitat. Advocacy has long stated in its own public comments to the Services that critical habitat designations have a direct, and burdensome effects on small entities.¹⁸

In this rulemaking, the Services are proposing to add a regulatory definition for “habitat” which would ultimately be used in determining critical habitat designations for a species. Without revision, Advocacy and small entities are concerned that this rule may impose new and unintended consequences during its implementation. Furthermore, since the rule’s intent is to provide consistency and clarity,¹⁹ while reducing overall burdens, the Services should consider comments from small entities regarding both the substance of the definitions proposed and suggested implementation measures.

Advocacy Comments and Recommendations

- 1. The Services should clarify that this regulatory definition only applies to Section 4 critical habitat designations.*

In the proposed rule, the Services state that they are providing a regulatory definition of “habitat” in response to the Supreme Court decision in *Weyerhaeuser*.²⁰ Because a definition of habitat has not been previously codified²¹, it is unclear what if any implications the rule may have on any provisions of the ESA.

The Court’s ruling however, pertained specifically to the issue of “habitat” of the species in designating critical habitat. It therefore follows that if the intent of this rulemaking is to add

¹⁷ 16 U.S.C. § 1536 describes the process for consulting with the Services when an action is to occur in an area where a species is present, or where critical habitat has been designated. The Services then issue biological assessments to identify species or habitat that may be affected, and whether the action is likely to result in destruction or adverse modification of habitat. It is this process that results in delays to small businesses.

¹⁸ *See, for example*, Comments of SBA Office of Advocacy, Designation of Critical Habitat for Gunnison Sage-Grouse (78 Fed. Reg. 57604) (filed December 2, 2013). *See also*, Comments of SBA Office of Advocacy, Proposed Designation of Critical Habitat for the New Mexico Jumping Mouse (78 Fed. Reg. 37328) (filed July 15, 2013), Comments from SBA Office of Advocacy, Revisions to the Regulations for Impact Analysis for Critical Habitat (77 Fed. Reg. 51503) (filed January 31, 2013), Comments of SBA Office of Advocacy, Designation of Revised Critical Habitat for Southwestern Willow Flycatcher (76 Fed. Reg. 50542) (filed October 11, 2011).

¹⁹ 85 Fed. Reg. 47333 at 47334.

²⁰ *Supra* note 13.

²¹ 16 U.S.C. § 1532 (5) (A).

regulatory certainty in response to the Court's decision, the Services should clarify that this rule applies only to Section 4 critical habitat designations, and that it will not be extended to any other provisions of the ESA. The proposed rule is currently silent as to this issue and Advocacy would strongly suggest that the Services include language making this provision clear as to both the use of the definition of "habitat" *only* when considering an area for critical habitat designation and also that this definition does not otherwise extend beyond Section 4 critical habitat considerations.

- 2. The Services should consider whether an area is "habitat" before determining whether the area should be designated as occupied or unoccupied critical habitat.*

Currently in the proposed rule the Services state that they do not intend to create a new procedural step prior to designating critical habitat.²² While Advocacy agrees that additional steps would add to already existing burdensome delays, this language suggests that the Services will not first assess whether an area is "habitat" before determining whether the area is critical habitat. Given the Supreme Court decision that an area can only be designated as critical habitat if it is "habitat" of the species, it is only logical that the Services first consider the question of whether an area is habitat. Advocacy therefore suggests that the Services clarify that they will indeed make a "habitat" determination prior to making a critical habitat determination and will only proceed when an area meets the requirements to be designated as occupied or unoccupied critical habitat.

- 3. The definition of "habitat" should be limited to areas where the species exists or where specific features necessary for species existence are found.*

The current definitions proposed by the Services are broad. The Services should narrow the scope to areas where the necessary attributes for species existence exist at the time of designation. The Services should consider suggested language from small entities that would clarify that "habitat" is limited to areas in which specific physical or biological features are found to support species existence. This eliminates the inclusion of areas that are uninhabitable or that are unlikely to be used by the species. By clarifying that habitat is limited to areas where features are presently found, the Services also eliminate the possibility for speculation about whether an area may become habitable at some undetermined point in the future. Advocacy agrees that habitat may be seasonal given that a species may inhabit different areas throughout its life stage but would caution the Services to only consider those areas that are shown to be necessary for the long-term survival of the species or where it is clear that the area is in regular use.

Conclusions and Recommendations

Advocacy encourages the Services to consider and revise their proposed definition of "habitat" based on the above comments and recommendations and the suggested text edits from small entities. Critical habitat designations can be economically burdensome to small entities and it is therefore prudent that the Services establish a definition of "habitat" that is not overly broad and that provides clarity and regulatory certainty.

²² 85 Fed. Reg. 47333 at 47335.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Prianka P. Sharma
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Paul Ray, Administrator
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