

Advocacy Comments on DOI and DOC's Proposals for Modifying Procedures for Designating Critical Habitat

On October 27, 2021 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 (jointly "Services"), published a proposed rule rescinding the 2020 final rule that added a definition of "habitat" to regulations implementing Section 4 of the Endangered Species Act.¹ On the same date, FWS published a proposed rule rescinding its 2020 final rule that revised policies and procedures for implementing exclusionary analysis when designating critical habitat. On November 23, 2021 the Office of Advocacy (Advocacy) submitted the following comments:

- Rather than completely rescinding both 2020 rules, the Services should instead revise the rules to address agency concerns but retain provisions for regulatory transparency and certainty.
- Critical habitat designations directly affect small entities and can impose a significant burden on small entities, especially in instances where the Services improperly designate an area.
- The issue of critical habitat designations is also itself a matter of equity and should be subject to the requirements of EO 13985. Rural electric cooperatives are often in low-income areas.
- The Services should not resort to a case-by-case basis for implementing the Weyerhaeuser decision and should instead propose a modified definition of habitat for public comment.
- FWS should not remove provisions of its 2020 final rule pertaining to exclusionary analyses, as they provide necessary transparency that did not exist prior.

For more information visit Advocacy's web page at advocacy.sba.gov, or contact Prianka Sharma at (202) 205-6938 or prianka.sharma@sba.gov.

¹ 16 U.S.C. § 1533 (a)(3)(A)(i).

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